THE 50

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 IV.

73

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1896.

JUDGES

OF THE

SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

AND IN ADMIRALTY

During the period of this Volume.

SUPREME COURT JUDGES.

CHIEF JUSTICE.

THE HON. THEODORE DAVIE.

PUISNE JUDGES.

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

LOCAL JUDGES IN ADMIRALTY.

THE HON. THEODORE DAVIE.
THE HON. MONTAGUE WILLIAM TYRWHITT DRAKE.

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.

ATTORNEY-GENERAL.

THE HON. DAVID MACEWEN EBERTS, Q. C.

NOTE—Angus John McColl, Q.C., was sworn in as a Judge of the Supreme Court of British Columbia on the 12th day of November, 1896, as successor to the Hon. Sir Henry Pering Pellew Crease, Knight, who retired from the Bench on the 20th day of January, 1896.

ERRATA.

PAGE.	LINE.	FOR.	READ.
18	5	785	783
44	14	Cap. 15	Cap. 51
155	5	Cap.	Ch.
374	15	Sec. 5.	Sec. 8

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TABLE OF CASES CITED

IN THIS VOLUME.

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ROEDDE v. THE NEWS-ADVERTISER PUBLISHING COMPANY.

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Feb. 23.
FULL COURT.
March 13.
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Partnership—Contract—Rescission—Company—Whether power to contract partnership with an individual.

The defendant Company, having power by its memorandum of association, *inter alia*, to carry on and enter into contracts for the purposes of the business of bookbinders, entered into an agreement with the plaintiff whereby it purchased and amalgamated his bookbindery business with its own, the joint concern to be carried on and profits and losses divided between the plaintiff and the Company in certain proportions, the plaintiff to be manager and foreman at a salary.

The Company not having paid plaintiff the purchase money as agreed, refused to furnish proper accounts or otherwise perform the stipulations of the agreement. In an action for a rescission of the agreement, an account, payment, and a receiver.

Held, per CREASE J.: That the agreement in question constituted a partnership, that the remedy by rescission was inapplicable, as it was contracted in good faith, and business carried on under it; but that a dissolution should be ordered with accounts and a receiver.

On appeal to the Full Court: *Held, per* MCCREIGHT, J. (WALKEM, J., concurring): That the order for accounts and a receiver should be affirmed, but the contract rescinded instead of ordering a dissolution.

Quære, Whether the agreement constituted a partnership or not.

Per DRAKE, J. (dissenting): That an incorporated Company has no power to enter into a partnership with an individual, and that neither such an agreement nor any of its incidents could be enforced against it.

ACTION for rescission of an agreement, for an account, and for a receiver. The facts fully appear from the head note and judgments. Statement.

E. V. Bodwell and *J. A. Russell*, for the plaintiff.

Charles Wilson, Q.C., for the defendant Company.

The action was tried before CREASE, J., without a jury, and, on motion for judgment, the following judgment was delivered by him :

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CREASE, J.: After a careful consideration of the numerous cases cited and a reperusal of the evidence, and after hearing the able arguments of the Counsel at the trial, I am of the opinion that the elements necessary to constitute a partnership exist in the case of the agreement which has formed the subject of contention in this suit. It is a partnership for five years, subject to be terminated by effluxion of time, six months' notice from the News-Advertiser Company, or breach of one or more of the conditions on which its continued existence depends. The action was for its rescission, or for dissolution of the partnership, especially on the latter grounds.

A strong and persistent effort was made on the part of the plaintiff to establish misrepresentation or fraud as a ground of rescission, chiefly from inference, from some expressions in the statement of claim. But there is no axiom of law more clearly established than that fraud is an allegation which cannot be inferred, but must be specially pleaded, and the pleadings must show in what particulars the fraud is charged, to enable the party to know with reasonable certainty what he has to meet, and it must be completely proved by the party who brings the charge. There was no such pleading here, and I am bound to say there was nothing in the evidence which even pointed either to fraud or misrepresentation having been used to procure the contract. Indeed, it was all fair and above board, and it was clearly proved that the plaintiff and defendant both entered into the contract with full knowledge, mutual consent and good-will, and with full appreciation of its purport, under legal advice of the highest character, and thoroughly acceptable to both parties. It was, moreover, reasonable and fair in its terms. How it was carried out is another matter, and the determination of that and the action itself depends on the evidence adduced at the trial.

Judgment of CREASE, J.

When, however, we come to examine the evidence, I find that the agreement of the 2nd of November, 1892, creating

a partnership between the plaintiff and the defendant, which is set forth in full in the statement of defence, has been broken in several material points, not by the plaintiff, who has steadily and faithfully carried out the portion binding on him, but by the defendant, in the following particulars. For the defendant has not yet paid the $3,150.00 which he was to pay to the plaintiff as the difference between the value of his plant and stock and the one-fourth value of the combined plant and stock, at the times and in the manner prescribed by the agreement, viz.: one half on March 1, 1893, and the balance on June 1, 1893. As so much of it ($3,092.00) has been paid by him to the plaintiff, though at irregular times, and only after several urgent demands, and that term has no doubt been broken, if it stood alone it would be unreasonable on that account alone to declare a dissolution. But on further enquiry, from the evidence I find that the defendant, although repeatedly requested, orally and by letter, has systematically avoided giving plaintiff the regular balance sheets, which are so necessary for the existence of any business confidence between partners, and are an express term and condition of the agreement.

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I also find, and it is admitted in the chief evidence for the defendant, that the business has all along been producing a profit; and plaintiff, who is confessedly thoroughly conversant with the book bindery business in all its details, and was to be foreman and manager of it, avers in his evidence, from private accounts he has made up of it during its continuance, that it must have been producing a profit of over $2,000.00 (he estimates $2,500.00) from November, 1892, to December, 1893, and defendant's chief witness admits a profit of over $1,000.00; the plaintiff, who estimates his share as $625.00, has, in direct contravention and violation of the terms of agreement, not been paid one farthing of it. I find also from notwithstanding several requests, the evidence that the plaintiff has not been given access to

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the books and accounts of the partnership, as expressly stipulated for by the agreement, at such reasonable times as he might require to inspect them. He asked for it, but it had been denied him. The only amount he has been regularly paid is his weekly wage of $25.00, without which the business could not have gone on. Mr. Cotton, President and Manager of the News-Advertiser Company, presumably under the impression that as an incorporated Company for carrying on a newspaper and cognate business it was *ultra vires* of the Company to carry on a book bindery business in connection with it, denied that the plaintiff was a partner at all with the defendant. But on reference to the Act of Incorporation, that business was found to be well within the purview of the Act—and we had the singular spectacle of the defendant out of Court denying the partnership, and his Counsel in Court stoutly maintaining its existence. I also find that the accounts of the partnership were not properly separated, so as to properly sever the amounts rightly due by the book bindery from those rightly chargeable to the printing department.

The principal was not examined, and the evidence of the Secretary of the Company was evasive, non-committal and unsatisfactory, showing clearly in the defendant Company a chronic indisposition to account. There was consequently a perpetual distrust and want of confidence created on the part of the plaintiff at this perpetual breach of important portions of their compact, and naturally a constant discord between them, not mere quarrels and disagreements, which at times harmlessly arise between friends, but caused by the conduct, or rather the misconduct of the defendant in violating the terms of the contract, excluding the plaintiff from ready access to the partnership account, and by other unrighteous acts in derogation of their contract.

Marshall v. *Coleman*, 2 J. & W. 266; *Goodman* v. *Whitcomb*, 1 J. & W. 589; *Crayshaw* v. *Collins*, 1 J. & W. 267; *Baxter* v. *West*, 28 L. J. Ch. 169.

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Under these circumstances plaintiff applies for a rescission of the contract: but, considering the good faith with which it was contracted and what has been done so far, though so far short of the agreement by the defendant, rescission does not appear to be the most suitable remedy. The proper remedy, therefore, and the only one I can now adopt is: To declare the dissolution of the partnership. I, therefore adjudge the said partnership to be dissolved on the terms set forth in the plaintiff's statement of claim, with costs, and for the purposes aforesaid let all necessary references and directions be made and accounts taken. I hereby appoint John R. Burton, of the City of Vancouver, receiver of the said partnership and assets.

Judgment accordingly.

Statement.

The defendant appealed to the Full Court, and the appeal was heard before McCREIGHT, WALKEM and DRAKE, JJ., on the 13th day of March, 1894.

Charles Wilson, Q.C., for the appellants.

E. V. Bodwell and *J. A. Russell*, for the respondent.

Judgment of McCREIGHT, J.

McCREIGHT, J.: In this case it is unnecessary, as it seems to me, to decide whether the agreement of the 2nd November, 1892, constituted a partnership between the plaintiff Roedde and the News-Advertiser or not.

Mr. Justice CREASE has decided that "the said partnership should be dissolved," now LINDLEY, L.J., in *Walker* v. *Hirsch*, 27 Ch. D. 473 (C.A), dealing with the agreement in that case speaks of the "so-called agreement or partnership, call it which you will," and adds: "I would rather not use the word 'partnership,' but 'agreement,'" and at the conclusion of his judgment he says: "Persons who share profits and losses are, in my opinion, properly called partners." See, however, the judgment of COTTON, L.J., 407, 470 and 471, *Lindley on partnership*, 5th Ed. page 11, note. "But that is a mere question of words; their precise

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rights in any particular case must depend upon the real nature of the agreement into which they have entered."

Following the judgment of LINDLEY, L.J., in that case, I prefer the use of the word "agreement" to that of partnership, but agree with Mr. Justice CREASE that the agreement or, as he terms it, partnership, should be rescinded or dissolved, for I cannot say that the reasons for such rescission are insufficient or that they are not supported by the evidence. The balance sheets which were to have been given on the 30th June and 31st December do not appear to have been at all in conformity with the agreement, and such accounts as were given were obtained with great difficulty, and long after the time required by the agreement. I cannot say either that the books were open to inspection as agreed upon, nor did the Company canvass as agreed on, or at all, and I do not know that the plaintiff could avoid taking proceedings with a view to ascertain and enforce his rights and interest in the plant. I cannot say that the decree is wrong, though, of course, I give no opinion on the question of partnership. I think the agreement must be rescinded and the plaintiff is entitled to a receiver in view of his interest and the accounts; but I may suggest, as was done in *Walker* v. *Hirsch*, 27 Ch. D. 462, that the News-Advertiser pay into Court the purchase money that the plaintiff will probably be entitled to, say $1,850.00, which will probably be sufficiently near the mark as being the value of the plaintiff's share of the stock or of the $7,400.00. If this was done, the expense and inconvenience of a receiver may be avoided, the $1,850.00 should, of course, remain in Court as an indemnity fund against the losses, if such there have been, and this will be in conformity with the stipulation that "in case of loss, the parties shall pay the same in the above proportions." I have already said I did not think it necessary to give an opinion whether the agreement of 2nd November, 1892, constituted a partnership or not.

Judgment of McCREIGHT, J.

The plaintiff's powers and duties are those simply of "manager and foreman of the business, which is to be run entirely in the name of the parties of the first part, *i.e.* the News-Advertiser, and to be subject to the direction of the President and Executive of the Company." Whether the plaintiff is simply manager and foreman, or a partner with authority as restricted as that of a manager and foreman, who is subject to the direction of the President and Executive, seems to be a mere question of words. He is simply an employee, with as much or as little authority as the President and Executive of the Company from time to time may allow him to have, and no question of *ultra vires* need arise any more than in the case of any other employee of a Company. Of course the President and Executive may have excepted their duties by giving the plaintiff too much authority or discretion, and by delegation of duties to him, but the evidence certainly does not disclose anything of that nature, nor is it within the scope of the deed, and it will be time enough to deal with that question if, as is very improbable judging from the evidence, it should arise. The only change which I think should be made in the decree is that the costs should be as usual dealt with on further consideration.

Judgment of McCREIGHT, J.

My brother WALKEM authorizes me to say that he agrees in this result, but is strongly of opinion that there was no partnership, on the ground that the Company was not, from the terms of the agreement, plaintiff's agent in any sense, and hence that there was no mutual agency, and plaintiff's agency was limited to that of an employee under the directions of the Company. There was, therefore, no such mutual agency as would constitute a partnership, nor do the terms of the deed show any intention of partnership.

WALKEM, J., concurred, as above, with the judgment of McCREIGHT, J.

Judgment of DRAKE, J.

DRAKE, J.: This action is brought on a deed, entered

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into by the parties on the 2nd November, 1892, and in the recital it is stated that it has been thought desirable by the parties to amalgamate the business carried on by the plaintiff with a similar business carried on by the defendants, and the parties have agreed to so amalgamate and carry on the business jointly. The Company is to pay the plaintiff one-fourth of the combined plant and stock, viz., $3,150.00, on the date therein mentioned. The business is thenceforth to be carried on for mutual benefit, the plaintiff receiving one-fourth of the net profits and the Company three-fourths, and to pay losses in the same proportion. The plaintiff to be manager and foreman, and to receive $24.00 a week as his wages for five years, or until arrangement otherwise terminated. Proper accounts to be kept by the Company, and a proportion of the expenses of the general establishment and for rent is to be charged against this business, and balance sheets to be made out semi-annually. On the termination of the arrangement, whether by effluxion of time or by six months' notice by the Company to the plaintiff, the defendant is to buy the one-fourth interest of the plaintiff at an agreed price, or to be decided by arbitration. This contract contains all the elements of partnership, community of profit, loss, and property. But the Company are to have the control of the business. The parties nowhere use the word or term "partners" or "partnership," but the language used in the recital that the parties have agreed to amalgamate and carry on the business jointly, followed as it is by the stipulations in the deed, all point to a partnership and not to mere co-ownership. A partnership is a contract by which two or more persons agree to put something in common with the view of dividing the benefit that may result from it. This may not be an exhaustive definition, but it expresses the general principle of partnership. A community of property may exist without community of profits, and a community of profits without community of property. But where all these

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elements appear subject only to a restriction in the mode of carrying on the business, I think that a partnership was created, whether the parties actually intended it or not. The case is very different from that of *Walker* v. *Hirsch*, 27 C.D. 460, where the plaintiff was engaged at a salary and one-eighth share of profits and losses; was also to leave £1,500 in the business; but this was not capital, but a loan, and was repayable in full and not liable for losses. The Court held the plaintiff not a partner, and not entitled to an injunction or receiver. If this was a contract between individuals no question, in my opinion, could arise as to its being a partnership, limited in scope; but here the defendants are incorporated by an Act of the Provincial Legislature, and the object for which the Corporation is formed is set out in Section 4 of the 53 Vic., Cap. 59, and contains *inter alia* power to carry on and enter into contracts for the purposes of the business of book binders. This does not imply power to carry on a book bindery in partnership with a stranger, but to contract for the binding of books and other cognate matters. If this is stated to be an amalgamation of the bindery business of the plaintiff with that of the defendant Company, the practical result is that the plaintiff has become a member of the defendant Company; this he cannot be, as he is not a shareholder of the Company, and becoming a shareholder is the only mode recognized by law by which a person can become a member of an incorporated company.

Judgment of DRAKE J.

The contract on which the plaintiff sues is *ultra vires* as beyond the scope and objects of the Company, and, as the Company could not enforce against the plaintiff the performance of the agreement, neither can the plaintiff enforce an illegal, in the sense of being unauthorized, contract against the defendants. In an action for specific performance there must be mutuality; here there is none, and this action is in the nature of an action for specific performance to compel the defendants to carry out the

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terms of a contract which they had no power to enter into.

The plaintiff by his claim seeks to rescind the contract of the 2nd November, 1892. There is, in my opinion, no binding contract, and such being the case, the Court cannot be asked to rescind a nullity.

The plaintiff further seeks the appointment of a receiver, and a declaration that he is entitled to a one-fourth share in the assets of the partnership and a lien upon the partnership assets for that amount. How can any order be made against the Company to this effect? It would, in fact, be winding up the Company by a side wind. It may be true that the Company consists only of a very limited number of persons, but of this there is no evidence, and I have to consider the Company as existing for the benefit of a general body of shareholders. Any order which may be made involving the payment of money implies that the shareholders' money has to be paid for that purpose, and they can not be made liable for an agreement which the Company was incapacitated from entering into.

Judgment of DRAKE, J.

The particular point here discussed has been the subject of many decisions. In *Newberry* v. *James*, 2 Meriv. 466, the Court will not interfere by injunction to prevent violation of an agreement, of which, from the nature of its object, there could be no decree for specific performance.

In *Knowles* v. *Haughton*, 11. Ves. 168, there was a partnership between the plaintiff and defendants in the business of brokers and underwriters. The plaintiff prayed an account which the Court refused. The defendant by his answer insisted that a partnership in underwriting could not legally subsist, as the defendant could not compel the plaintiff to contribute to the payment of the losses, although he admitted that by the agreement it was understood that the plaintiff should bear a moiety of the loss.

In the present case how could the Company compel the plaintiff to contribute to the losses of the Company? Book binding being one of the ordinary branches of the Com-

pany's business, any loss sustained in that especial branch is a loss for which the Company alone would be liable. In case the Company was wound up, the plaintiff is neither a debtor to the Company or a shareholder of the Company, and it is only in one or other of these capacities that he can be made responsible; and although the Company has had the benefit of this contract, yet that fact will not be deemed to be ratification of the contract; *Early* v. *Lye*, 15 East. 7. And in *Ernest* v. *Nicholls*, 6 H. of L. 423, it is held that a contract of directors of one Company to purchase the trade of another Company is not binding unless authorized by the deed of settlement of each Company. The plaintiff must be taken to be fully aware of the powers of the defendant Company in this respect, and cannot now ask the Court to compel the defendant to do that which the Company was legally incompetent to do. It is true that this question is not raised in the pleadings. The plaintiff could not raise it, and the defendants have carefully avoided it. In my opinion the appeal should be allowed, but under the circumstances without costs.

Appeal allowed without costs.

RE FARQUHAR MACRAE.
Ex parte JOHN COOK.

DRAKE, J.

1895.

Feb. 18.

Criminal Law—Code sections 783 (f)784, 791—"disorderly house"—Summary Jurisdiction of Magistrate—Discretion to hear charge or commit.

RE MACRAE EX PARTE COOK

A Magistrate has absolute jurisdiction under section 785, sub-section (f) and section 784 of the Criminal Code to hear and determine in a summary way a charge of keeping a disorderly house.

The exercise of the summary jurisdiction is, under those sections, and section 791, discretionary with the Magistrate, and he may commit the accused for trial, and a mandamus will not lie to compel him to hear and determine the charge summarily.

The meaning of the term "disorderly house" in section 783, sub-section (f), must be taken from its definition in section 198, and not from the common law.

RULE *nisi* for a mandamus commanding John Farquhar Macrae, Police Magistrate in and for the City of Victoria, to hear and determine in a summary way a certain information laid before him against one John Cook, for keeping a disorderly house—to wit, a common gaming house—at the City of Victoria, contrary to sub-section (a) of section 198 of the Criminal Code of 1892.

Statement.

Counsel for the accused requested the Magistrate to proceed to hear and determine the charge in a summary way, which he refused to do, but stated that he proposed to commit the prisoner for trial, but, at the request of counsel, deferred making the commitment in order to allow the present motion to be made.

A. L. Belyea supported the rule *nisi*.

Gordon Hunter, contra.

DRAKE, J.: I think the rule for a mandamus should be discharged. In order to ascertain the meaning of disorderly house in sub-section (f) of section 783, it is necessary to refer to those sections which deal with the subject. Section 198 defines a disorderly house as being, *inter alia*, a gaming

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house. It does not include a variety of disorderly houses which may be indictable at common law, but only those especially mentioned in that section. This being the case, the Police Magistrate under part LV., has jurisdiction to deal with gaming houses as falling within the category of disorderly houses, but his jurisdiction is optional; the language used is that he may determine the charge in a summary way. If he concludes to exercise the jurisdiction the person charged cannot object, and the Act further provides that if, after having commenced the investigation under part LV., he may even then (section 791) at the close of the evidence for the prosecution send up the case for trial.

Therefore the Magistrate cannot be compelled by mandamus to hear and determine the present charge. Where a discretion is vested in a subordinate officer or tribunal, the Court cannot compel a particular course to be adopted, the exercise of the discretion by the officer or tribunal is a complete justification. I think the rule should be discharged.

DRAKE, J.

Rule discharged.

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COUGHLAN & MAYO v. WILMOT AND THE CORPORATION OF THE CITY OF VICTORIA.

Feb. 28.

FULL COURT.

April 19.

COUGHLAN v. VICTORIA

Contract—Construction of—Privity—Tender in form of lump sum to do specified work at specified prices—Mistake—Right of Contractor to compel Engineer to give final certificate.

The City of Victoria called for tenders for the construction of certain sewers, setting forth in specifications and bills of quantities the amount and character of the excavations and work to be done, and requiring persons tendering to put their prices against each item in the specifications and bills of quantities, which were to form essential parts of the contract. Plaintiffs tendered, filling in their prices for each item as required, and offering to do the work for a lump sum of $7,032.00, which represented their total. The specifications called for interim and final certificates of work done to be granted by W., an engineer employed by the Corporation. The contract as executed was "to execute all works described in the specifications, bills of quantities and form of tender, which are hereby made parts of this contract, in strict accordance with all the conditions and stipulations therein set forth, in the best and most workmanlike manner, for the sum of $7,032.00." It turned out that the bills of quantities largely over-estimated the work. Plaintiffs obtained the contract and performed the work, and sued to recover the lump sum and extras, less amounts paid them by the defendant corporation, and to compel W., the Engineer, to grant them a final certificate.

Per DRAKE, J.: That the contract was for a lump sum.

On appeal to the full Court (Crease, McCreight and Walkem, JJ.): That the contract was to do the work by quantities at specified prices and was not controlled by the lump sum mentioned.

That there was no privity between the plaintiffs and W, and their right of action against him, if any, was for damages for fraudulently and in collusion with the defendant corporation, refusing his certificate.

Statement. APPEAL by the defendants to the Full Court from a judgment of DRAKE, J., at the trial, in favour of the plaintiffs, holding that the contract, the material elements of which are set out in the head note, was to do the work in question for the lump sum mentioned in the body of the agreement

without reference to the plaintiff's tender upon the specifications and bills of quantities referred to.

The action was tried before DRAKE, J., without a jury.

E. V. Bodwell, for the plaintiffs.

W. J. Taylor, for the defendants.

DRAKE, J.: The question here is—What is the meaning of the contract? The plaintiffs tendered for the work on an estimate of quantities furnished by the defendants' engineer. It is now stated the quantities are largely in excess of the actual material required to be removed. It is stated that they show some 2,600 lineal feet, while the whole work has been completed for some 1,460 feet.

This error, if it is one, is not that of the plaintiffs. The specifications, clause 10, expressly state that the defendants are not to be in any way responsible for the quantities given or liable for any loss in respect thereof. On the other hand, the defendants cannot complain now that they over-estimated the work.

The plaintiffs, when they made their tender, put in figures in the forms furnished them at how much per foot they would charge for the various material they would remove in vertical depth. Looking at the tender, it is clear the plaintiffs contemplated these figures as having relation to the amount they would be entitled to receive for any extra work done by them, and also as the criterion by which any works not done would be valued for the purpose of deduction from the contract price. The tender is an offer to construct the works in accordance with the drawings, specifications, quantities, forms of tender, and to keep in repair for $7,054.75.00, and it goes on to say that the accompanying schedule contains the prices on which the tender was based, and are those on which the contractors agree to execute any additional work or to deduct for any work not executed.

The only meaning I can attach to this tender is, that a

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lump sum was offered for the whole work and the schedules were to be used to calculate the value of any extra work or work not done.

It is admitted that the whole work has been executed under this contract. That being so, there can be no estimates of deduction, and the question is, to what payment are the plaintiffs entitled, leaving out of consideration for the present the claim for extras which the plaintiffs have put forward ?

The contract is drawn up based on the tenders, and the plaintiffs undertake to execute the works described in the specifications, bills of quantities, and form of tender, for the price of $7,032.00, which price the defendants agree to pay.

The defendants contend that this is a contract not for the price of $7,032.00, but for only such an amount of work as the engineer may certify and measure at the prices mentioned in the bills of quantities. The specifications and contract lead me to a different conclusion. The work is to be carried out in accordance with the contract drawings, subject to modification.

Judgment of DRAKE, J.

By clause 9, additional work shall be constructed in accordance with the specifications, bills of quantities, etc.

Additional work must be something superadded to the contract work.

Clause 5 shows what the contract work was to be.

Clause 11 indicates that the schedule prices are used for the purpose of enabling the engineer to ascertain upon what basis the tender is made, and for defining the amount to be paid for extra work, or to be deducted for work not done. If this was a contract by quantities, such a clause would be utterly useless, for there could be no deductions from the contract sum, there being no sum from which any work not perfected could be deducted.

Then clause 13 refers to the gross sum at which the contractor offers to execute the work, as being inclusive of everything requisite to complete the proposed works under

the contract. This is entirely opposite to the idea of this contract being a bills of quantity contract only. Mr. Wilmot, in giving his final certificate, has adopted the schedule of prices as his guide to ascertain the amount due, ignoring the fact to which I have drawn attention, that the defendants have agreed to pay a lump sum, and that the schedule of prices is to be used for extra work or for deductions only.

I think a great blunder has been made somewhere. If the amount certified to be due to the contractors is anything approximate to the value of the work done, it is apparent the plaintiffs have a very valuable contract.

The next point is as regards the extra work claimed by the plaintiffs for connections. Mr. Wilmot's answer is: This work was done under my order and by my direction, but as the estimates of the quantity of excavation which I gave to the contractors is so greatly in excess of the actual work done, they should not now be entitled to any additional payment. There is some slight ground for this view, because the schedule papers show that the lump sum which the contractors inserted as their figure for the whole job was based as I have before stated on figures given by the engineer which, if incorrect by being in excess of the actual work required, would compensate for the work done in making the connections. But was this the contract—were the plaintiffs to do any more than the work shown on the plans and included in the specifications? The contract and tender both refer to these quantity schedules as the criterion for valuing extra work, and in my opinion the connections under the contract are extra work and have to to be valued accordingly.

I cannot ascertain without a reference unless the parties agree what is the value of this extra work; the method of computation put forward by Mr. Wilmot will not bear examination.

The schedules of prices on which he claims to base his

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figures only deal with vertical quantities of earth, rock or hardpan from the surface downwards, and not with mixed strata at all. Mr. Wilmot calculates in this way: if there is, say, ten feet of earth and one foot of rock below he allows for the earth at 62 cents, and he allows for the rock at the difference between the figures $6.87 for ten feet of rock and $7.50 for eleven feet, thus allowing 63 cents for one foot of rock extracted at a depth of ten feet from the surface or $1.25 in all. If, on the other hand, there was a foot of rock on the surface followed by ten feet of earth, this result would happen—the contractor would get $1.50 for the rock and 57 cents for the earth, or $2.07. The result would be, the easier the work the higher the pay, and by working out in some other instances these figures by his mode of calculation the contractor would, with a foot of rock at a depth of twelve feet, get nothing for removing it.

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Mr. Mohun was called to support Mr. Wilmot's figures, but he admitted that in such a case as that last mentioned the engineer would make an allowance to the contractor, but how or on what basis he did not explain. I am satified the mode of computation is wrong, but I have not been furnished with any criteria as to the correct method, and therefore I cannot deal with the question of value of the extra work at present.

I therefore give judgment for the plaintiffs for $3,392.00, being the balance still due on the contract. The defendants are entitled to retain ten per cent. of the whole amount of the contract for six months.

There will be a reference as to the value of the extra work unless the parties agree, and the plaintiffs will be entitled to judgment for the amount when ascertained.

Judgment accordingly.

From this judgment the defendants appealed to the Full

Court, and the appeal was argued before CREASE, McCREIGHT and WALKEM, JJ.

W. J. Taylor, for the appellants.

E. V. Bodwell, for the respondents.

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CREASE, J.: This is an appeal by the defendants against an order of DRAKE, J., after a trial without a jury directing judgment to be entered for the plaintiffs on the 26th February, 1895.

The action was brought by the plaintiffs, who are contractors, against the defendant Corporation and their engineer, under a contract for the making of certain sewers in the city. The contract made between the plaintiffs and the Corporation on the 20th August, 1894, is set forth at length in the pleadings. The plaintiffs thereby engaged to construct and execute all the works described in specifications, bills of quantities, and form of tender, which were thereby made integral parts of the contract, and were to be read and construed therewith, in strict accordance with all the conditions and stipulations therein set forth in the best and most workmanlike manner for the sum of $7,032.00, to be paid to the contractors by the Corporation in such manner as is "described in the said specifications," and to complete the same in a time certain—therein particularly specified.

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All the work required by the Corporation to be done by the contractors was done when ordered satisfactorily, and under the contract the contractors were paid by the defendants $3,274.89 in all, on account of the work so done by them.

On the application by the defendants for a final certificate a dispute arose as to the amount of the balance which they were to receive. Plaintiffs claimed to receive from the defendant Corporation the sum of $7,032.00 less the $3,274.39 already received, and less the sum of $366.29 being the sum retained under the contract for maintenance,

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that is to say $3,391.72. They claimed also to be entitled to receive under the contract extras for the extension of the sewer according to the schedule rates a further sum of $1,896.20. There was no dispute at first about the actual measurements.

The engineer, Wilmot, contended that according to the proper understanding of the contract and specifications the plaintiffs were only entitled for work done under the contract to $3,662.96; less the amount paid on account, $3,274.39, and also less 10 per cent. retained for six months, $366.29; total $3,640.68, leaving a balance due at present payable to the contractors of $22.28.

The whole question was as to the meaning of the rates and prices in the bills of quantities in computing the payment to be made for the work done.

A special clause, No. 13, was inserted in the specifications by the Corporation for all persons tendering to abide by. That the printed specifications and conditions therein contained, issued by the Corporation together with all the other documents already enumerated (form of tender, bills of quantities, etc.) must be returned to the City Hall at the time and in the manner directed, properly filled in in every particular, and prices filled in against each item in the bills of quantities, which were to form essential parts of the contract and be held as integral parts of the same.

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Then clause 11 of the specifications makes the contractor fix his own figures in his own proper handwriting on work of the kind and depth clearly pointed out as the estimated quantities which would probably be required to be done by the contractor, adding that such prices were to be taken as those on which his tender is founded, and on which alone he agrees to be paid for any additional works above those contained in the contract and referred to in clause 9 of the specifications, and (this is an important part) further agrees to deduct from the contract sum for works executed and this provision is added: "The prices will be held as

rigidly inclusive and covering all charges for all permanent and temporary works whatsoever, and for all alterations, additions to or deductions from the works contracted for."

These special clauses are to be specially considered under the rule in *Roberts* v. *The Bury Improvt. Commrs.*, L. R. 4 C.P. 755, in considering the general and particular effect of the documents constituting the contract.

The prices of the bills of particulars were arrived at in the following manner: The figures in the first column were made by the engineer as a guide to the contractors to form their own estimate upon the quantities and kind of work and fix their own prices on a scale of their own graduation against each item in consecutive order according to the depth of the work. The Corporation did not bind themselves that the engineer's estimate of the ground would turn out as he estimated.

The contractors must make their own estimate and prices.

By the notice calling for tenders the contractors, who claim to have had local knowledge and experience of the ground, must satisfy themselves whether they could accept the engineer's estimate or not. They could examine and inquire for themselves and take their own levels, but if, after such enquiry they accepted the engineer's levels—they were to fix their own prices to each item consecutively and by them they were to be bound absolutely without recourse. These conditions the contractors accepted in their tender and contract, and by these and the specifications, bills of quantities and their own prices, they are bound absolutely. The sum added up, as the summary of these estimates of quantity and price, in the specifications was 2,647 lineal feet, and the summary of charges for these made up in the contractors' own figures in the opposite column about made up the sum named in the contract, $7,032.00.

The trial went off upon an issue which had not been raised by the pleadings. For the contract, instead of being one of schedule and prices, was declared by the learned

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trial Judge to be a lump sum contract—and the pleadings were constructed on the theory of a lump sum. If the learned Judge had heard the argument of which we have had the benefit, he would scarcely, I venture to think, have arrived at that conclusion.

If the $7,032.00 had been agreed to be paid to the contractors upon work definitely agreed upon, with definite plans, and to be paid in any event assuming no fault found with the contractors' work—and that they had followed the specifications and obeyed orders—that would have been a lump sum contract, an ascertained sum.

The learned Judge gave judgment for the plaintiffs for $3,392.00, the difference between the contract sum $7,032.00, and the $3,640.68 paid to the contractors on account. His view of the contract pre-supposes that no changes or deductions could be made if any of the estimated work was not executed, or if there were such the contractors must have payment for it as if it had been done. Such view also ignores altogether section 44 providing that the contract could be terminated at any time, *e.g.*, from failure of the municipal appropriations for the work, and the provision that in such case the work would have to be measured and paid for under the schedule prices according to the terms of the contract. That is fatal to the idea of a lump sum contract. The conclusion could not well have been arrived at by consulting the plans, as the plans and drawings which were subject to variation were not an integral part of the contract.

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I think the misapprehension probably arose from the occasional use among the documents which formed the contract of the words "the lump sum," "gross sum," and the like, not taking into account that effect had to be given to every part of the contract as a whole. I gather from the evidence that there was no claim in writing for a lump sum contract put in before the action had commenced. Then as to connections, it is true none were specified in the

drawing, for the sufficient reason that the engineer or any other person could not possibly say beforehand where they should be commenced.

They were, however, provided for in the estimated amount and in clause 8. The contract estimated the length of the excavations altogether as 2,647 lineal feet; whereas manifestly the length of the sewer was only 950 feet. The surplus, the engineer tells us, and the contractor must presumably have known, covered the connections; and these connections were, therefore, well within the contract, and not extras.

There is no doubt in my mind, after careful examination of documents and the evidence, that the contract was one where a gross sum and gross quantities in lineal feet, 2,647, are named, liable to addition or subtraction as the proper execution of the work might require, at the prices named in the schedule. That construction would include the connections (without which the contractor must have known a general sewer would be next to useless) and additional works; until the total 2,647 feet was reached, after which any additional work either inside or outside of the contract would, as the word implies, be extra; that is outside of the contract, but to be paid for at the schedule prices. The prices are constant quantities varying, though not with irregularity, with the depth of the work.

Judgment of CREASE, J.

The judgment of the learned Judge settled no mode of computation. The bills of particulars, as explained by the evidence, supply to a certain extent, the deficiency. Instance the principle for computing for the excavation of earth. The schedule price per lineal foot of earth excavated is the price of excavating and refilling all the earth down to that depth.

The price of excavating or trenching and refilling one lineal foot by twenty-seven inches, the width of the trench, in a trench "more than five and not less than six feet deep" would be 34 cents for all the way down. It could

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not be cumulative. It would not be 11 cents for the lineal foot of that width to two feet down, and 17 cents for the second foot between two and three feet deep, and 22 cents for the third between three and four feet deep, and so on to the sixth, cumulative, so that the price must necessarily be 34 cents, not 11 x 17 x 22 x 28 x 34 cents, equals $1.02 for excavating that one foot by twenty-seven inches column of earth six feet down, and that this is the engineer's and contractors' mode of computation is apparent.

Therefore, 1,247 lineal feet of trenching and refilling earth in a trench nine feet deep by twenty-seven inches wide he charges 50 cents per foot; and carries out the figures himself at $623.50, which is the full price for nine feet deep. The prices could not possibly have been cumulative. If the prices above nine feet had been intended to be cumulative that is added at the same number of lineal feet, at the rates put for 9, 8, 7, feet, to one foot respectively, the cost of eight feet for this 1,247 lineal feet would have been $561.15, adding only these two together, $623.50 and $561.15, would have made $1,184.65. If seven feet deep and so on up to two feet had been added to the $623.50, it would have amounted to the sum of $2,444.12 for 1,247 feet of earth excavated to 9 feet deep—a proposition which answers itself. It must therefore mean one price set in the schedule for all the excavation down to the given point.

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The units in Bill No. 1 are merely put to provide for cases where unexpected amounts of trenching, whether branches, extensions or additions might be necessary; and then the Corporation could pay the contractors for all such, according to the price per lineal foot and depth so agreed upon for such work.

By this means rates were provided for every depth down to fifteen feet, all that was required.

The cost of hardpan was estimated for on a similar prin-

ciple. But it so happened that in this contract there was no hardpan to consider.

The cost of trenching and refilling rock is provided for on the same principle; and of this, the bill of particulars and evidence show the contractors were cognizant.

The depths at which, by estimate, most rock was expected to occur were, between eight and nine feet, twelve and thirteen, and thirteen and fourteen feet deep. At these depths, according to the legal construction of the contract and the bill of quantities, the price was fixed at $8.12 per lineal foot, whether at eleven, twelve or thirteen feet deep. But the contractor wants to construe the bill of particulars as to rock in such a manner that if they had excavated down to eleven feet of earth, and from the eleventh to the twelfth foot (*i. e.*, only one foot) of rock; that he should charge the whole eleven feet of earth as rock, $8.12 per lineal foot. This is utterly unreasonable. If the bottom foot, say the twelfth, had been hardpan and all the feet above earth, he says he would have charged all above at the higher price of hardpan. But if the eleven feet above had been rock and the twelfth foot earth, if his mode of computation was correct, he should have charged all the twelve feet above at the lower price of earth.

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There could be no better index as to his own view of what the bill of particulars as to earth really meant, and the legal mode of computation under it, than his own charge for twenty-five feet extension of the sewer. "The sewers," he says, "extended twenty-five feet further east on Fort street than the plan calls for. For this twenty-five feet of additional length he charged $1.05 a foot—fourteen feet deep—coming to $26.50"; it should have been $26.25. Turning to Bill No. 1, earth, we find the rate for more than thirteen and not more than fourteen feet deep is $1.05 per lineal foot; multiplying that by the twenty-five feet we get the price charged $26.25. There is no hint of cumulative price in this calculation.

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As to the engineer's certificate, it is to be observed that although a final certificate, it does not give the quantities in lineal feet, to enable the Court to compare it with bills of particulars, which are made out in that measure. It is to be observed that the Corporation did not plead it as a final certificate in bar. The reason probably was that the contract fails to declare that its decision as a final certificate shall be binding and conclusive on all parties, which under *Scott* v. *Avery* 5 H.L. Cas. 811 and 25 L.J. Ex. 308 is necessary to give it that effect.

There was a remedy for a greater part, if not all of the present difficulty (and one which if the parties consented they could use now effectively) inserted in the contract, namely, Clause 14, whereby the Sewerage Commissioners and the engineer were constituted a body and tribunal whose explanation of any difficulty whatever, whether of construction, mode of computation, or other matter under the contract would be final and binding on all parties, and so have prevented litigation. But for some reason or other, when applied to they declined to give a decision, and held their meeting "without prejudice," so making it no meeting at all. The present legal proceedings are the result.

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It is clear from the evidence and what has preceded that this, being a contract whereby the contractors are to be paid by schedule and prices, while the pleadings were all drawn on the basis of a lump sum contract, the decision of the learned Judge cannot stand, and must therefore be set aside.

But it appears from the evidence that some money is due to the contractors; moreover, there was no specific price in the estimated bills of quantities and specifications whereby the cost of mixed strata of earth, hardpan and rock could be calculated. That being left for experts to determine, should have been proved at the trial. But no custom was pleaded, or shown, or even attempted; but merely what would be the engineer's and Mr. Mohun's practice on similar occasions.

There is also a difference of opinion between the parties as to the quantity of work actually done.

These reasons seem to me to afford sufficient grounds, with the question of alleged extras reserved, for a new trial.

I also observe that the judgment appealed from does not touch the question of the joinder of the engineer Wilmot as a defendant.

According to *Hudson's Law of Building Contracts* p. 63 *et. seq.* and the cases there cited, the engineer so far as he acts under the authority of the employer is in no way liable to the contractor, for acting or not acting, unless he acts fraudulently; because there is no privity of contract between the engineer and the contractor. Wilmot therefore must be dismissed from the action with costs.

As the pleadings were for a lump sum contract, and the trial therefore abortive, the plaintiff must pay the costs of the trial. The appeal was successful on one part of the motion, and not successful on the other. The judgment is set aside but judgment could not be given for the plaintiffs. If the Court had been certain that the certificate was right, judgment could have been given for the plaintiffs but it could not be certain of that. I am of opinion therefore that no costs should be given of the appeal.

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In case the plaintiffs should go to a new trial liberty must be given to amend the pleadings of both sides, but as the necessity for amendment has been caused by the mode in which the pleadings were drawn, the costs of all amendments must be defendants' costs in any event.

McCREIGHT, J.: In this case Mr. Justice DRAKE has decided that the contract between the plaintiff and the city was for a lump sum of $7,032.00, but after hearing a fuller argument than I gather was addressed to him, I think the contract was to do work in schedule quantities for corresponding schedule prices as in Bill No. I "earth, hardpan and rock" and see also Bills 2, 3, 4 & 5, bearing

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in mind that the contract (see the tender especially) contemplated deductions for any work not executed (see form of tender) and additions for additional work, but always according to the schedule, so that the contractor should be paid and at a fixed rate exactly for what he had done and no more and no less.

That this is the true meaning of the contract becomes more apparent when we observe the words of the agreement to "construct and execute all the works described in the annexed specific bills of quantities and forms of tender which are hereby made part of this contract and are to be read and construed herewith."

It is evident then that to ascertain whether the contract is for a lump sum or to do scheduled work more or less as the case may be at scheduled prices, we must attentively consider all these instruments and especially according to the cardinal rule referred to by Mr. Justice WILLES in *Roberts* v. *The Bury Commissioners* L.R. 4 C.P. 755. He at p. 760 speaks of the cardinal rule that "the Court should be guided more by the words of the clause dealing specifically with the matter, than by any general inference from the whole contract." I take it that the important clause or clauses or parts of the agreement of the 20th of August bearing on this question are clauses 11 & 13 (see especially the first member or portion of clause 13 and clause 33) see especially as to "additions to" or "deductions from," "additions," "omissions," and compare the same with the provisions in the tender. "The accompanying schedule containing the prices upon which our tender is based, and also those upon which we agree to execute any additional work or to deduct for any work not executed." As to additional work, see clauses 11 and 33.

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From perusal of these clauses and the schedules throughout, I have come to the conclusion that the meaning of the the whole agreement is that the plaintiffs are to be paid *pro rata* for what they have done, neither more nor less and

of course according to the prices in the schedules. In arriving at this conclusion I have not forgotten the expression "lump sum" at which the contract "was taken," occurring in clause 2, nor the expression "gross sum" in the 2nd member or portion of clause 13, but I think these expressions cannot be taken as overriding the other portion of the contract taken in its entirety and explainable, see clause 44, as referring to the amount of the appropriation for the works "under this contract" which I gather was a little over $7,000.00. I look upon clause 11 as perhaps the most important in negativing what I may call the "lump sum" construction.

If this view is correct, as I believe it to be, then the judgment for $3,392.00 given by the learned trial Judge cannot stand, and the next consideration is what course is to be adopted in order that the plaintiffs may obtain such sum, if any, as they are really entitled to under their contract.

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The schedule bill No. 1, "earth," "hardpan" and "rock" has given my learned brothers and myself a good deal of trouble in coming to a conclusion as to its true legal meaning, and I have at length concluded that its true meaning is that the column headed "lineal feet" limits the quantities in respect of which the plaintiffs are entitled to recover, and that the column headed "rate" correspondingly limits the amounts recoverable in respect of such quantities, the next column headed "$ cts." bringing out the amounts and their aggregate. Of course I am not now considering either "additions" or "deductions."

This construction, I think, satisfies each word and figure in the schedule relating to "earth," "hardpan" and "rock." For instance, in that part which relates to "earth," the contractors would be entitled to receive in respect of the first seven items the sums of 11, 17, 22, 28, 34, 29 and 45 cents, aggregating $1.96, a sum, of course, quite incommensurate with the work done; but then the

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next item, 1,247 lineal feet at 50 cents, making a total of $623.50, might, in the opinion of the contractors, and did, judging from their tender, more than compensate for this loss. Again, the next three items of $63.68 and 90 cents, aggregating $2.20, would represent *per se* a loss, but to be compensated by the next item of 357 feet at 97 cents, aggregating $346.29. And the same doctrine as to measurement and prices would apply to the "hardpan" and "rock," and at whatever depths "earth, hardpan and rock" respectively were to be found. Moreover, this interpretation agrees with the prices of the contractors in their tender, and their aggregate. It is to be remembered that the duty of a Judge is to ascertain the meanings of the words and figures which the parties to an instrument use in the instrument, and that, generally speaking, is the only legitimate method for him to pursue in order to ascertain their intention.

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The amount due to the plaintiffs, if any, according to the above construction of the specifications and schedule, etc., cannot, as I understand, be ascertained without further evidence of Wilmot, the city engineer, and, if thought necessary, further evidence on behalf of the plaintiffs.

For although it may, upon the evidence, be taken that 1,408 feet of work was done and no more, that is 1,408 feet of combined or mixed earth, hardpan and rock, yet his mode of computing for earth, hardpan and "rock" seem to me at variance with the true construction of the schedules; and further, we cannot tell the respective amounts of "earth," "hardpan" and "rock" taken out, of course at very different prices for each kind of material. Without such further evidence which we are entitled to call for by the rules, I cannot tell what judgment should be given or for what amount.

The final certificate given by Wilmot does not remove the difficulty, as by clause 36 of the specifications it has no operation as against the claim of the contractor by reason

of the absence of any provision in the clause that the architect should have power to bind by his determination. *Roberts* v. *Bury Commissioners*, in the Exchequer Chamber L.R, 5 C.P. 310, and see *Hudson on Building Contracts*, p. 285. Until such further evidence is produced, I think it is perhaps premature to say anything about amendments of the pleadings, costs, or any other matter.

WALKEM, J.: The plaintiffs, as contractors for the construction of certain sewerage work in the city, brought this action to compel Mr. Wilmot, the city engineer, to give them a certificate for $5,287.62, and to obtain a judgment for that amount against the Corporation. The amount consists of the balance due on an alleged agreement for payment of $7,032.00, as a lump sum for the whole work, and of about $1,900.00 for extras.

The defence, in effect, is that payment at schedule prices, and not of a lump sum, was agreed upon; that the alleged extras were part of the contract works; and that the engineer had given a final certificate for $22.28 which was all that was due to the plaintiffs.

Judgment of WALKEM, J.

At the trial Mr. Justice DRAKE held that the contract was for the lump sum mentioned; that the plaintiffs were entitled to be paid $3,757.00 as a balance due thereon by the Corporation, subject to the right of the latter to retain ten per cent. of it for the maintenance period of six months; and that they should be allowed for certain works as extras —the amount thereof and the question of costs being reserved for further consideration.

The Corporation now appeals from the part of the decision relating to the lump sum and the extras.

The judgment, it will be observed, does not dispose of the case against Mr. Wilmot. The certificate that was pleaded was, as I understand it, given after the commencement of the action; but even had it not been given at all the action would not lie against Mr. Wilmot; for an engineer or

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architect cannot be compelled by the contractor to give a certificate, as there is no privity of contract between them. He is only liable for damages to the contractor if he acts fraudulently, and there is no charge or even suggestion of the sort against Mr. Wilmot. See *Hudson's Building Contracts*, p. 63, and cases cited. The action as against him should therefore have been dismissed with costs; hence the order on this appeal must contain a direction to that effect.

The contract between the parties consists of several documents which are mentioned and incorporated in the following agreement of the 20th August, 1894, namely:

"The said contractors hereby agree to construct and execute all the works described in the annexed specification, bills of quantities, and form of tender, which are hereby made part of this contract, and are to be read and construed herewith * * * for the sum of $7,032.00 to be paid * * * in manner described in the said specification, [and to complete the same within five months after receiving a written order from the engineer to commence.]

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In ascertaining whether the above amount of $7,032.00 was meant to be a lump sum or not, all the documents referred to, and not the agreement alone, must be considered and particular attention given to those portions of them which deal specifically with the question of price or payment, it being a cardinal rule, as observed by Mr. Justice WILLES, in *Roberts* v. *Bury Improvement Commissioners*, Law Reports 4 C.P. p. 760, that the Court should be guided more by the words of clauses relating to a particular subject which requires elucidation than by any general inference from the whole contract.

The bills of quantities come first in order, as upon them tenders were invited. They call, in effect, for bids for the construction and re-filling of 2,647 horizontal feet of trenching, twenty-seven inches wide and of various depths, and the execution of certain incidental works which are

enumerated. To each of these items the plaintiffs affixed their price, the total of the price being $7,054.75. This sum they inserted in their tender, but as it proved to be incorrect owing to clerical and other errors, the correct sum, namely, $7,032.00, was substituted for it and inserted, as it now appears, in the agreement.

I mention these facts as accounting for the difference between the amount bid in the tender and the sum named in the agreement, and also as showing that the sum of $7,032.00 merely represented in an aggregate form the schedule prices to be paid for the enumerated works.

We come now to the tender. By it the plaintiffs offer to construct the requisite work "in accordance with the drawings, specifications, bills of quantities and form of tender," and to maintain them "for six months after completion for the sum of $7,054.75." Then occur these words: "The accompanying schedule contains the prices upon which our tender is based, and are those upon which we agree to execute any additional work or to deduct for any work not executed." This shows that from the outset the plaintiffs contemplated being paid at schedule rates and not otherwise.

In the next place, in Clause 11 of the specifications, which is important, as it specifically provides for the mode of payment, it is stipulated as follows: "The rates and prices * * * filled in against the several items of work in the bills of quantities * * * by the contractors * * * are to be taken as those upon which their tender is founded, and upon which alone they agree to be paid for any additional work * * * and further agree to deduct from the contract-sum for work not executed." Here is a clear stipulation that the $7,032.00 or "contract-sum," as it is called, shall be subject to increase or diminution. It is, therefore, impossible to hold it was intended to be a fixed or ascertained amount, or, in other words, a lump sum.

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The alleged extras are the lateral trenches for the connections with the main sewer, and also an extension made to the main sewer of twenty-five feet beyond the 950 feet indicated on one of the engineer's plans. But the lateral trenches are made part of the contract works by Clause 8 of the specifications; and the bills of quantities provide for their construction at a mean depth of eight feet, as distinguished from the provision made for the deeper trench of fifteen feet, intended for the main sewer. Moreover, the obvious purpose of the contract was the construction, not of a main sewer alone, which might, and probably would, be of no public benefit, but of a sewerage system for the neighbourhood. With respect to the increase in length of the main sewer, the evidence shows that it was included in the 1,408 lineal feet of trenching that was actually done, and as this quantity is far within the original sewerage alignment of 2,647 feet, the extension cannot be classed as an extra. The plan in question could not have the effect of limiting the contract, but, like working drawings, for a building, would be merely illustrative of what the engineer considered at the time was expedient to be done. The question, however, of extras loses its importance in view of our opinion that the contract is one for payment at schedule rates for all works, whether extras or not.

With regard to the meaning of the respective schedule rates for earth, hardpan and rock, we have been unable to agree. The earth schedule, for instance, reads thus:—

EARTH.

TRENCHING AND REFILLING.

Width of Bottom of Trench ..... 2 ft. 3 in.

	Rate.	
1 lin. ft. more than 1 and not more than 2 ft. deep	11 cts.	
1 lin. ft. more than 2 and not more than 3 ft. deep	17 cts.	
And so on till we come to—		
1,247 lineal ft. more than 8 and not more than 9 ft. deep	50c.	$623 50
And then—		
357 lineal ft. more than 12 and not more than 13 ft. deep	97c.	346 29

There is nothing technical in this scale. The trench is to be of a uniform width at the bottom of 27 inches, and each price is the price for a separate horizontal lineal foot of earth of a given depth. The prices are not cumulative —and it is on this point we disagree—for that would imply that they were for vertical feet. Again, the units, or other quaantities, of feet mentioned in the scale, being part of the 2,647 horizontal feet of trenching proposed to be done, might be hundreds of feet away from each other. The price of any one horizontal foot of a given vertical depth would therefore have nothing to do with the price of any other of a different depth, and could not, therefore, be added to it. The contractors, according to the scale when read with other portions of the contract, in effect, say, "We agree to take out earth and replace it for 11 cents a horizontal foot at any place along the line if the required excavations be over one, but not over two feet deep; for 17 cents. a horizontal foot if it be over two but not over three feet deep," and so on to 16 feet in depth. These are our prices, whether you increase the units of feet or correspondingly decrease the 1,247 feet or other quantities mentioned." This principle of construction gives effect to all the words and figures in the schedule, including those which provide for excavations that might not be, or that have not been, made, for as to them the contract provides for their deduction at the rates named for them. The engineer acted upon this principle in making his valuations of earth work, and the plaintiffs would seem to have similarly interpreted the schedule, as appears by their extension of the gross amounts in the outer column for the proposed excavations to the 9, 13, 14, and 15 feet levels. Their charge of $26.25, or $1.05 per horizontal foot for excavating the 25 feet extension of the main sewer to a depth of 15 feet is another, and perhaps more marked, instance of their having understood the schedule as the engineer understood it, for $1.05 is the schedule rate for that depth; and as the

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work, according to their contention, was an extra, it is reasonable to assume that they would not have considered themselves bound by the rate mentioned if it had been wrong, and the prices cumulative or otherwise. Any contractor's or engineer's construction of a contract may, it is true, be imperfect, but in the instances I have given both the contractors and the engineer have, in my opinion, been right.

Now, it is impossible to reconcile the view thus taken by Mr. Coughlan of the schedule of earth, with the view which he takes of the schedule for rock, although both schedules are similarly framed. He considers, for instance, that if his firm took out a body or column of earth, say a foot in length by 11 feet in depth and 27 inches in width, and then an underlying foot of rock, all should be charged for at $8.12, which is the price in the schedule for excavating a column of rock a foot long by 12 feet in depth and the width mentioned. In other words, if in sinking through 11 feet of earth he came to rock and had to take it out, he would charge for all as rock. Supposing, however, that the converse were the case, viz., 11 feet of rock and then an underlying foot of earth, is it at all likely that he would accept the price of earth for rock? Such a mode of computation, of course, condemns itself. The plaintiff's scale of prices for the rock as it deepens is not, I observe, a properly graduated scale, for in some places the same price is named for excavations of different depths, while in others the prices are in inverse ratio to the increase of depth But these mistakes, and they are evidently such, are the plaintiffs', and they are, therefore bound by them.

Judgment of WALKEM, J.

There is no separate schedule of prices for mixed bodies, or alternate layers of earth and rock. I understand there was no hardpan; and we have not sufficient evidence to show that the schedules before us would enable the engineer, in valuing such mixed materials, to calculate what might be due to the plaintiffs to their satisfaction, for they have

the right to be satisfied of the correctness of such valuations, as his certificate, though a final one, is not made conclusive or binding upon them by the terms of the contract. The contract, moreover, gives him no power to make allowances in the nature of adjustments. Such a power is given to him and the Sewerage Commissioner jointly; but it was not, in any legal sense, exercised; for at the meeting which took place with respect to the matters now in dispute, it was stipulated by the Commissioner that whatever decision was arrived at should be without prejudice to the Corporation. This was equivalent, of course, to saying that no decision should be binding; and the evidence, consequently, with respect to what was done, was properly ruled out by the learned Judge at the trial as being inadmissible.

The question as to what is due to the plaintiffs is yet an open one, and can only be determined by a new trial, unless the parties agree to refer to some competent person to determine—a course which I venture to suggest they should adopt as being the least expensive, and perhaps, most satisfactory one. We have no power to direct such a reference. The stipulation in the contract that all differences as to its meaning, or as to measurements or variations, should be referred to the Commissioner and Engineer jointly for their decision, should have been taken advantage of at the proper time. Even had that been done, the jurisdiction of the Court would not have been ousted, as there is no provision in the contract to the effect, as in *Scott* v. *Avery*, 5 H.L. Cases 811, that a reference to, and determination by, them should be a condition precedent to the plaintiffs' right to sue.

Judgment of WALKEM, J.

The judgment of the Court below must be set aside, and the costs of the trial that has taken place paid by the plaintiffs. Their pleadings will need amendment, hence the costs occasioned thereby to the defendants should be the defendants' costs in the cause in any event. The

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action, as against Mr. Wilmot, should, as I have said, be dismissed with costs. As the judgment has not been reversed, but merely set aside, the parties to this appeal should bear their own costs.

Appeal allowed and new trial ordered.

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BROWN AND ERB v. JOWETT.

Bill of sale—Fraudulent Preference Act, C.S.B.C. 1888, Cap. 51—Pressure—Bills of sale Act, C.S.B.C. 1888, Cap. 8, Sec. 3—Affidavit—Omission in jurat of place of swearing.

A *bona fide* demand by a creditor upon his insolvent debtor for payment or security is pressure sufficient to rebut any inference of "intent to prefer" in the execution of a mortgage in response to the demand, and takes the transaction out of the prohibition of the Fraudulent Preferences Act, C.S.B.C. 1888, Cap. 15, Sec. 2, following *Stephens* v. *McArthur*, 19 S.C.R. 446.

The Bills of Sale Act, C.S.B.C. 1888, Cap. 8, Sec. 3, as to the affidavit of execution to be filed with the instrument provides, "the affidavit aforesaid may be in the form in the schedule hereto annexed marked 'A.'" In this form, and also in the affidavit filed with the chattel mortgage in question, no mention was made in the *jurat* of the place of swearing the affidavit.

Held (per curiam) That the affidavit was sufficient as complying with the Statute.

Per DAVIE, C.J.: Apart from its statutory sufficiency it would be presumed, from the fact that the affidavit was on the face of it sworn before a commissioner for taking affidavits in British Columbia, that the official acted within the territorial limits of his authority and not elsewhere.

Statement.

THIS was an appeal from a judgment of CREASE, J., delivered at the trial on 21st September, 1894, dismissing the action. The plaintiffs, manufacturers, living in Berlin, Ontario, sued to recover from the defendant, the assignee for the benefit of creditors of the estate of James Macdonald

& Co., certain of their goods upon which the plaintiffs had obtained a chattel mortgage prior to the date of the assignment. The defendant had gone into possession of the goods in question, claiming as assignee. The plaintiffs claimed that they were entitled to the goods under the chattel mortgage in question, as against the assignee, and for a return thereof and for an account of all sums received by the defendant from the sale of any of them and also for damages for their detention.

The defendant set up the defence that the Bills of Sale Act, B.C., had not been complied with. That he then, and prior to the bill of sale, was a creditor of James Macdonald & Co., and that the said firm was at that time in insolvent circumstances, and that the bill of sale was made with the intent to give the plaintiffs a preference over the other creditors of said firm, and he claimed the benefit of Cap. 51, C.S.B.C. 1888, and of 13 Elizabeth, Cap. 5.

Statement.

W. J. Macdonald, a member of the firm of James A. Macdonald & Co., gave evidence as to the circumstances under which the chattel mortgage was given, as follows: "Mr. Middleton (agent for the plaintiffs) came in in the following year, and there had been drafts unpaid, so then he wanted an understanding for security; he asked for his money or security, I hardly remember whether he asked once or twice. He asked for security for his money. The goods chiefly came from Brown and Erb. There were goods there belonging to three houses. This mortgage comprised all my goods and property except some goods on the way. I know Mr. Jowett, the assignee. I told him before I made the assignment "Mr. Middleton was here and was very friendly and didn't wish to do any harm, but to secure themselves." The defendant swore that the financial position of Macdonald & Co. in July, 1893, was such that they then wished to make an assignment for the benefit of their creditors. The facts more fully appear in the judgment.

The defect in the registration of the mortgage objected

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to was that the *jurat* in the affidavit for registration was in these words: "Subscribed to and sworn before me this 13th October, A.D. 1893," without stating at what place it was sworn. It purported to be sworn before a commissioner.

The learned trial Judge found that there was a concurrence of intention between Macdonald & Co. and the plaintiffs to create an unlawful preference in favour of the latter and also that the registration of the mortgage was void as against the defendant by reason of the defect objected to in the *jurat* of the affidavit of execution, and dismissed the action with costs to be paid out of the insolvent's estate.

W. J. Taylor for the plaintiffs the appellants. As to the affidavit it is sufficient. It will not be presumed that the commissioner took an affidavit outside his jurisdiction. On the contrary, *omnia præsumuntur rite esse acta.* The *jurat* follows the form given in the schedule to the Act. It is not contended that the form given were not better expanded by stating the place where the affidavit was sworn to, but the mistake is not fatal and occurred by reason of the form. Section 3 of the Statute provides "the affidavit aforesaid may be in the form in the schedule hereto annexed marked A." *Regina* v. *Atkinson*, 17 U.C. C.P. 295, holds that an indictment for perjury will lie upon an affidavit the *jurat* of which does not state where it was sworn. The technical requirements of the Rules of Court in regard to affidavits to be used in Court are not essential to the validity of affidavits for the purposes of the Bills of Sale Act. *Smith* v. *McLean*, 21 S.C.R. 355; *Emerson* v. *Bannerman*, Cassels S.C. Dig. 1893, pp. 120, 122, 19 S.C.R. 1; *Barron on Bills of Sale*, p. 327, 2nd Ed.; see also Oaths Act B.C., 1892, Cap. 49, Sec. 14.

Argument.

It is clear from the evidence that the plaintiffs obtained this bill of sale by a degree of pressure which negatives the intent to prefer *Molson's Bank* v. *Halter*, 18 S.C.R. 88; *Stephens* v. *McArthur*, 19 S.C.R. 446; *Carscaden* v. *McIntosh*, 2 B.C. 268; *Gibbons* v. *McDonald*, 20 S.C.R. 587. Apart

from statutory provision, and there is none such in this Province, an assignee for the benefit of creditors is not in better position than his assignor to impeach previous conveyance by the assignor. *McKenzie & McGowan* v. *Bell-Irving, Paterson & Co.* 2 B.C. 241. The defendant appears to have been a simple contract creditor of Jas. Macdonald & Co., but he should have been a judgment and execution creditor in order to give him *status* to attack the bill of sale, see *Barron on Bills of Sale*, 357 2nd Ed.; *Parkes* v. *George*, 10 O.A.R. 496.

C. Wilson, contra: The defect in the affidavit is fatal to the registration of the bill of sale. The Court will not assume anything in favour of an affidavit other than that which is stated in it. *Re Emerson Election Petition*, 4 Man. L.R. 287, and cases cited. *Re The North Dufferin Election Petition, ibid*, p. 259-280. [DAVIE, C.J.: *French* v. *Bellew*, 1 M. & S. 302 decides that in the case of a Judge taking an affidavit he will be assumed to have taken it in his territorial jurisdiction.] Further, there was no evidence that the bill of sale was in fact registered. [DAVIE, C.J.: You attack the registration both in the Court below and here upon the ground that the affidavit for registration is insufficient. For the purpose of that argument it is *e concessus* that the bill of sale was registered, and I do not think, therefore, than you can be admitted now to argue that it was not registered.] [MCCREIGHT, J.: You are bound by the course you took at the trial.] As to the objection that the defendant has no *status* as assignee to attack the bill of sale, it is submitted that such an objection only lies to a plaintiff. The defendant is brought in here by the plaintiff and can defend his position upon any ground, whether personal to himself or the person he represents. At all events it is only a question of amendment. *McCall* v. *McDonald*, 13 S.C.R. 247; *Reese River Mining Co.* v. *Atwell* therein cited at p. 255.

Argument.

Upon the merits the finding of the learned Judge will

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not be disturbed, as he may have disbelieved the witnesses for the plaintiff. [Davie, C.J.: The *onus* was upon you to show the intent to defraud, that is to say to make out that the deed was voluntary and not the result of pressure, and I do not see any evidence of that.] The giving of a bill of sale would have been an act of bankruptcy in England.

Cur. adv. vult.

DAVIE, C.J.: The plaintiffs, who are manufacturers carrying on business at Berlin, in the Province of Ontario, became creditors of a firm of Macdonald & Co., trading at Nelson in British Columbia, in the sum of $5,220.68 for goods sold and delivered, and drafts upon the firm of Macdonald & Co. in respect to such indebtedness having been dishonoured, the plaintiffs' agent, Middleton, in the fall of 1893 came to British Columbia and asked Macdonald & Co. for payment or for security for their indebtedness, promising Macdonald & Co. that if they would give him security the plaintiffs would "carry them on," meaning as I take it, would extend them further credit. To quote from the rather meagrely reported but uncontradicted evidence of James Macdonald, who was called at the trial: "Mr. Middleton was very friendly and did not wish to do anything to harm me but to secure themselves. If he gave that mortgage he could go along and nobody would trouble him." At this time it appears that Macdonald & Co.'s stock in trade, principally procured from the plaintiffs, was already mortgaged to a relative of one of the firm for the nominal amount of $5,000.00—but of which there had been consideration to the extent of $1,000.00 only, and that, for the purpose of securing the plaintiffs by a first mortgage upon the same stock, the relative relinquished his mortgage, and thereupon the indebtedness of $5,220.68, which was then overdue, was arranged by the acceptance by Middleton of four promissory notes dated 13th October, 1893, for equal amounts payable at three, six, nine and

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twelve months carrying interest at eight per cent. per annum, secured by a bill of sale by way of mortgage, which, subject to the objection presently considered, was duly registered, of all the stock in trade of Macdonald & Co., a schedule whereof was attached to the bill of sale. I assume that Macdonald & Co. were in insolvent circumstances, for they owed $12,000.00 besides the plaintiffs' claim and their assets do not appear to have been equal to this sum.

Some time after making the bill of sale to the plaintiffs, Macdonald & Co. assigned to the defendant, Jowett (who was also a creditor in a small amount) for the benefit of creditors generally, and he, immediately upon the assignment, took possession of the stock in trade which had been mortgaged to the plaintiffs, who, thereupon, brought this action to recover the goods from him. Jowett pleads, among other things, that the bill of sale was made with intent to defeat and delay the creditors of the said firm, or with intent to give the plaintiffs a preference over the other creditors of the said firm, and he claims the benefit of Chapter 51 of the Consolidated Acts of British Columbia (an Act respecting the fraudulent preference of creditors by persons in insolvent circumstances) and of the Statute of 13 Elizabeth, Chapter 5, and the learned Judge at the trial in supporting this defence finds "that there was a concurrence of intention to give an unlawful and voluntary preference between the mortgagor and mortgagee and that the bill of sale is null and void as against the creditors."

Judgment of DAVIE, C.J.

It was urged before us that it is not competent for the assignee who, it was argued, stands in no higher position than the grantor, to attack this bill of sale, and that as a creditor without judgment he could not impeach the deed. As however consideration of these points is unnecessary in the view I take I express no opinion upon them. There was abundant consideration for this bill of sale, and it was in no way a mere cloak or method of retaining a benefit for the grantor. It is therefore a perfectly good deed so far

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as the Statute of Elizabeth is concerned. *Alton* v. *Harrison*, L.R. 4, Ch. 622, and that it may have been made with intention to give a preference to the grantee would not of itself affect the validity of the bill of sale under the Statute of Elizabeth, nor at Common Law, neither is there anything unlawful in the mere circumstance of preferring one creditor to another, *Middleton* v. *Pollock*, 2 Ch. D. 104, unless the case is one which falls within the provisions of the Provincial Statute, C.S.B.C. 1888, Chap. 51, which enacts that "in case any person being at the time in insolvent circumstances (which as I stated before I assume the grantors in this case were) * * * makes any * * * assignment or transfer of any of his goods, chattels or effects * * * with intent to defeat or delay the creditors of such person; or with intent to give one or more of the creditors of such person a preference over his other creditors * * * every such assignment or transfer * * * shall be null and void as against the creditors of such person." So far as regards the intent to defeat or delay creditors, these expressions carry the law no further than the Statute of Elizabeth, and the construction which the other language of the Statute applicable to this case has received both in England and Canada. (See *Stephens* v. *McArthur*, 19 S.C.R. 446 where the principal cases are referred to) shews that the preference intended by the Statute is a voluntary preference, and that the Act does not apply where the transfer has been induced by pressure on the part of the creditor. I think there was abundant proof of pressure in this case. In *Stephens* v. *McArthur (ubi sup.)* it was held that a mere demand by the creditor without even a threat of legal proceedings is sufficient pressure to rebut the presumption of a preference. In this case it would appear that the creditor had come all the way from Berlin, Ont., to enforce his demand if necessary, and it is a mistake to suppose that because Middleton, the agent, adopted gentle methods to secure what he wanted, "was very

friendly, and did not wish to do anything to harm me," in fact as Macdonald told Jowett "had not put any pressure upon him," that he had not quietly but firmly given Mr. Macdonald to understand that he had come to obtain payment or security, and was going to have it. A business man pressing for his money would act precisely as Middleton is described to have acted here, and Mr. Macdonald in his evidence says: "Mr. Middleton came here at the fall of the year—and there had been drafts unpaid—so then he wanted an understanding for security. He asked for his money or security—I hardly remember if he asked once or twice." "He asked for security or his money." So far then from there being anything voluntary in this transaction on Macdonald's part, his action was the mere submission to the demand of the creditor for his money or security, and so potent was this demand that the relative was made to give up his prior mortgage. Moreover Macdonald's consent to give the bill of sale was evidently brought about, largely, if not wholly, by the promise of Middleton to give him further credit, the effect of which by enabling him to carry on and extricate himself from his difficulties, would of itself remove the case from the operation of the Provincial Statute.

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But it is pleaded and has been strongly urged before us that the registration of the bill of sale is void, in that the *jurat* to the affidavit omits mention of the place where sworn, and *non constat* it was not sworn within the jurisdiction. The *jurat* however complies with the form supplied by the Statute, and it appears upon the face of it that the affidavit was sworn before a commissioner to administer oaths in B.C. It must therefore I think be presumed that the functionary taking the affidavit acted within the limits within which he had authority to take it, and not elsewhere, and that therefore the affidavit is unobjectionable. See *French* v. *Bellew*, 1 M. & S. 302; *Meek* v. *Ward*, 10 Hare 709; *Regina* v. *Atkinson*, 17 U.C.C.

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P. 295 and *Ex parte Johnson re Chapman*, 50 L.T.N.S. 214.

For these reasons I am of opinion that the judgment of the Court below must be reversed and judgment entered in lieu thereof for the plaintiffs for a return of the goods and chattels sued for.

There is no evidence of any actual damage to the plaintiffs owing to the detention, and even if there were any damage they could have avoided the same by replevying the goods. I think therefore there should be nominal damages in the sum of $1.00 for detention, and, as the plaintiffs ask it, an account of any moneys received by the defendant from the sale of any of the goods, and judgment for the sum which may be found due on taking such account.

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The defendant should, I think, pay the costs of the action in the Court below and of this appeal.

We will hear further argument as to the form of the judgment as to damages, if any, for detention and upon the question of account.

McCREIGHT, J.: In this case I cannot agree with the finding of the learned trial Judge as to this being a case "of an unlawful and voluntary preference between the mortgagor and mortgagee."

Considering all the discussions which had taken place as to the meaning of the word "preference" in Cap. 51 of the Consolidated Statutes of 1888 or Statutes in *pari materia* though in force, it may be, elsewhere (see especially the judgment of STRONG, J., in *Stephens* v. *McArthur*, 19 S.C. R. pp. 451-456, and see his judgment also in the *Molson's Bank* v. *Halter*, 18 S.C.R. at pp. 94-95) it would not be right to discuss the meaning of that word "preference" at length, especially as Lord CAIRNS remarks thereon in *Butcher* v. *Stead*, L.R. 7 H. L. at p. 846, referred to in both those cases, seem to conclude the point.

Judgment of McCREIGHT, J.

He there says "the use of the word 'preference' implying an act of free will would of itself make it

necessary to consider whether pressure had or had not been used," and this appears to have been the opinion of the Lords Justices in *Ex parte Topham*, L.R. 8 Ch. 619.

I cannot look upon the circumstances in this case as indicating "preference." Middleton, on behalf of Brown & Erb, journeys from Ontario to B.C. in order to get payment or security from the Macdonald's in October, 1893, and the Macdonald's make the mortgage in consequence thereof, moreover on the promise that Middleton on behalf of Brown & Erb "would carry them on," as the expression is. This is a very different case from Macdonald writing to Brown & Erb, or going to them and volunteering a mortgage. The case of *Ex parte Griffith*, 23 Ch. D. (C.A.) p. 60, is instructive on this point. See especially the judgment of LINDLEY, L.J. at p. 73, where he says "the letter of Williams (the debtor to Griffith, the preferred creditor) throws a flood of light upon the transaction." And see the judgment of BOWEN, L.J., in *Ex parte Hill*, 23 Ch. D. (C.A.) 695, as to the dominant and substantial view of the debtor, or, as on the same page he calls it, the "operative effectual view" of the debtor.

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As to the point on the affidavit sworn in connection with the bill of sale, I think also the learned trial Judge is wrong. It is precisely in the statutory form which section 32 of the Act says may be used. Had the form been incorporated and set out in the section there could be no doubt, and it can make no difference that it is in the schedule and at the same time specifically referred to in the section.

The section must not be dealt with as if the words were to be read into it at the conclusion, "subject however to the law and practice in force in reference to affidavits."

The authorities do not seem quite agreed as to the validity of the affidavit if tried by the general law, and independently of the Statute, and to use the language of Baron PARKE, "must not be read as if a trap was laid," especially where, as here, there are clear words authorizing

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its user. The case of an affidavit being *de facto* taken out of the jurisdiction need not now be considered.

As to costs, Jowett, of course, must not have his in the Court below or here; Brown & Erb must have their costs in both Courts paid by Jowett himself, not out of an estate which may be substantially the property of Brown & Erb. The form of judgment or decree had better be settled after argument by counsel for the respective parties.

DRAKE, J.: The plaintiffs being creditors of James Macdonald & Co., of Nelson, on the 13th October, 1893, obtained a bill of sale by way of mortgage from their debtors to secure their debt, but did not take possession of the goods assigned. On 5th April, 1894, James Macdonald & Co. made an assignment for the benefit of their creditors to the present defendant, who immediately took possession.

The plaintiffs sued the defendant for their goods.

Judgment of DRAKE, J.

The defendant denied the validity of the bill of sale on two grounds.

1st. That it was not duly registered inasmuch as the place where the affidavit was sworn was not stated in the *jurat.*

2nd. That the bill of sale was given with intent to defeat creditors, or for the purpose of giving the plaintiffs a preference over the other creditors.

On the first point under the English authorities *Regina* v. *Justices of West Riding of Yorkshire*, 3 M. & S. 493 and *Regina* v. *Cockshaw*, 2 N. & M. 378, the place where an affidavit is sworn should appear in the *jurat*; and see Chit. Arch's Forms 14th Ed. p. 463, under the heading of affidavits. Here however the Bill of Sale Act gives a form, which may be used, of the affidavit which has to be filed with the bill of sale or copy, and to that form a *jurat* is attached in which the place where sworn is omitted. I therefore think that the affidavit which follows that form is sufficient and (although in other cases the place where an

affidavit is sworn should be inserted), that being so, and there being no other objection to the registration of the bill of sale, I am of opinion the bill of sale is duly registered.

The second objection is one that depends on the evidence. The debtor, James Macdonald, says in his evidence that Mr. Middleton, the agent of the plaintiffs, called on him because some of their drafts were unpaid, and asked for security or money, and, in re-examination he says, in answer to the question, "Did you give this security because you were pressed for it?" "He (meaning Middleton) wanted security and if I gave security the plaintiffs would carry me on," and Mr. Jowett says that Macdonald told him that Mr. Middleton did not wish to do any harm but to secure themselves, and "if I gave the mortgage we could go along and no one would trouble me."

This is practically all the evidence with the exception of the significant fact that the debtor's brother gave up a security for $1,000.00 in order that this mortgage should be given. There is nothing in this evidence to show that the mortgage was a sham, or that it was volunteered by the debtors, or, in fact, that it was given in any other way than as a security for money owing which the debtor could not pay.

The case is governed by *Stephens* v. *McArthur*, 19 S.C.R. 446, which decides the point that an application for payment or security is sufficient, without any threat of ulterior proceedings, to take the case out of the Statute. The intent to prefer must be present in the mind of the debtor. It must be a voluntary act not arising from the pressure of the creditor. If, in answer to an application for payment of a debt, the debtor paid the money and by so doing stripped himself of all means of meeting his other liabilities, the creditor could not be called upon to refund the money so paid, and the same result happens when security is given in answer to a *bona fide* application for security of a *bona fide* debt. The appeal must be allowed with costs. With

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regard to the costs in the Court below the learned Judge, in the exercise of his discretion, did not give costs to the successful party, but gave both parties costs out of the estate, which, in my view of the case, makes the present plaintiff, who is successful, bear the costs of the action. I think the plaintiffs should have their costs in the Court below.

Appeal allowed with costs.

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Practice—Cross-examination on affidavit—Right of deponent to expenses of attendance.

On an interlocutory application to change venue, defendant fyled his own affidavit in support of the application, and on being served with an order and appointment for his cross-examination on such affidavit, attended for such cross-examination, but refused to be sworn or answer until paid his expenses of attendance.

Held, on appeal to the Divisional Court (Davie, C.J., and McCreight, J., overruling Crease, J.): That he was not entitled to conduct money; following *Mansel* v. *Clanricarde*, 54 L.J. Ch. 982.

APPEAL from an order of CREASE, J., made in Chambers February 26th, 1895, upon summons by the defendant, changing the venue from Vancouver to Victoria. The only material used in support of the application was an affidavit sworn by the defendant. Upon the application coming up in Chambers, an order was made for the cross-examination of all deponents on their affidavits, whereupon plaintiff obtained an appointment and subpœna for the cross-examination of the defendant on his affidavit. The defend-

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ant duly attended for cross-examination, but refused to be sworn or answer until paid conduct money, which was refused by the plaintiff. The application then came up in Chambers, when objection was taken to the affidavit being read, as the defendant had refused to be cross-examined thereon.

J. J. Godfrey, for the plaintiff: We submit that the affidavit cannot be read.

E. P. Davis, Q.C., contra.

CREASE, J.: Mr. *Godfrey*, for the plaintiff, raised a preliminary point on the hearing of this application, which was a summons by defendant to change the venue of the action from Vancouver to Victoria, where the cause of action arose. The defendant Irving had made an affidavit on which the plaintiff's counsel wished to cross-examine him. An order was made for his cross-examination in the usual way before the Registrar. The application was partly heard on January 15th, 1895. It came up again on February 12th, when the preliminary point was raised. Captain Irving came up expressly from Victoria to be cross-examined, but refused to be sworn until his expenses were paid or secured; he did not ask for payment, as I understand it, for his time. The plaintiff's solicitor refused to pay or secure Irving's expenses, and relied on Order XXXVIII., which says: "Upon any motion, petition or summons, evidence may be given by affidavit, but the Court or Judge may upon application by either party, order the attendance for cross-examination of the person making such affidavit." The plaintiff's counsel contended that under Order XXXVIII., Rule 29, "the party producing such deponent for cross-examination shall not be entitled to demand the expense thereof in the first instance from the party requiring such production." Mr. *E. P. Davis, Q.C.*, on the other side, contended that Irving was quite right in not being cross-examined before his expenses were paid or secured.

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Thereupon the two counsel agreed, and it was noted and read over by me "that if Mr. *Godfrey's* contention was correct, the affidavit of Captain Irving could not be used. If incorrect, that affidavit could be received as it stood without cross-examination, and the application for change of venue should go on."

Mr. *Godfrey* depended on *Mansel* v. *Clanricarde*, 54 L.J. Ch. 982. In that case he said the woman declined to be examined unless her expenses were paid and she was ordered to appear for cross-examination. He contended that the witness is the witness of the party cross-examining, and referred to *Backhouse* v. *Alcock*, 28 Ch. D. 669, which was a case of evidence taken after the trial, and not under Rule 22 (our Rule 21); that the practice before the trial is the same as the practice after the trial, and that if a party gives evidence by affidavit it is at his own expense, and the cross-examination also. But in *Nokes* v. *Gibbons*, 5 W.R. 216, before Vice-Chancellor KINDERSLEY, where the question was first not "whether a witness was entitled before cross-examination to be paid his travelling expenses (to which he was clearly entitled) but whether he was entitled to be paid for his loss of time," the Vice-Chancellor ordered his expenses to be paid before cross-examination. In the case of *Irving* the demand was not for payment for his loss of time, but for his travelling expenses, to which Vice-Chancellor KINDERSLEY said, "he was clearly entitled," and these should have been paid or secured to him.

Judgment of CREASE, J.

It not infrequently happens in Court when a witness steps into the witness box, he asks for his expenses, and in such a case his expenses are paid or an undertaking given for the amount. Here the witness came from great distance, necessarily at much inconvenience and expense, a jonrney taken solely to afford the plaintiff an opportunity for cross-examination, for which purpose he is considered the plaintiff's witness. He will still have to appear and be examined and cross-examined at the trial, wherever that

may take place. The case of *Hughes* v. *Spital*, 13 W.R. 251, is in point. There the witness had made affidavits before the hearing on which it was desired to cross-examine before the examiner. KINDERSLEY, V.-C., said Spital and the other witnesses named in the notice must be cross-examined within two months and be ordered to attend the examiner at such time within such period as the examiner should appoint; but the witnesses must not attend at their own expense and there must be no costs of the motion.

Now the latter part of Rule 29, Order XXXVIII., on which the plaintiff's counsel bases his contention, is a rule which applies only where the trial itself is by consent upon affidavits, and the cross-examination there referred to is the cross-examination at, or in certain cases after, the trial, where a witness has not got to travel from a distance to be cross-examined and at his own expense. The heading of that set of rules is "Trial by Affidavit." The English rules do not contemplate witnesses having to come from a distance to be examined, but at or measurably near the locality of trial, and the two last cited cases provide for the payment of expenses before cross-examination.

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I think therefore under the circumstances of this case the defendant was justified in not giving evidence in cross-examination unless his expenses were either paid or secured.

Objection overruled.

The plaintiff appealed to the Divisional Court, and the appeal was heard before DAVIE, C.J., and MCCREIGHT, J.

J. J. Godfrey, for the appeal: The defendant on cross-examination on his affidavit is not our witness, but has given evidence on his own behalf by fyling his affidavit and is subject to cross-examination thereon without payment of any fees to him. The practice is the same as if he had given evidence on his own behalf at the trial, in such case the other side could as of course cross-examine him

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without payment of fees. The defendant gives his evidence by fyling an affidavit, Marginal Rules 401 and 385 are applicable. *Mansel* v. *Clanricarde*, 54 L.J. Ch. 982.

Argument.

E. V. Bodwell, for respondents: The matter is one of great doubt and is a novel point here. If the rule is correct as laid down in *Mansel* v. *Clanricarde* great hardship may ensue in many cases. In any event there should be no costs of appeal, and we should have liberty to apply again for a change of venue if this appeal is successful after submitting to the examination at our own expense.

Judgment of McCREIGHT, J.

McCREIGHT, J.: The case of *Mansel* v. *Clanricarde*, 54 L.J. Ch. 982 is not distinguishable from the present. The cross-examination there was, as here, upon an affidavit fyled upon an interlocutory motion before trial and the rule appears to be the same upon a similar examination after the trial.

DAVIE, C.J.: I concur.

Appeal allowed with costs.

RE THUNDER HILL MINING COMPANY.

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Public Company—Winding up—Contributories—Irregular issues of shares —Whether holder liable to creditors—Ultra vires—Waiver.

A Public Company, incorporated under the Companies' Act, 1862, (Imp.), having power by its memorandum of association to increase its capital of $50,000.00, passed a resolution for the issue at a discount of new shares of the face value of $375,000.00, falsely marked "fully paid up," which were substituted for the original $50,000.00 of shares, which were fully paid up. The resolution was not a special resolution, as required by section 51, and the increase of capital was not registered. The Company became insolvent.

Upon motion by the liquidator to settle the list of contributories, the holders of the new shares maintained that they never had any legal existence, and were void for all purposes.

Held, That the issue of shares was invalid and voidable by the shareholders, but not as against creditors upon a winding up, and that the shareholders who had not repudiated before the winding up commenced but had acquiesced in the issue of the shares in the manner adopted, should be put on the list of contributories in respect of the actually unpaid portion of their face value.

MOTION by the liquidator of the Company, which was being wound up under the Companies' Winding Up (Can.) Act, to settle the list of contributories. The facts fully appear from the head note and judgment. Statement.

Charles Wilson, Q. C., for shareholders who had accepted certain shares in the increased capital in lieu of their original fully paid up shares at a discount represented by the difference between the original capital of $50,000.00 and the $375,000.00, to which the capital was increased, contended that the new shares never had a legal existence, and that all parties must revert to the *status quo ante*, as the capital could only be increased by the method provided by law. See sections 12, 34 and 51 of the Companies' Act, 1862, and section 26 of Table "A," citing *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C. 101; *Liverpool Bank* v. *Turner*, 2 De G. F. & J. 502; *Brice on Ultra Vires* 3rd Ed., 227; *Re Cambrian Peat Co.*, 31 L.T.N.S. 773; *Bottomley's case*, Argument.

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16 Ch. D. 681. The nominal holders of these shares must be reverted to their position as the holders of their original fully paid up shares, and therefore not liable to contribute to creditors.

E. V. Bodwell, for certain holders of the new shares marked on their face "fully paid up," who had purchased same in the open market without notice to the contrary.

There is an estoppel against the Company, or any one claiming through them, maintaining that these shares are not what they state themselves to be. *Guest* v. *Worcester Ry. Co.* L.R. 4 C.P. 9; *Burkinshaw* v. *Nicholls* 3 App. Cas. 1,004; *In re Stapleford Company Barrows case* 14 Ch. D 431.

Argument.

If the new issue of shares is not valid as between the shareholders and the Company, the shareholders cannot in this case be held to them for the purpose of satisfying creditors. The rights of creditors are based on the fact that they are presumed to have given credit on the basis of the capital share issue of the Company, but, as the increase of share capital was never registered, and the creditors had no notice of it, they are not defrauded by being relegated to the position as they understood it. *Mudgett* v. *Veeder*, 6 Am. and Eng. Corp. Cas. 485; *Re Millers Dale Co.*, 31 Ch. D. 211.

W. J. Taylor, for other shareholders.

A. N. Richards, Q.C., and *C. D. Mason*, for the liquidator.

DRAKE, J.: This company was registered on the 10th of June, 1891, under the Companies Act, 1862, with a capital of $50,000.00 divided into 5,000 shares of $10.00 each, with power to increase to such extent as the Company might determine, and to issue any shares in the original or in any new capital stock as fully paid up or at a discount.

Judgment.

The objects of the Company were to purchase and work mines and in particular the land, minerals and mining rights known as Thunder Hill mine in East Kootenay with the buildings thereon and any other mines of the Company.

There being no special articles of association prepared, the relations of Table "A" to the Act of 1862 (Imp.) are the regulations of the Company. The directors of the Company under Rule 53 of Table "A" were the subscribers to the memorandum of association, 8 in number, and these were under Rule 52, to be the directors until other directors were chosen by the subscribers to the memorandum of association. The first meeting of directors was held on September 1st, 1891, at which three members were present with Mr. C. Sweeney, who was not one who had signed the memorandum. There was no general meeting held within six months after registration as required by Rule 39. The first general meeting was held on February 19th, 1892. There was no note in the minutes that the Company had bought the Thunder Hill or any other mines, but it is conceded that a purchase was made from Mr. Brady, but what the terms were, I have had no evidence before me except the deed itself and what appears in Bainbridge's evidence. Mr. Bainbridge says that the first meeting was held in September, 1891, and that 3,750 shares was the purchase price of the mine paid to Brady and 1,250 shares subscribed for outside and he says that the purchase of the mine was made before the Company was formed, which is incorrect according to the deeds, and again he says that 3,750 shares were issued to Brady as vendor of the mine, and Mr. Taylor in his evidence produces conveyances from Brady and others to the Company of certain mining claims all subsequent in date to the incorporation of the Company. I therefore take it that the Thunder Hill mining claim was transferred to the Company by Brady in consideration of 3,750 paid-up shares. Although the whole transaction is most irregular it nowhere appearing from the records that the Company sanctioned the purchase, but the directors must be taken to know as a fact that these shares were issued to Brady as vendor in payment for the mine.

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On the 19th of February, 1892, the general meeting of

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shareholders was held, and certain by-laws were passed but never registered. It was then moved by Mr. Macgurn that the capital stock of the Company be increased to $500,000.00, of which $125,000.00 worth were to be sold, and $375,000.00 were to be divided *pro rata* amongst the present shareholders according to the number of shares held by them respectively on their surrendering their original shares fully paid up. There was no subsequent meeting of the Company to ratify this resolution. The directors appear to have acted on this resolution; they issued fresh shares to the public, and fully paid up shares to those who were holders of original shares, and incurred fresh liabilities to creditors. No change was made in the memorandum of Association as originally registered and this resolution was not fyled with the Registrar of joint stock companies as required by sections 51-53 of the Act.

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The Company is now being wound up and the liquidator applies to place on the list of contributories those persons who have had given to them the 37,500 shares for which no payment has been made to the Company. It is sought to be made out, from the evidence of Bainbridge, that the arrangement made between the Company and Brady was that when the increase of capital was agreed to, Brady was, as vendor of the mine, to have three-fourths of the shares then issued, although he had already been paid 3,397 shares of the original capital. There is no evidence in support of this. There are two prospectuses produced, the first alleging incorporation with a capital of $50,000.00, and Major Nicholles, W. F. Bullen, Joseph Hunter, D. R. Ker and W. J. Taylor are named as trustees, and W. H. Bainbridge as secretary. It is there stated that 3,750 shares will be retained by the proprietors—the only proprietor was Brady, who received 3,397 shares; the other 367 will have to be accounted for—and 1,250 issued to the public, and it then proceeds to state that after development work is done the capital will be increased to $500,000.00 in $10.00

shares, of which 37,500 will be divided among the stockholders, giving seven and one-half shares for each original share held by them, when that prospectus was issued there is no evidence to show.

The other is apparently a document issued after the 16th of February, 1892, and subsequent to the general meeting, but not a word in it with reference to the issue of fully paid up shares to the shareholders. The board of directors named in this document is composed of Nicholles, Macgurn, Taylor, Bowker, Ker, Bullen, Child, Twigg and Browning. None of them repudiated their office or the shares issued to them, except Twigg.

It is apparent that the Company thought that they were duly incorporated with a capital of $500,000.00, but it was the directors' duty to see that the requirements of the Act had been complied with.

Under section 28 of Table "A" any new capital raised by the creation of new shares shall be considered part of the original capital, and shall be subject to the same provisions with reference to the payment of calls as if it had been part of the original capital.

Judgment.

Mr. *Wilson* and Mr. *Bodwell*, on behalf of certain shareholders, contended that this issue of shares was not only *ultra vires*, but absolutely void, and such being the case, these parties cannot be placed on the list of contributories in respect of the shares improperly issued, neither can those who have bought these shares from the Company recover their purchase money. This contention is based on section 12 of the Act, which says that a Company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed (it is to be noted here that this Company had power by its original memorandum of association to increase its capital), but save as aforesaid no alteration shall be made in the conditions of the memorandum of association.

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This Company thus having reserved to itself power to increase its capital, could only do so by special resolution, carried under the provisions of section 51 of the Act, in pursuance of Rule 26 of the Articles. It is admitted that these regulations have been ignored; in the first place the resolution was not confirmed by a majority of the shareholders at a second meeting called for the purpose; and, secondly, it was not registered.

Notwithstanding the neglect of the directors to comply with the statute and articles, they proceeded to allot the shares in the additional capital amongst the original shareholders, and sold a portion to the public. Is this issue wholly void? A distinction exists between shares which the Company has no power to issue and shares which the Company has power to issue, although not in the manner in which or upon the terms upon which they might have been issued.

Judgment.

If the shares legally exist, however improper their issue may have been, the Company and the holder of them may be estopped from denying their existence, and this view is held in *In re Bank of Hindustan, Campbell's case* and *Hippisley's case*, 9 L.R. Ch. 1, where a company in excess of its powers amalgamated with another, and as part of the scheme issued new shares in excess of the authorized capital, the issue was held void; but it was also held that a person who had taken the new shares and paid on them, and retained them without objection, was precluded from denying that he was a shareholder.

Brice on Ultra Vires, 3rd Ed., page 631, lays it down that essential formalities may be waived or their absence acquiesced in, and the informal transaction may become valid. This is an apparent contradiction in terms, but the ground is that lapse of time will render valid that which in its inception was invalid. And Lord CRANWORTH in *Houldsworth* v. *Evans*, L.R. 3 H. of L. 263, said: "In every case of *ultra vires* there ought not to be presumption

of assent by notice of the unauthorized act, but proof of actual assent," showing that an unauthorized act can be affirmed by assent. Applying this rule to the present case, there must be taken to be actual assent by those who were present at the meeting of February, 1892, when the resolution for increasing the shares was passed, and of the directors who issued the shares, and such a presumption of subsequent assent of those shareholders who exchanged their original shares for the new issue as makes it equivalent to actual assent.

The non-registration of the resolution by the directors under section 51 of the Statute, is not of itself sufficient to invalidate the increase of capital. The directors are liable to a penalty for neglect of duty, and Sir George JESSEL, in *In re International Pulp and Paper Company*, 6 Ch. D. 556, held that, on principle, when a penalty was imposed for not doing a thing, the Legislature did not intend to make the Act itself, which ought to have been done, invalid ; if that had been intended the Legislature would have said so. I allude to this because it was strongly urged that the non-registration of the resolution increasing the capital would invalidate the increase, even if it was in other respects perfect. The section is one which was passed for compelling compliance with this statutory requirement by a specific penalty adjudged ; but it does not invalidate shares issued in non-compliance with the Act.

Judgment.

The chief ground of invalidity is the non-confirmation by a subsequent meeting of the resolution increasing the capital, and, in my opinion, adopting the view expressed in *Brice on Ultra Vires*, 3rd Ed., 631 ; although this was an essential formality, yet lapse of time and acquiescence renders this resolution valid as regards all those who acquiesced in it, and now that a winding-up order has been made, it is too late to rely on the invalidity of the resolution. *Ultra vires* does not necessarily mean that the act done is void *ab initio*, but that it is one that cannot bind

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non-assenting parties, and if the Act is carried into effect, although the Company might be unable to enforce it, yet as regards third parties the Company may be bound. In *Spackman* v. *Evans*, L.R. 3 H. of L., at page 194, Lord CRANWORTH, in effect, says that illegal and irregular acts of directors can be ratified by shareholders, provided the shareholders knew they were illegal or irregular; that is, knew they were acts not authorized by the deed; shareholders are supposed to know what the law is and what their regulations require.

There is a case of *In re London Insurance Co., Stace & Worth's case*, 4 Ch. 682, which is at first sight in favour of defendants' contention. There, Company A amalgamated with Company B under circumstances which rendered the amalgamation void. Stace was a shareholder in A, and exchanged his shares for shares in B, which the Company had no power to issue; he was put in the register of B, and acted as a director. It was held he was not a contributory in Company B, the issue of shares to him being void, and all his acts being referable to those shares and to the arrangements between the companies and nothing else. The point is contained in the last few words, and was discussed in *Challis' case*, L.R. 6 Ch. 266, where shareholders were held liable under similar circumstances, not having objected before winding up. In *Hare's case*, 4 Ch. 503, a very similar case to *Stace & Worth's case*, the shareholder was kept on the list of contributories because he had not repudiated although he had taken steps to set the amalgamation aside which resulted in a compromise approved of by the Court, and that the directors had actually passed a resolution to remove the names of the objecting shareholders from the register. In the *Miller Dale Lumber Co. case*, 31 Ch. D. 211, it was contended that fourteen days not having elapsed between the passing of the resolution increasing the capital of the Company and the meeting held to confirm it, the persons taking the additional capital

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could not be placed on the list of contributories. Vice-Chancellor BACON points out in terse language that as far as the Act of Parliament was concerned the contention was unanswerable, but he says not only was fresh capital raised and new shares, *de facto*, issued; but rights of creditors have intervened, and all the cases in equity recognize this principle, otherwise the statute would enable a body of persons to form a Company and then become bankrupt, when the public would be told: "We are a set of knaves; we meant to cheat you and we have done so; you can't recover because of this statutory defect." This was very much the line of argument of Mr. *Wilson*, minus the opprobrious epithets: "We have not complied with the statutory requirements, therefore we are not shareholders; those who have bought the shares take nothing, and the creditors have no rights against us."

In *Richmond's case*, 4 K. & J. 305, the chairman of the Company made an entry in the minute book stating that an extraordinary meeting of the shareholders had been held and had resolved to increase the capital from £10,000 to £100,000. Although no such meeting had been held, the Company had power by their deed of settlement to increase. By a general meeting duly convened, the capital was increased and the shares issued. Vice-Chancellor WOOD in his judgment held that it was for the original shareholders to complain, not having done so they must be held to have acquiesced; they were not entitled to relieve themselves from enquiring whether such a meeting had been held; they must have known whether any notice of such a meeting had been given, and to hold that they did not acquiesce would be giving them an opportunity to commit a fraud on all who were admitted into the Company as subscribers to the additional capital. It may be said that the provisions of an Act of Parliament are more binding than a deed of settlement, but the sections relating to passing special resolutions are under the heading of pro-

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visions for the protection of members, if the members do not care to see that these provisions are followed they cannot at this stage relieve themselves from their neglect; they must be taken to know the law and to know that there never was any meeting to confirm the issue of the additional capital; such being the case they have acquiesced in a state of affairs which must be a fraud on those whom they induced to take these additional shares and on the persons whom they induced to extend credit on the strength of this additional capital. If the Company was solvent the parties affected could take steps to set the irregularities right or to be relieved of their shares, but even in such a case a long acquiescence of the knowledge would be a bar to relief in equity. Here the Company, acting by and through their directors, have neglected the obvious statutory duties imposed upon them. The shareholders as a body are entitled to rely on their directors to carry out the rules and regulations by which they are governed, but if the directors do neglect their duty it does not relieve the shareholders from the responsibility to see that the directors do their duty. I am of opinion that the shareholders who took the shares in the additional capital are liable to be placed on the list of contributories, and I so order accordingly.

Judgment.

Order accordingly.

ROBERT WARD & CO. v. JOHN CLARK, JOHN CLARK, JR., AND HENNIGAR.

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DIVISIONAL COURT.

April 30.

WARD v. CLARK

Ca. Sa.—Effect of arrest as superseding other modes of execution—Practice —Divisional Court—Jurisdiction—Notice of Appeal—Setting out grounds.

Plaintiffs having recovered judgment in an action against defendant, J. C. brought this action on behalf of themselves and his other creditors against him, J. C. Jr. and H., to set aside prior judgments recovered by the two latter against him upon the ground that they were fraudulent and collusive as against the plaintiff's judgment. Pending this action, the plaintiffs arrested J. C. on a *ca. sa.* under their judgment, and defendants herein pleaded such arrest, and that J. C. remained in custody thereunder, as a satisfaction of that judgment and bar to this action. Upon issue in law and argument of the point:

Held, Per Walkem, J., dismissing the action: That though the arrest and detention of J. C. on the *ca. sa.* did not extinguish the debt, it operated meanwhile as a satisfaction of the judgment, and was a good defence to the present action, the object of which was to establish a remedy by *fi. fa.*, which was suspended.

On appeal to the Divisional Court (Davie, C.J., Crease and McCreight, JJ.)

Held, (1.) That the judgment appealed from was not a final judgment, as it would not have been so had the point been decided the other way, and that the Divisional Court had jurisdiction, following *Salaman* v. *Warner*, (1891) 1 Q.B. 734.

(2.) That the disability of the plaintiff was limited to this, that he could not resort to any mode of execution on the judgment other than the *ca. sa.*, or any charge under 1 & 2, Vic. (Imp.) Cap. 110, but that he had a *status* to impeach the prior judgments as interfering with other remedies left to him under his judgment, *e.g.*, registration thereof under the Execution Act against the judgment debtor's lands, which is not an execution.

(3.) That the right of execution might be restored by the death or escape of J. C. or his taking gaol limits under section 12 of the Execution Act, and that the action might be maintained for a declaration of right independently of any claim to present relief.

Semble, That the action might be maintained by plaintiff on behalf of the other creditors of J. C. who were strangers to the *ca. sa.* independently of his personal status.

Statement.

APPEAL from a judgment of WALKEM, J., upon the argument of a point of law involving the question of

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whether the defence that the plaintiff had arrested the defendant, John Clark, and held him in custody upon a writ of *ca. sa.* was a bar to this action, which was brought on behalf of the plaintiffs and all the creditors of John Clark against said John Clark, John Clark, Jr., and Isaac Hennigar, to set aside, as fraudulent and void as against the plaintiffs' judgments recovered against John Clark by the two latter defendants prior to the judgment of the plaintiffs, and the writs of *fi. fa.* issued thereon, and for an injunction to restrain the defendant, John Clark, Jr., from dealing with certain property brought in by him at a sale under the writs of *fi. fa.*

The facts more fully appear from the headnote and judgments.

A. P. Luxton, for the plaintiff.

A. L. Belyea, for the defendants.

Judgment of WALKEM, J.

WALKEM, J.: The arrest of the defendant, John Clark, Sr., on a *ca. sa.* is, in my opinion, fatal to the plaintiff's action as against the defendants, John Clark, Jr., and Hennigar. Although the debt is not thereby extinguished, for, in the case of death or an escape, payment of it might be enforced, still the *ca. sa.* operates meanwhile as a satisfaction of it. See *Chitty's Archbold, Ed.* 1862, 695, and cases there cited. The plaintiff has elected to take this strongest of remedies as against all other remedies. *Mr. Pooley* contends that the action is not in the nature of an execution, but is merely brought to have a declaration made to the effect that the property, which is the subject matter of it, belongs to the judgment debtor, John Clark, Sr., so that it may be available under a *fi. fa.* in the event of either of the above contingencies happening. What is this but seeking to establish a remedy by *fi. fa.*, and that, too, for a debt, which though not extinguished, has, in point of law, been stayed by the taking of the judgment debtor's body in satisfaction of it? Supposing that the plaintiff succeeded

in the action, the judgment debtor could not be prevented from selling or otherwise disposing of the property so long as the *ca. sa.* was being enforced; and Clark could not be released for the purpose of having a *fi. fa.* executed, for the release would be a complete discharge of the debt. The action, therefore, as against Clark, Jr., and Hennigar must be dismissed with costs.

Action dismissed.

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued before DAVIE, C.J., CREASE and MCCREIGHT, JJ., on the 24th day of April, 1895. The grounds of appeal, as stated in the notice of appeal, were "That the learned Judge erred in deciding that the paragraph of the defence objected to was a good answer in law to the action."

A. L. Belyea, for the defendants: I take the preliminary objection that the order dismissing the action is a final and not an interlocutory judgment, and that no appeal lies to the Divisional Court, and the further objection that the grounds of appeal are not set out, as required by Rule 671. To state that the judgment below is in error is not sufficient. *Pfeifer* v. *Midland Ry. Co.*, 18 Q.B.D. 243; *Murfett* v. *Smith*, 12 P.D. 116. Argument.

Per curiam: The judgment appealed from is final in the sense that if it stands it puts an end to the action, but if the decision had been the other way the action must have proceeded. It is, therefore, interlocutory for the purposes of this appeal. *Salaman* v. *Warner* (1891), 1 Q.B. 734. As to the statement of the grounds of appeal: The question for argument is fully set out by the point of law raised on the pleadings and referred to in the notice of appeal, and the mind of the Court fully directed to it. It is not necessary to state the reasons in the notice. Judgment.

Objections overruled.

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A. P. Luxton, for the appeal: The only effect of the arrest and custody of John Clark on the *ca. sa.* is to oust all other remedies by way of execution, and by virtue of Section 16 of Stat. 1 and 2 Vic., Cap. 110 (Imp.), to deprive the plaintiff in the meantime of the benefit of the collateral remedies given by that Act. All other remedies upon the judgment are left to the plaintiff. The *ca. sa.* does not extinguish the debt or operate as a satisfaction of the judgment, *Taylor* v. *Waters*, 5 M. & S. 103; *Thompson* v. *Parish*, 28 L.J. C.P. 153; *O'Brien* v. *Lewis*, 32 L.J. Ch. 668 (McCreight, J., the defence is *puis darrein continuance*). In that case the defendants admit the fraud and have no right to plead other defences without leave. (See cases cited in *Smart* v. *Moir*, 7 Man. L.R. 565)

Assuming that the defendants who have recovered the prior judgments now attacked have registered them against the lands of the judgment debtor (and such a proceeding is not an execution, *Foley* v. *Webster*, 2 B.C. 251), the plaintiffs are entitled to set aside the judgment for the purpose of registering their own judgment as a first charge on the lands. The effect of the arrest and detention on the *ca. sa.* is only to suspend other modes of execution which may revive upon contingencies which may happen. The defendant may give bail to the limits, which under section 20 of the Execution Act will revive the right to execution. Under Rule 236 the plaintiffs are entitled to a declaration of right, even though no consequential relief were asked. In any case the action is not for the benefit of the plaintiff only, but also on behalf of all other creditors of John Clark, and they are strangers to the *ca. sa.*, and have a right to have the action carried on by the plaintiffs for their benefit.

Argument.

A. L. Belyea, for the respondents: Whatever may happen in the future, the plaintiffs have, as matters now stand, no right to proceed with this action. They ask to set aside the defendants' writs of *fi. fa.*, having

deprived themselves of the right to maintain or enforce any of their own. They have no *status* to complain of our prior judgments, for they can make no use of their own which the maintenance of our priority can prejudicially affect. It is suggested that we may have registered our judgments against the judgment debtor's lands under the Execution Act. There is no proof of that. If the plaintiff registered his judgment, it was superseded by the *ca. sa.* and arrest. He would have no right to maintain it as a subsisting charge. *Lambert* v. *Parnell*, 10 Jur. 31. Such a mode of recovering on a judgment is an execution. *O'Donohue* v. *Robinson*, 10 O.A.R. 622. It is at all events a proceeding in the same nature and within the reasoning of the authorities, *Dawson* v. *Moffatt*, 11 O.R. 484. The kind of securities which are not suspended or superseded by the *ca. sa.* and detention are those which are collateral to the debt and independent of the judgment; those other remedies which are under and wholly dependent upon the judgment are, it is submitted, superseded. The rule is not a technical one, dependent on the scope of the word "execution," but is that, while you hold the defendant in execution, you shall not otherwise enforce the judgment. The defendants have no priority against the lands by reason of their prior judgments. Their priority, if any, in that regard must be by priority of registration. To take advantage of the argument the plaintiffs must at least show that the defendants have registered their judgments against the lands in priority to plaintiffs. The proceedings in this action, upon motion supported by the facts, would be stayed by the Court. The extraordinary remedy of injunction can only be maintained on the basis of an existing and not prospective state of facts. If the judgment debtor takes the benefit of the limits, the right to execution revives. In the meantime the effect of the arrest on the *ca. sa.* is to supersede plaintiffs' *fi. fas.* and any other *fi. fas.* coming into the hands of the Sheriff thereafter take priority of them. The

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plaintiffs have not asked for a declaration of right. The plaintiffs have no present rights against the defendants judgments to be declared. The rights intended by the rule are subsisting rights *in rem.*, not that a plaintiff may obtain a declaration that he will have certain rights upon a contingency which may never happen.

DAVIE, C.J.: The point of law involved in this appeal is whether a creditor having recovered judgment for his debt by a *ca. sa.* thereunder, can, whilst the debtor is still in custody, maintain a suit on behalf of himself and all other creditors for relief against a fraudulent and collusive judgment, under which, anterior to his judgment, the property of the debtor, otherwise available for execution, has been removed from the reach of creditors by the action of the plaintiffs in obtaining the fraudulent judgment.

In the decision appealed from, WALKEM, J., says: "Although the debt is not extinguished by the *ca. sa.*, for in the case of death or an escape the judgment might be enforced, still the *ca. sa.* operates meanwhile as a satisfaction of it."

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I think this proposition cannot be maintained in its entirety. In *O'Brien* v. *Lewis*, 32 L.J., Ch. 665, it was held that a solicitor does not, by taking the body of his client in execution, on a judgment obtained by him at law for his costs, in a suit in equity, lose his lien for such costs, upon the costs of a suit ordered to be paid by the opposite party to his client, and Lord Justice KNIGHT-BRUCE in giving judgment in that case, after referring to the writ of *capias* against the client, who was taken thereunder, says: "The debt remained unsatisfied, unless so extinguished by the judgment and execution. There is a fund open under the order of the Court, but now in the hands of the defendants, on which the solicitor claims against the client the right of lien, the ordinary solicitor's lien for the amount of the bill. That right of lien the solicitor clearly has, unless he has

lost it by the judgment and execution, which the client contends that the solicitor has done. That is the question now for decision, and, upon that, I think the solicitor right and the client wrong. The execution was not a satisfaction of the debt, at least in any such sense. A mortgagee, we know, who is his mortgagor's creditor for the mortgage debt, may sue the mortgagor at law for it; may recover judgment in the action, and, under the judgment, take the mortgagor's person in execution, without losing the benefit of the mortgage security, but may still enforce that security, the debt remaining unpaid"; and Lord Justice TURNER, in the same case, says: "Two points were relied on on the part of the appellant in support of this appeal. First: That the debt due from the appellant to the respondent was merged in the judgment; and, second: That it was satisfied by the appellant having been taken in execution under the judgment; but, assuming the debt to have been merged in the judgment, the collateral security, by virtue of the lien, would nevertheless subsist, according to the case of *Lloyd* v. *Mason*, 4 Hare, 132; and, as to the debt having been satisfied by the appellant having been taking in execution, I think it is clear, on the authorities, that the debtor's being taken in execution does not extinguish the debt, or operate as payment of it."

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To the same effect is the judgment of WILLIS, J., in *Thompson* v. *Parish*, 28 L.J., C.P. 158, where he says: "Mr. Couch says that taking the debtor in execution under a *ca. sa.* is an extinguishment and satisfaction of the debt, but that is not so. In *Foster* v. *Jackson* it is expressly laid down that taking the debtor in execution under a *ca. sa.* is not an actual satisfaction, but only an election binding upon the creditor to proceed by that means 'when he hath begun and chosen the body he can never resort to any other execution against the self same party.'"

Unquestionably, however, according to the law of England as applicable to this Province, and unless that law has

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been modified or changed by subsequent Colonial or Provincial legislation, as to which I think there is much to be said, the taking of the body of the debtor in execution operates as a suspension of all methods of execution upon the judgment and as a destruction of any charge or security arising under the Statute 1 & 2 Vic. Cap. 110, intituled "An Act for abolishing arrest on Mesne Process in Civil Actions except in certain cases; for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," section 16 of which enacts: "That if any judgment creditor, who under the powers of this Act shall have obtained any charge or be entitled of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment creditor to be taken or charged in execution upon such judgment, then and in such case the judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly." But, as remarked by Vice-Chancellor WIGRAM in *Lloyd* v. *Mason*, 4 Hare, p. 136, "The effect of that section is only to deprive the creditor of all the benefit which the Statute gives him, the consequence of which is that he is remitted to, or rather left in possession of the rights he had independently of the Act."

Admitting, then, that although not satisfied, still all remedies upon the judgment are suspended, and all charges and securities under the 1 & 2 Vic., Cap. 110 destroyed, how does that affect this case? Are the plaintiffs seeking to enforce any process of execution upon their judgment? They are certainly not seeking to enforce any charge or security given by them by the 1 & 2 Vic., Cap. 110; neither do I think it can be said that they are seeking to enforce any execution or process upon their judgment, such as a

fi. fa. against goods or lands, garnishee of debts, as in *Jouralde* v. *Parker*, 30 L.J. Exch. 237, equitable execution, or writ of sequestration. Any one of these would be process upon the judgment, but, by taking the body in execution, the creditor foregoes for the time being the right to any such process, and elects the one mode of proceeding upon the judgment, that of *ca. sa.*

The plaintiffs, however, in this case, notwithstanding that they are confined to the one process of execution upon their judgment, that of *ca. sa.*, are still creditors, and judgment creditors of the defendant, John Clark, and moreover they are suing not only for themselves, but on behalf of all other creditors, for relief against an alleged fraud, and but for which fraud, if they are successful in proving it, there might have been no occasion to take John Clark's body in execution at all. Of course, we cannot say what might be proved at the trial, but, consistently with the pleadings, and bearing in mind what is said by McCREIGHT, J., in his judgment, which I have had the advantage of perusing, the plaintiffs might succeed in establishing a state of facts which would entitle them to damages, either in this or subsequent action, against these defendants, Clark, Jr., and Hennigar.

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What these plaintiffs want is a declaration as against Clark, Jr., and Hennigar, that their prior judgments are fraudulent. Any creditor could bring such a suit, when he brings it on behalf of all others, without a judgment at all. If the plaintiffs succeed in impeaching the judgment they will know what to do. They may, as before mentioned, establish their right to damages as against Clark, Jr., and Hennigar, and, having thereby recovered sufficient to satisfy the judgment against John Clark, there the matter will end. On the other hand, if the result of the suit discloses property of John Clark available to execution, there are many contingencies upon which the plaintiffs may have execution on their judgment. Apart from the death or

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escape of John Clark, he may take gaol limits under section 12 of the Execution Act, or he may obtain his discharge from custody under section 22; or the plaintiff's solicitor might, under the Common Law Procedure Act, 1852, S. 126, without consulting his client, authorize the debtor's discharge from custody.

In any of these cases, and possibly others, the plaintiffs' right to execution would be restored as perfectly as if the *ca. sa.* had never been issued. The plaintiffs want to know whether their judgment debtor has property or not, and a declaration of how matters stand as against John Clark, Jr., and Hennigar, and Rule 236 expressly says that they shall be entitled to a declaration of right whether any consequential relief is or could be claimed or not. This rule relieves us of considering what, if any, consequential relief the plaintiffs can claim if they succeed in this action, and, clearly to my mind, entitles the plaintiffs to maintain it.

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Apart from these considerations, Clark, Jr., and Hennigar, having judgments prior in time to the plaintiffs, may or may not have registered them under the Land Registry Acts. The pleadings do not inform us on that point, and it is open to the plaintiffs to prove at the trial that the defendants' judgments were registered before the plaintiffs'.

If upon any proof which the plaintiffs upon their pleadings could adduce, they would be entitled to any relief, it is quite clear that the action cannot properly be dismissed before trial under Rule 234. If then the defendants' judgments are registered, the Land Registry Act, section 26, makes them a charge against any interest in real estate which John Clark has or may acquire at any time, and the plaintiffs, of course, would be entitled to a similar charge. If Clark, Jr., and Hennigar's judgments are fraudulent, then they ought to be set aside, otherwise Clark, Jr., and Hennigar would obtain a security upon the lands of John

Clark to which they are not entitled, and thereby wrongfully postponing the plaintiffs' security.

Whilst I cannot say that the plaintiffs at the trial will make out any case at all against the respondents, yet I think it is clear upon the pleadings that they may prove themselves entitled to substantial relief. At all events, no point of law has been raised which disposes of the whole action, and it is only in such an event that under Rule 234 the action can be dismissed before trial.

For these reasons I think this appeal must be allowed, and the order dismissing the action set aside.

CREASE J.: This is an appeal from a judgment of Mr. Justice WALKEM on a point of law, which was argued on the 28th March, 1895. The facts are a little complicated; but the point of law involved stands out clearly. There were three judgments concerned. One of these was obtained in an undefended action, by the plaintiffs, against the defendant, John Clark, senior. Previous, however, to this judgment, two other judgments had been obtained against the same John Clark, senior, by John Clarke, junior, his son, and Isaac Hennigar, another relative, respectively. These, for reasons alleged in the statement of claim, plaintiffs say, were collusive and fraudulent, and should be set aside; and that John Clark, junior, was estopped from denying this by his conduct in an interview between him and his father, and Robert Ward & Co., the plaintiffs.

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John Clark, Jr., and Isaac Hennigar in defence, separately entered the following plea: "5a. This defendant further says that after action brought the defendant, John Clark, has been arrested upon a *capias ad satisfaciendum* issued at the instance of the plaintiffs herein, and endorsed to satisfy the amount of the plaintiffs' alleged judgment against the said John Clark, and that the said John Clark is still in custody upon the said *capias ad satisfaciendum*." In paragraph of the reply the plaintiffs objected "That as a matter

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of law, the facts (in Paragraph 5a) set out above, disclose no ground of defence to the plaintiff's claim."

By Chamber Order of 25th March last, and under Supreme Court rules 233 and 234 for the disposal of points of law raised in the pleadings, the question was argued before Mr. Justice WALKEM, and he dismissed the action as against John Clark, Jr., and Isaac Hennigar. Against this the plaintiffs appeal. It is *e concessus* that when a man is taken, as John Clark, Sr., is, under a *ca. sa.*, no process like a *fi. fa.* can be executed against him, but that does not affect any collateral security which the plaintiffs may have. It would not prevent the plaintiff from having recourse to his lands under the mortgage or other lien, and his applying the proceeds of them towards satisfaction of his judgment; and this is what the learned Judge probably means when he says "The debt is not extinguished by the *ca. sa.*, for, in the event of an escape or death, the judgment might be enforced."

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Indeed, Lord Justice KNIGHT-BRUCE in *O'Brien* v. *Lewis*, 32 L.J. Ch. 665, has decided that a mortgage security from a debtor, under such arrest, to his judgment creditor, is realizable. He tells us that "A mortgage, which his mortgagor's creditor for the mortgage debt, may sue the mortgagor at law for it, may recover judgment in the action; and, under the judgment, take the mortgagor's person in execution, without losing the benefit of the mortgage security; but may still enforce that security, the debt remaining unpaid."

This case, and *Thompson* v. *Parish*, 28 L.J. C.P. 153, are abundant authorities for this proposition.

The decision of the learned Judge in the Court below that, although the debt is not extinguished by the *ca. sa.*, as "the judgment might be enforced, still the *ca. sa.* operates meanwhile as a satisfaction of it" appears to have been based on *Beard* v. *M'Carthy*, 9 D.P.C. 136, which has been deprived of its force in the case before us, as well as

Lambert v. *Powell*, 10 Jur. 31, which followed it, since the judgment in *Thompson* v. *Parish*, 28 L.J.C.P. 153, which overruled them. Consequently, the plaintiffs' cause of action cannot be said to have been "substantially disposed of."

The plaintiffs have several remedies to fall back upon. They may still claim relief, and a declaration of the Court against John Clark, Jr., and Isaac Hennigar, with a view of obtaining relief against John Clark, Sr., and so getting payment of the debt secured to them by their own judgment against him, or by some other collateral remedy.

Defendants' counsel cited section 16 of the Statute 1 & 2 Vic. Cap. 110, as a bar to seeking such a remedy; but that will not impede the plaintiffs, as *Lloyd* v. *Mason*, 4 Hare 136, decides that section 16 only takes away the advantage which that statute gives them, nothing further.

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It is not, however, the province of the Court to say in what particular mode, and the exact time at which such relief should be sought; whether on the lines of *Pasley* v. *Freeman*, 2 *Smith's L. Cas.* 74, or by seeking to make Clark their Trustee as indicated in *Kerr on Fraud and Mistake*, 1893, p. 399, or *Barnesley* v. *Powell*, 1 Ves. 120, or the collateral remedies referred to in the cases before cited. The Land Registry Act was casually mentioned as one channel for attempting to obtain relief. But into these I cannot enter.

For the present it is sufficient to say that the judgment of the learned Judge in the Court below to the effect that the *ca. sa.* disposes of the action, cannot be maintained; and I consider it must be reversed, with costs of the Court below, and of the present appeal.

Judgment of McCREIGHT, J.

McCREIGHT, J.: In this case the plaintiffs recovered a judgment against J. Clark, Sr., but John Clark, Jr., as well as Isaac Hennigar, also recovered judgments against John Clark, Sr., and recovered them before that of the

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plaintiffs'. The plaintiffs claim that the said judgments of John Clark, Jr., and Hennigar were fraudulent and collusive, and should be set aside; and further, that John Clark, Jr., is estopped from denying this, as he was present and assented by implication to statements and assurances made by John Clark, Sr., to the plaintiffs to the effect that he had no creditors save them, and therefore owed nothing to John Clark, Jr.

The defendant, John Clark, Sr., puts in no defence, but the defendants, John Clark, Jr., and Isaac Hennigar, separately plead as follows: 5 (a) "This defendant further says that after action brought, the defendant, John Clark, was arrested upon a *ca. sa.* issued at the instance of the plaintiff herein, and endorsed to satisfy the amount of the plaintiffs' alleged judgment against the said John Clark, Sr., and that the said John Clark is still in custody upon the said *capias ad satisfaciendum.*"

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The plaintiffs objected that, as a matter of law, the facts in said paragraph 5 (a) disclosed no ground of defence to the plaintiffs' claim.

The question was argued before WALKEM, J., under Rules 233 and 234 of the Supreme Court, and he dismissed the action as against John Clark Jr., and Isaac Hennigar, with costs.

The plaintiffs appeal, and whilst admitting that no *fi. fa.* or like remedy can, in view of the present position, be executed against John Clark, Sr., I think the plaintiffs' rights in other respects unimpaired. For instance, if he has the judgment registered against the lands of the defendant, John Clark, which he either now has or hereafter may have, any moneys recoverable at any time through such judgment could be appropriated, notwithstanding the arrest of the defendant, John Clark, upon the *ca. sa.* This seems plain from the case of *O'Brien* v. *Lewis*, 32 L. J., Ch. 667 and 668, where the Lords Justices state that a debtor could not, though in prison under a *ca. sa.*,

prevent his execution creditor from realizing on a mortgage security. *Lambert* v. *Parnell*, 10 Jur. p. 31, was relied on by *Mr. Belyea* for the defendant, John Clark, Jr., and Hennigar, but that case seems to have proceeded upon *Beard* v. *McCarthy*, 9 D.P.C. 136, which has been overruled, or at least does not govern or have any operation in the present case, since the decision in *Thompson* v. *Parish*, 28 L.J., C.P. 153. Section 16 of 1 & 2 Vic. Cap. 110, was also relied upon by *Mr. Belyea*, but its alleged application may now be disposed of as it was by WIGRAM, V. C., in *Lloyd* v. *Mason*, 4 Hare, at page 137. He there says "The effect of that section is only to deprive the creditor of all the benefit which the statute gives him: the consequence of which is that he is remitted to, or, rather, is left in posession of the rights which he had independently of the Act."

The plaintiffs may, now or hereafter, invoke our Land Registry Act, but I don't see how they are concerned with section 16.

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I cannot by any means agree that the plaintiffs' cause of action is substantially disposed of. It seems to me that the plaintiffs may have a right to set aside alleged fraudulent judgments against Clark, Sr., with a view to realizing their own, subject, of course, to the doctrine of *Foster* v. *Jackson*, *Hob*, 59, as circumstances may allow, or some equivalent remedy, and for a declaration to that effect.

The exact mode in which the plaintiffs may have to seek relief against J. Clark, Jr., and Hennigar, need not now be enquired into; whether by action against them for having fraudulently hindered the plaintiffs from seizing in execution and selling the "Enterprise" by their own previous, but, as alleged, fraudulent judgment and writs of *fi. fa.*, on the principle that "Whilst fraud without damage, or damage without fraud, gives no cause of action, yet where these two concur, an action lieth." See *Pasley* v. *Freeman*, 2 Sm. L. Cas. 92; or on the principle stated in *Kerr on Fraud and Mistake*, page 399, Edition of 1883.

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Although the Court of Chancery could not set aside the judgment of a common law Court obtained against conscience, it would consider the person who had obtained a judgment, as a trustee, and would decree him to recover any property, on the ground of laying hold of his conscience so as to make him do that which was necessary to restore matters as before, referring to *Barnesley* v. *Powell*, 1 Ves. 120 and 285.

I merely mention these matters to show that I cannot say that the plaintiffs have "no substantial case of action"; especially bearing in mind the judgments of KNIGHT-BRUCE and TURNER, L. JJ., in *O'Brien* v. *Lewis*, 32 L.J. Ch. 668, to the effect that collateral remedies are not interfered with by seizure under a writ of *ca. sa.;* and, of course I shall not be understood as expressing any kind of definite opinion, either on the law or the facts, which are *sub judice*, but only to say that the defendants cannot successfully invoke Supreme Court Rule 234 (1890), and I think the judgment must be reserved, with costs in this Court and in the Court below.

Judgment of McCREIGHT, J.

DRAKE, J.: The plaintiffs have brought this action on behalf of themselves and other creditors of the defendant, John Clark, Sr., against whom they have recovered judgement to set aside certain prior judgments recovered against him by the defendants, John Clark, Jr., and Hennigar, which they allege are fraudulent and void as against them. After the pleadings in this action were closed, the plaintiffs arrested the defendant, John Clark, Sr., on a *ca. sa.* under the judgment in their action against him, and he is now in custody. The defendants by leave amended their pleadings herein and set up this arrest as a bar to further proceedings by the plaintiffs. On the argument before Mr. Justice WALKEM, he sustained the contention of the defendants and dismissed the action.

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A question may arise as to the mode of introducing the

general body of creditors into an action of this character, but this does not arise in this appeal.

The procedure by a *ca. sa.* is the same procedure that was in force in England in 1858; the effect, however, of this form of execution is varied by the Execution Act, and there are certain contingencies in that Act which, when they arise, will have the effect of enabling the judgment creditor to enforce other remedies against the debtor, which, but for the Act, would not be open to him.

The debtor is now in close custody, and therefore none of the contingencies have yet arisen. The defendants' contention is that this action cannot be continued by the plaintiffs, as all further remedies have been suspended while the custody continues, and that the plaintiffs have no right to proceed with it upon the supposition that a contingency might arise, which would revive the plaintiffs' original rights against the judgment debtor, and that they must wait until that contingency has arisen.

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What is this action for? It is to set aside certain alleged fraudulent judgments, and the writs of execution executed in respect thereof. The plaintiffs do not ask that the property thus released, if it is released, shall be paid over to them, if they did, under the authority of *Lewis* v. *Dyson*, 21 L.J. Q.B. 194, they might be estopped. In that case, which was decided under Section 16 of 1 & 2 Vic. Cap. 10, the plaintiff was ordered to remove the registration of a judgment against lands, he having taken the debtor in execution.

This is a good cause of action. Is it barred or suspended by the arrest of the defendant? A *ca. sa.* is not an arrest in satisfaction but *ad satisfaciendum*, the debtor being coerced by loss of his liberty until he makes payment. If he pays the debt the action can go on in the interest of other creditors. As long as the debtor is in close custody no other remedy can be taken against him to enforce the judgment. The debtor's goods and lands are free from

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execution under Section 20 of the Execution Act until certain contingencies arise.

Suppose the action had been to set aside a deed as fraudulent against creditors, such an action could go on to judgment, and not until the judgment was sought to be enforced by execution could the debtor interpose, and then he would have to show that the proposed execution was in fact for the recovery of the original debt.

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The remedies which are suspended are forms of execution, such as garnishment of debts, writs of *fi. fa.*, *elegit* and others the sole right to which arises out of the judgment on which the debtor is in custody.

I think the appeal should be allowed with costs.

Appeal allowed, with costs.

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JOSEPH BOSCOWITZ v. T. H. COOPER, J. D. WARREN AND HANNAH WARREN.

Practice—Dismissal of action of want of prosecution—Action partly tried —Rules 340, 350, 353.

Supreme Court Rule 340, providing that "if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or apply to the Court or a Judge to dismiss the action, for want of prosecution" does not apply where the trial of the action has been partly proceeded with and adjourned.

On appeal from an order dismissing the action for want of prosecution: *Held*, By the Divisional Court (Crease & McCreight, JJ.) allowing the appeal and reversing the order of DRAKE, J., that the proper mode for a defendant to get rid of the action in such case was to set it down for trial, and if the plaintiff did not appear, to ask for judgment dismissing the action, under Supreme Court Rule 353.

Statement. SUMMONS by the defendants, James Douglas Warren and

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Hannah Warren, to dismiss, as against them, the action brought by the plaintiff against them and their co-defendent Cooper, on the 5th day of February, 1889.

After several adjournments the action came on for trial before Sir M. B. BEGBIE, Chief Justice, on the 20th day of October, 1890, and was partly heard and adjourned, the trial not being afterwards proceeded with. On the 7th day of August, 1891, an order was made that the plaintiff proceed with the trial after the long vacation, but the order was not issued or served, and on the 16th day of November, 1891, an application was made by the plaintiff to examine the defendant Hannah Warren for discovery, which was refused. On the 21st day of January, 1892, a summons was taken out by the plaintiff's solicitor to set a date for the trial of the action, which summons was, after two adjournments, eventually abandoned. No other proceedings being taken, the defendants, on the 17th day of January, 1894, gave one month's notice of their intention to proceed by moving to dismiss the action for want of prosecution, and on the 5th day of July, 1894, took out a summons for that purpose.

Statement.

The application was heard by DRAKE, J., on the 31st day of July, 1894.

W. J. Taylor, for the application.

E. E. Wootton, contra.

DRAKE, J.: This is an application by the defendants Warren to dismiss for want of prosecution. The action stands in a peculiar position; it was partly tried before the Chief Justice on the 20th October, 1890, and on examining his notes, and those of the Registrar, there is nothing to show what became of the case; evidence was taken, but it does not appear to have been concluded. On the 11th of November a fresh notice of trial was given for the 30th November. I am not informed if the action was set down for hearing; if it was not the defendants were entitled to

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set it down and bring on the hearing. If it was set down the defendants should have appeared on the 30th and asked for judgment. What took place on the 30th I am not informed.

The only rule referring to dismissal for want of prosecution is Supreme Court Rule 340, and that refers to cases in which the pleadings being closed, the plaintiff does not within six weeks give notice of trial. That does not apply because notice of trial was given and the action partly heard. The notice of trial given for 30th November, 1891, cannot be countermanded unless by leave or consent; on this point I am in the dark. The inference is that the plaintiff considered what had taken place in October, 1890, as null. I think the defendants are entitled to get rid of the action as against them. The question is, how can that be done, are they to bring the action on for trial, or are they at liberty to dismiss? The whole proceedings are in a chaotic condition, arising from a neglect of the rules of practice; if either party had followed the practice this present tangle would not have happened.

Judgment of DRAKE, J.

I see no reason offered by the plaintiff for the delay that has occurred, and I therefore dismiss the action as against the present applicants, with costs.

Summons dismissed.

The plaintiff appealed to the Divisional Court, and the appeal was argued before CREASE & MCCREIGHT, JJ., who delivered judgment on the 9th day of May, 1895.

Gordon Hunter, for the appellant.

W. J. Taylor, for the respondent.

CREASE, J.: We have conferred on this case and given considerable attention to it, and have arrived at the same conclusion upon it.

Judgment of CREASE, J.

This conclusion has been fully set forth in a careful judgment by my brother MCCREIGHT, which I have had the

advantage of hearing, and in which, and the reasons on which it is based, I entirely concur.

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The appeal must be allowed. The judgment of the learned Judge in the Court below must be set aside. As to the costs, the defendants are not entitled to any costs either here or in the Court of first instance, as they have failed. Neither is the plaintiff in consequence of his very dilatory conduct for several years.

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McCREIGHT, J.: In his judgment the learned Judge says, and apparently with truth, that the whole proceedings are in a "chaotic condition" and I must further observe that the Court, both of first instance and of appeal, before my brother CREASE and myself is placed in a state of some embarrassment from not being in a position to ascertain the facts as might be wished, owing among other reasons to the long illness and lamented death of the late Chief Justice, before whom this case has been pending for years. On the 16th February, 1891, Arthur Williams, managing clerk to Messrs. Eberts & Taylor, made an affidavit that on 20th October, 1890, the action came on to be tried before the late Chief Justice, and after proceeding therewith and hearing evidence, the trial was adjourned by the said Chief Justice to the 27th October, 1890.

Judgment of McCREIGHT, J.

And that since the said 20th October, 1890, no steps in the action had been taken by the plaintiff or any one on his behalf.

On the 19th February, 1894, A. C. White, also clerk to Mr. Eberts, solicitor for the defendants, made an affidavit that on the 17th August, 1891, an order was made that the plaintiff proceed with the trial after the long vacation; that on the 11th November notice of trial for the 30th November then next was served upon the said Eberts as such solicitor; that on the 16th November, 1891, an order was made, refusing an application on behalf of the plaintiff to examine the defendant, Hannah Warren, by way of dis-

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covery; that on the 21st day of January, 1892, a summons was taken out by the plaintiff's solicitor "to set a date for the trial of the action," which summons was, after two adjournments, eventually abandoned, and that no further steps had been taken by the plaintiff to bring the said action on for trial.

But Supreme Court Rule 340 plainly presupposes dismissal for want of prosecution before notice of trial given by the plaintiff, and, of course, is inapplicable to the present case, which was in part heard before the late Chief Justice in October, 1890; moreover such a dismissal would have been, comparatively speaking, unimportant as an order dismissing for want of prosecution before the case had been set down to be heard *in re Orell Fire-Brick Co. 12*, Ch D. 682, and the learned Judge, whose order is appealed from, appears to have been of this opinion.

But that which took place before the Chief Justice on 20th October, 1890, cannot be considered as null, as may appear by supposing a prosecution for perjury, or other illustrations that might be put.

Judgment of McCREIGHT, J.

It does not appear why the trial did not proceed on the 27th October, 1890, the day to which it was adjourned, but the defendant could then have appeared and invoked successfully as far as appears Rule 353, which says that "If, when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter claim (as here) shall be entitled to judgment dismissing the action." This, according to the *Orell Colliery* case, 12 Ch. D. 682, already cited, would have been equivalent to dismissal on the merits and a bar to a new action.

See also *Armour* v. *Bate*, 1891, 2 Q.B. 233 (C.A.) which is full of instruction as to this case, if I may say so, (see Consolidated Orders XXIII. and XIII., now repealed, Annual Practise, 1895, p. 203, and see Order XXXVI. Rule 32 (Eng.) (which is the same as our Rule 353)—our rules, both repealed and existing, being identical with the English

rules on this point. LORD ESHER in *Armour* v. *Bate*, refers at p. 235 to the form, in *Seton on Decrees* at p. 122, last edition, "Dismissal of the action when plaintiff does not appear."

The defendants might have invoked this rule either on the 27th October or any one of the days for which notice of trial was given subsequently, for such notices as against the plaintiff might well be treated as notices for adjourned hearings. Of course this could only have been done before the late Chief Justice. It follows that in the present state of the cause the defendants cannot invoke either Rule 340 or Rule 353, and there appears to be no other rule dealing with the subject of dismissal before Mr. Justice DRAKE, and that order now appealed from cannot be sustained, though the defendants must, of course, be able to bring the action on for trial by taking the necessary steps, as indeed Mr. Justice DRAKE suggests, though I cannot agree with him that the defendants can have the action dismissed in its present state. Even if the order was in other respects sustainable, I feel that it should be varied so as to allow the present action to proceed, considering the large amount at stake and that both sides appear to be nearly equally to blame for its continuance before Sir Matthew B. BEGBIE for so many years without reaching a conclusion.

Judgment of McCREIGHT, J.

With respect to costs, the defendants are not entitled to any, either before Judge DRAKE or before us, as they have failed, and I think neither are the plaintiffs by reason of their very dilatory conduct of the suit during the last five or six years.

Appeal allowed without costs.

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PILLING v. STEWART

PILLING v. STEWART *ET AL.*

Contract—Construction of—Homestead Act, 1888 (Sec. 10), Amendment Act, 1890, Sec. 2—Creditors' Trust Deeds Amendment Act, 1894—Exemption from execution—Option—When exercisable.

P. & Y., partners, on the 26th of July, 1894, executed a deed of assignment to S., for the benefit of their creditors, of "all their and each of their personal estate which might be seized and sold under execution (save and except the household furniture of Agnes York), and all their and each of their real estate," and S. immediately entered into possession thereof, and afterwards converted the same into money, Subsequently, on December 28th, 1894, P. claimed from S. $500.00 of the proceeds as an exemption from execution to which he was entitled under the Homestead Act (C.S.B.C. 1888, Cap. 57) Amendment Act, 1890, Sec. 2, and implied reservation in the deed.

Held, That the $500.00 exemption from execution under the Act is not an absolute right, but a privilege or option to be effectuated only by claiming it within a reasonable time in regard to the specific goods seizable, or which have been seized, under execution, and does not apply to the proceeds of the goods after sale and conversion into money.

Quære, as to the effect of a claim of exemption by one partner only where some of the goods seized are partnership, and others individual property.

CASE stated for the opinion of the Court, as follows :—

This action was commenced on the 14th day of February, A.D. 1895, by a writ of summons whereby the plaintiff claimed $500.00, for that the defendants converted to their own use and wrongfully deprived the plaintiff of goods, chattels and effects to the value of $500.00, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:

Statement.

1. The plaintiff and Agnes York carried on business for some time as partners prior to the 26th day of July, 1894, as general merchants, at Mission City, in British Columbia.

2. The capital of the said business was not subscribed

by the said parties equally, but they shared equally in the profits and losses.

3. On the 26th day of July, 1894, the plaintiff and the said Agnes York made an assignment for the benefit of their creditors to the defendants, under the provisions of the Creditors' Trust Deeds Act, 1890, and amending Acts. of all their and each of their personal estate, credits and effects which might be seized and sold under execution (save and except the household furniture of Agnes York), and all their and each of their real estate.

4. The plaintiff had household furniture and other property separate from the assets of the partnership on the said 26th day of July, 1894, of the value of $50.00, and the said Agnes York had household furniture at the said date of a value of $500.00 and upwards, which said last mentioned furniture of the said Agnes York was exempted from the operation of the said assignment.

5. The said assignment was duly fyled and notice thereof was duly given. Statement.

6. The defendants, immediately upon the execution of the said assignment entered into possession of, and sold all the goods and chattels, personal property and real estate which were the assets of the said partnership, but did not take possession of nor sell or otherwise interfere with the household furniture of either the plaintiff or the said Agnes York.

7. The defendants received from the sale of such goods and chattels, part of the assets of the partnership, more than $1,000.00, which money the defendants have still in hand, and which sum is insufficient to satisfy the claims of the creditors of the said partnership and of the said plaintiff and of the said Agnes York.

8. Notice was served on the defendants on the 28th day of December, 1894, by the plaintiff, subsequent to the sale of the said goods, by which the plaintiff claimed $500.00 exemption of whatever he was legally entitled to, and after-

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wards the plaintiff demanded of the defendants the sum of $500.00 as the value of goods which he alleged he was entitled to retain out of the partnership assets, and which the defendants had taken and sold as aforesaid.

9. The plaintiff did not notify the defendants what goods and chattels, if any, he claimed as exempt, did no other act and gave no other notice in respect of the said exemption except as aforesaid.

10. The partnership between the plaintiff and the said Agnes York has been terminated.

The questions for the opinion of the Court are :

1. Was the plaintiff entitled on the 26th day of July, 1894, to retain from the partnership assets, goods and chattels of the value of $500.00, or goods and chattels of any value ?

2. Is the plaintiff entitled to the sum of $500.00 out of the proceeds of the sale, now in the hands of the defendants, or to any sum ?

Statement.

3. Is each partner entitled to an exemption in partnership property ?

4. Is each partnership entitled to exemption in separate property ?

5. Is each partner entitled to exemption in both partnership and separate property ?

If the Court is of the opinion that the plaintiff is entitled to exemption under the circumstances set out in this case, judgment is to be entered for the plaintiff for the value of the exemption to which the Court considered the plaintiff entitled, and costs ; but if the Court shall be of the opinion that the plaintiff is not so entitled, the action shall be dismissed, with costs to the defendants.

The case was argued before DRAKE, J., on May 15th, 1895.

A. H. MacNeill, for the plaintiff : We submit that the construction of the assignment is that the same right as an execution debtor could exercise, by claim of exemption, is

Argument.

reserved by the terms of the deed itself, and that only a qualified title to the goods passed under it. The deed does not profess to convey the same title to the goods as an execution creditor would have, which is a right, through the Sheriff to sell to realize the judgment under the express qualifications and conditions required by the Execution Act, subject also to the right of the execution debtor to exercise an inchoate right of reservation or exemption by a notification to the Sheriff, and selection from the goods in a prescribed manner; all of which is inapplicable to the present relationship. The deed either reserves the right now claimed, or it does not. If it is an absolute conveyance it is an estoppel in itself to any such claim no matter how soon thereafter made. If it is not an absolute conveyance, but, as we contend, only a conveyance of such rights to the goods as an execution creditor could exercise by way of seizure and sale under an execution against a judgment debtor who claims the reservation open to him under the language used in the Statute and in the deed, then no subsequent notification was necessary, and the grantee did not become possessed of an absolute right subject to be cut down by a subsequent claim, but of a qualified title, subject to the right of the grantor to $500.00 of the proceeds. Where goods the subject of exemption are converted into money the exemption may be claimed as to the proceeds. *Osler* v. *Muter*, 19 O.A.R. 94. That some qualification was intended is plain, or the grant would have been absolute, and a reasonable construction must be put upon it. The Legislature must have intended to give partners the benefit of the Act, *The Dunelm*, 9 P.D. 171. The Act must be construed reasonably, *Hardcastle on Statutes*, 187.

Argument.

L. G. McPhillips, Q.C., for the defendants: The Homestead Amendment Act of 1890 does not make it necessary for the debtor to select goods, but it shows clearly the intention of the Legislature that it is only the goods which are exempt and not the proceeds of a sale thereof. Section

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10 of the Homestead Act, 1888, gives the debtor an option, but if he does not take advantage of this and claim his exemption within reasonable time, the privilege of exemption is gone. *Pourrier* v. *Harding*, 15 N.B.R. 120. Exemption is a privilege and only the debtor can claim it. *Young* v. *Short*, 3 Man. L.R. 302. The assignment passes all goods which may be "seized and sold under execution," and all the goods of a debtor may be seized and sold under an execution, unless he claims his exemption within the time and in the manner prescribed by the Homestead Amendment Act, 1890. All the property must vest in this assignee or else none does, for he cannot tell what goods the debtor might select; the debtor should at once select the goods he claims to be exempt and allow the assignee to take the rest. He cannot wait until the sale, for if the assignee were liable to an action for selling goods which the debtor has a privi-

Argument.

lege of claiming, but never claims, he would never dare to sell, not knowing but he might sell something the debtor wanted to exempt. The Act should be strictly construed, KILLAM, J., in *Harris* v. *Rankin*, 4 Man. L.R. 115. The Legislature allows two days in which a debtor may claim the exemption allowed under an execution. The goods which he might claim to be exempt under an assignment are the same, and by analogy he should claim them within two days, a reasonable time. One partner cannot claim exemption out of unsevered partnership assets.

DRAKE, J.: This is an action on a special case which discloses the facts that Pilling & York carried on business in partnership at Mission. On the 28th July, 1894, they

Judgment.

made an assignment for the benefit of creditors, in the language used in section 4 of Cap. 9, 1894. The deed also exempted the household furniture of York. The trustees took possession of the goods and chattels immediately, and after the lapse of some months sold them out. On the 28th December, after the sale, Pilling claimed from the trustees

$500.00 of the proceeds of the sale, under the Homestead Act, C.S.B.C. 1888, Cap. 57., Sec. 10. Mr. *McPhillips*, for the assignees, raised three grounds of defence: 1st. That the Statute contemplated the debtor making a claim to certain specific goods and chattels, and if he did not exercise his option within a reasonable time he must be held to have waived his right. 2nd. That after the goods and chattels had been converted into cash the right of the debtor was gone. 3rd. That this being a partnership the exemption must be a joint exemption only and each partner is not entitled to claim specific goods to the value of $500.00. Section 10 of the Homestead Act, Cap. 57, of 1888, is clear and precise in its language, "the following personal property shall be exempt from forced seizure or sale, that is to say, goods and chattels of a debtor at the option of such debtor to the value of $500.00." This limits the personal property that is exempt to goods and chattels that can be seized, and if seized the debtor has the option of claiming particular goods of the exempted value. The option is one which the debtor must exercise in a reasonable time after assignment or execution, and it applies only to goods and chattels capable of seizure or which have been seized; it does not apply to the proceeds of a subsequent conversion. The intention of the Act was that a debtor should not be stripped of all he possessed in the world, but should be left a sufficiency to enable him to start again.

Judgment.

In my opinion, if the debtor neglects to notify the assignee who has lawfully taken possession of the goods assigned, he cannot after conversion make any claim under the Statute, unless the acts of the assignee have been of such a nature as to prevent a claim being put in before conversion. In the present case several months elapsed before the assignees sold, and it was not until after the sale that the plaintiff claimed, not goods and chattels, but $500.00 of the amount realized. The other question, as to the right of each of several partners to claim exemption of $500.00, it is not

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necessary to decide. When such a case arises, the facts will have to be investigated, for an obvious distinction exists in cases where the partnership property alone is taken and the partners are left in possession of their private assets, and a case where both partnership and private assets are taken; in fact, it would be impossible to lay down any rule which would govern the different cases that might arise. I therefore dismiss the action with costs.

Action dismissed with costs.

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Contract—Construction of boiler for special purpose—Implied warranty—Consequential damages.

Plaintiffs contracted to construct for defendants, according to specifications, a marine boiler capable of standing 120 lbs. pressure to the square inch, to be used in a steam tug. The boiler, as delivered, did not comply with the specifications, but it was accepted upon a statement by plaintiffs "that if it was not right they would make it right." The boiler burst, and besides direct damage the defendants were obliged to hire another tug to carry on its work. The defendants admitted the plaintiffs' claim for goods sold and delivered, and counter-claimed, alleging breach of express warranty of the boiler, claiming direct and consequential damages.

Held, per DRAKE, J., at the trial upon the counter-claim, that, on the evidence, the injury was caused by defective construction of the boiler, and that its steam pressure capacity was not as agreed. That the contract as to the form of the boiler was waived, but that the agreement to "make it all right," etc., amounted to a general warranty of fitness for the purpose. That the defendants were entitled to recover the cost of putting the boiler in the condition originally agreed upon, but not the amount paid for hire of another tug during the delay, on the ground that such liability was not contemplated by the contract.

Plaintiffs appealed to the Full Court, and defendants cross-appealed claiming that the judgment should be increased by allowing the consequential damages claimed.

Held, per CREASE, MCCREIGHT and WALKEM, JJ.: That apart from any, in this case doubtful, express warranty, there is an implied warranty by a manufacturer of goods for a particular purpose that they are fit for that purpose, and that, upon the evidence, the defendants were entitled to recover for the breach of such warranty.

That, on the facts, the consequential damage which ensued from the bursting of the boiler must be taken to have been within the contemplation of the parties to the contract, as an accident to the boiler would, in the known circumstances of the defendants, necessitate the hire by them of another tug.

THE action was for the price of certain machinery supplied

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by the plaintiffs to the defendants. The defendants admitted the claim, and counter-claimed for breach by the plaintiffs of the warranty of a boiler manufactured by them for the defendants, for which the defendants had paid, and damages direct and consequential caused by its bursting, necessitating repairs, and occasioning loss in obliging the defendants to hire another tug to carry on the work of the disabled tug in the meantime. The trial was had before DRAKE, J., without a jury. Evidence of the loss on both branches as above was given.

J. A. Russell and *J. J. Godfrey*, for the plaintiffs.
E. V. Bodwell, for the defendants.

DRAKE, J.: The plaintiffs' claim is admitted to the extent of $1,251.00, and judgment has been entered accordingly. The defendants' counter-claim against the plaintiffs for $3,000.00 damages for loss incurred owing to the collapse of a boiler manufactured by the plaintiffs, and which they allege was not constructed according to the plans and specifications furnished by the defendants to the plaintiffs, and owing to defective construction.

Judgment of DRAKE, J.

The evidence adduced for the plaintiffs was that a sketch plan of a boiler of certain dimensions to carry 120 lbs. pressure was delivered to the president of the plaintiff Company, and a contract made to manufacture a boiler accordingly, at a price then fixed and which was subsequently paid, and this not denied.

The contract was made in May, 1890, and the boiler was to be finished by 1st July, but was not delivered at Vancouver until October.

When it arrived it was inspected by Mr. Palmer, the manager of the defendants' Company, who, however, had no technical knowledge, and also by W. Gill, the then engineer of the Company, and who had prepared the sketch plan. Certain minor visible defects were pointed out which the plaintiffs undertook to repair; but in examining the

interior of the combustion chamber W. Gill found a radical change from his plan, this chamber, instead of being constructed with a circular top and the inner plate leaning inwards, had a square top, and the outer and inner plates parallel. This deviation from the plan W. Gill considered a serious defect. Accordingly he drew Mr. Palmer's attention to it, and before accepting delivery they called in Mr. Munro, who was the plaintiffs' agent in the province, and there appears to have been a long discussion over the change which had been made, Mr. Munro asserting the boiler as constructed was of the most approved pattern, and Mr. Gill asserting that it was defective in its construction ; and on their threatening to refuse delivery and send it back, Mr. Munro stated that if the boiler was not all right the plaintiffs would make it all right. On this assurance the defendants took the boiler and placed it in their tug, the Daisy, and commenced to run the vessel. For the first few months they used a safety valve that was limited to 80 lbs. pressure. In May they replaced this safety valve by one that was limited to 120 lbs., the amount of pressure which the contract called for. On the second trip one of the inner plates of the combustion chamber collapsed, and necessitated extensive repairs to the boiler, which were done under the orders of Mr. Thompson, the steamboat inspector of this province ; and it is for the cost of these repairs and demurrage for the time the boat was laid up that this action is brought. The chief contention before me was that this collapse was not caused by any faulty construction of the boiler, but by some other cause such as dirt or grease.

Judgment of DRAKE, J.

A great mass of evidence was adduced on commission from boilermakers and others in the East to show that the construction was in all respects scientific, and that the collapse could not have been caused by any error in construction, but must have happened from some extraneous cause, notably grease.

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On reference to the evidence on this head, Mr. Gill testifies that there was no grease visible when he took the plate off, and the plate was not tampered with. Mr. Thompson, who was there before the boiler was cold, saw no grease. Mr. St. John saw no grease, though in his examination he says he went to look for it, and his report was put in evidence. Mr. Meneilly says grease, if deposited at all, would be found not only in the plates but in the stays, in fact on all parts, and none was found. This is the evidence of experts. Expert testimony is not as a rule satisfactory; it generally proceeds on an assumption, and theorizes on that assumption. If the assumed facts are incorrect, what becomes of the theory? In this case the witnesses called testified that a square topped combustion chamber was the best, and that the majority of boilers were thus constructed. This is a mere matter of opinion, and I have come to the conclusion that the variation from round to square was not the cause of the collapse, but it was one of the causes which led to the warranty.

The witnesses further assert that a water space such as was allowed in this boiler was sufficient for circulation. In this the defendants do not disagree. But the point on which the defendants rely as showing a faulty construction is in making the inner and outer plates of the combustion chamber vertical and parallel. The defendants' plan shows that the water chamber gradually enlarges from the bottom upwards, and the necessity for this particular form of construction was clearly shown. If the inner plates were vertical and parallel to the outer plate, the steam generated must rise perpendicularly, and would follow the course of the inner plate, and by its expansive power force the water away from the plate itself, and thus render the plate liable to damage from fire. If, on the other hand, the inner plate was deflected inwards, the steam would not follow the course of the plate, but would rise vertically, and the water would not be forced from the plate by the rising steam.

This point was not touched upon by the plaintiffs' witnesses, and although the boiler may have been constructed of good materials and workmanship, yet if it collapsed owing to the plaintiffs ignoring the defendants' plan, and adopting their own, they are responsible.

One of the plaintiffs' witnesses, Thomas James Main, admits he prepared the plan of the boiler as constructed; that he had never made a boiler with a round top, and had only seen one or two; that the difference in cost was slightly in favour of the square top, and on being pressed he said there was no time to communicate the alteration which he made in his plan to the defendants. Such an excuse is palpably absurd; postal communication is not unknown, and twelve days would bring an answer. In fact, the plaintiffs did not want the trouble of deviating from their accustomed mode of construction for the sake of this one job, and quietly ignored the design they had contracted to follow. The plaintiffs' witnesses testify that a boiler could not be constructed according to the sketch plan which would stand 120 lbs. pressure. That may be true; but the weakness was neither in the round top nor in the deflection of the plate, but in the number of stays shown on the plan and the spaces for rivets. The plaintiffs contracted to make a boiler of the pattern produced to stand 120 lbs., and if it were a mere question of stays or thickness of iron the plaintiffs had to supply all that was required. The defendants wanted a boiler of the shape indicated to stand 120 lbs.; the construction was left to the plaintiffs.

Judgment of DRAKE, J.

The really important issue in this case is whether there was such an acceptance and user by the defendants as precludes them now from recovering damages, or whether they are entitled to rely on the warranty alleged.

The evidence is first, that if Mr. Palmer, who says that Mr. Munro, the plaintiffs' manager when the variation in plan was pointed out, and he was told that the defendants would not take the boiler, said if the boiler was not right

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they would make it all right, followed by that of Mr. Gill, and Mr. Munro does not deny that he made the warranty, but does not recollect it.

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A warranty as defined in *Smith's Leading Cases* is where the subject matter of the sale is ascertained and existing so as to be capable of being inspected, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by the contract of sale will not revest in the vendor on a breach of warranty.

In my opinion the defendants could have rejected the boiler as being radically different in design from the one they ordered, and it was only accepted on the distinct assurance that if it was not all right the plaintiffs would make it all right, and Mr. Hamilton asserted that if it was not all right his Company would be liable. I think this is a warranty that the boiler would answer the purpose for which it was designed, which, from the evidence, it did not.

Judgment of DRAKE, J.

It then becomes a question whether the warranty had not been completely satisfied by the time the defendants had had the boiler in use. The boiler was delivered in October, inspected by Mr. Thompson, and passed on the sworn report of Mr. St. John, the Government Inspector for Western Ontario, who has to pass on boilers as to workmanship and materials, and to see that the boiler will stand the required pressure; he had nothing to do with the design.

The boiler then was put into the Daisy and was run at a pressure of 80 lbs. until a fresh safety valve was put in, and on the second trip after the increased pressure was used the plate collapsed; and I think it reasonable to conclude that if the boiler had been used at once with 120 lbs. it would have collapsed, not because it was not strong enough in material, but because its construction prevented sufficient circulation of water and steam. This could not be dis-

covered by the hydrostatic pressure with cold water to which it was subjected.

I am therefore of the opinion that the defendants are entitled to rely on the warranty at the time of the collapse, if the collapse was not caused by negligence in the defendants. The evidence satisfies me that it was not caused by oil, or grease, or dirt. Mr. St. John, in his report to the plaintiffs, states: "It was probably caused by the lack of circulation in this part of the boiler," and the defendants' contention is that this lack of circulation was due to construction, and I think they have substantially proved this contention. That being so, to what damages are they entitled? They claim first, cost of repairs, $979.03; and, secondly, fifty-three days' demurrage at $30.00 a day, $1,590.00. On the first head the plaintiffs say it could have been repaired at a cost of varying from $50.00 to $200.00. The plaintiffs were notified of the collapse, and Mr. Hamilton was asked to meet the defendants to arrange about the repairs; but he did not come, and the repairs went on without him, and were done under Mr. Thompson's orders. A new and heavier back plate put in, the patching which the plaintiffs suggested as sufficient, would not satisfy Mr. Thompson, and he required the boiler to be made absolutely safe by the insertion of a new plate. I think the defendants are entitled to the costs of this, $979.03. With regard to the demurrage, the defendants say that the chartering value of the Daisy was $30.00 a day, and that they had to pay $50.00 a day for a boat to take her place. The question arises, was this liability one which was in contemplation of the parties at the time the warranty was given, and is it covered by the warranty? I don't think it is. The mere fact that the Daisy was to be used as a tow boat will hardly impose on the plaintiffs the liability to be responsible for the loss of future earnings during the time she was laid up for repairs. I think the judgment of WILLS, J., in the *B.C. Saw Mill Company* v. *Nettleship*, L.R. 3

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C.P. 506, is applicable to this case; therefore give judgment for the defendants for $979.03 on the counter-claim, with costs, and for the plaintiffs on their claim for $1,251.00, with costs, one judgment to be set off against the other.

Judgment accordingly.

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The plaintiffs appealed to the Full Court from this judgment, and the defendants cross-appealed claiming that the learned Judge should not have disallowed the consequential damages. It was agreed that the plaintiffs' appeal as to direct damages should be argued first and judgment given thereon; and if in favour of the defendants, their cross-appeal should be argued on a day to be fixed. If in favour of the plaintiffs, their appeal should be allowed, and the cross-appeal of the defendants dismissed.

J. A. Russell, for the plaintiffs.

E. V. Bodwell and *Archer Martin* for the defendants: Apart from any express warranty, the plaintiffs knew the purpose for which the boiler was supplied, and there was an implied warranty that it was fit for that purpose. *Jones* v. *Bright*, 5 Bing. 533; *Drummond* v. *Van Ingen*, L.R. 12 App. Cas. 290; *Randall* v. *Newsom*, 2 Q.B.D. 107; *Jones* v. *Padgett*, 24 Q.B.D. 652.

Argument.

Cur. adv. vult.

Judgment of CREASE, J.

CREASE, J.: This was an appeal against so much of a judgment of Mr. Justice DRAKE, of the 22nd February, 1894, as gave $900 damages to the defendants on their counter-claim against the plaintiffs for loss and damage caused by their defective construction of a certain boiler supplied by them to the plaintiffs. The facts are as follows: The plaintiffs are manufacturers of machinery at Peterborough, Ontario. In May, 1890, Mr. William Hamilton, Sen., president of the plaintiff Company, being then on a business visit in Victoria, made a verbal contract with the managers of the Victoria Lumber Company in the presence

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of a witness, who confirms the fact, to supply the defendants with a boiler for use in the steamer Daisy which should fulfil the requirements of a design made by Gill, the engineer of the Lumber Company, which they stipulated should bear a pressure of steam of 120 lbs., and be of a particular make and manufacture, with a round top and deflected plate for free circulation.

It was to be delivered free on board at Vancouver City. There it was met by Mr. Palmer after a refusal to receive it on the ground of non-compliance in several particulars with the original contract and a conditional arrangement between the parties to which I shall refer. The boiler was taken to Chemainus and placed in the Daisy, for which it was intended, and, after a month's use at low pressure, paid for.

Later on the defendants ordered and received other machinery of the plaintiffs to the value of $1,300.00, for which they declined to pay, alleging a counter-claim for damages on account of the defective boiler, whereupon the plaintiffs brought suit and recovered $1,300.00. But on the counter-claim the defendants, at the same trial, recovered a judgment against the plaintiffs of $900.00 damages. It is against this judgment the plaintiffs now appeal.

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The evidence then adduced describes the Daisy as using the boiler for seven months with only 80 lbs. of steam without any casualty. But when, in the ordinary course of business, a heavy boom of logs had to be towed, and the full pressure of 120 lbs. of steam employed, the latent defect in the construction or material became manifest ; the boiler collapsed, and the damage alleged ensued.

The boiler was defective and could not bear the pressure which the plaintiffs had contracted it should sustain, and on that ground the plaintiffs are responsible for all the loss and damage which resulted, and that ground alone is an ample justification for the judgment of the learned Judge

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at the trial, and more was not necessary to entitle the defendants to the judgment they obtained.

There were, however, other reasons, into which it is not necessary to enter at length, which induced the learned Judge to decide in their favour, among others on the ground of a warranty of its sufficiency, given by the vice-president of the plaintiff Company, upon obtaining which, after at first refusing, the defendants consented to receive the boiler.

A glance at Gill's plan or design, which formed an integral part of the contract, showed not only that the boiler was to bear a steam pressure of 120 lbs., and was intended "for the steamer Daisy," but that it was to have a round top and deflected plate, supposed to afford a freer waterway. The plan designed by the plaintiff Company without any reference to the defendants, by which the boiler was actually constructed, had a flat horizontal top with side plates nearly parallel and vertical. It had therefore, in this respect, departed from one of the terms of the contract; and although that form of boiler could probably have been made to bear the required pressure, the sequel shows that it was not made so.

The substantial point, therefore, on which the appeal rests, is: Was the boiler sent a fulfilment of the contract entered into? The answer is direct and immediate, as disclosed by the evidence and found by the learned Judge. The boiler ordered was of a certain form and design, which was, without any reason or authority, departed from in what was deemed by defendants a material point. The boiler substituted was not adequate for the purpose for which the plaintiffs knew it was designed. It did not fulfil the condition that it should sustain a pressure of 120 lbs. of steam, and so the appellants rendered themselves liable for the loss and damage occasioned by their breach of contract.

A special warranty was not necessary. *Drummond* v.

Van Ingen, 12 App. Cas. at p. 284, *et seq*, was cited in support, and as to the question of warranty it may not be amiss to give in the present connection a definite meaning to the word warranty, respecting the use of which in the sense of undertaking, in several cases in the reports, a good deal of confusion has arisen. Lord ABINGER, C.B., in *Chanter* v. *Hopkins*, 4 M. & W. 399, describes a warranty as "An express or implied statement of something which the party undertakes shall be part of a contract yet collateral to the express object of it."

The circumstance of a man selling a thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty ; but it would be more correct to describe such cases as a non-compliance with a contract which a party has engaged to fulfil. GASELEE, J., in *Jones* v. *Bright*, 5 Bing. 549, lays down that it is clear where goods are ordered for a particular purpose, the law implies that they are fit for that purpose. BEST, C.J., in the same case: "If a man sells generally, he undertakes that the article sold is fit for some purpose. If he sells it for a particular purpose, he undertakes it shall be fit for that particular purpose." And that is the case here. The learned Judge has found that the accident was not caused by the defendant Company. He has found that it arose from defective construction. The only two other causes which could properly have been assigned for the failure, grease in the boiler or overheating, which implied lack of water, were expressly negatived by the evidence. There was no grease, and the safety valve, which was in order, showed that there was no lack of water or overheating at the time of the collapse.

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Hamilton, at the time of making the contract, knew the use and object to which the boiler was to be applied, and the amount of steam power which it was indispensable to provide under the contract, and that the officers of the defendant Company had specially insisted upon that as a *sine qua non* throughout.

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The plaintiffs' breach of the contract and consequent liability in damages was complete. So that there was no necessity for the defendants to take upon themselves an *onus probandi*, which did not, under these circumstances, belong to them, by going into a large quantity of expert evidence as to the details of the defective construction, or to cause the plaintiffs the expense attendant on such enquiry.

The counter-claim will, therefore, have to be amended to accord with the facts and findings on which the appeal is being decided, and the consideration of what portion of the extra costs, thus unnecessarily caused to the plaintiff Company, should be paid by the defendants, may come up and be dealt with when the question of the damages suffered by the defendant Company comes up for argument.

Meanwhile the present appeal must be dismissed with costs.

Judgment of McCREIGHT, J.

McCREIGHT, J.: In this case the defendants by their counter-claim sue the William Hamilton Manufacturing Company for loss incurred owing to the collapse of a boiler manufactured by the said Company, and which the defendants show was not constructed according to the plans and specifications furnished by them to the said Hamilton Manufacturing Company ; and the defendants further allege that by reason of such defective construction the said boiler was not fit for the purposes for which it was required, and collapsed.

The learned trial Judge decided in favour of the counter-claim of the defendants, and that they had substantially proved their contention that the accident was caused through lack of circulation in the boiler, which was due to the defective construction, and I understand him to rely on an alleged warranty given by Munro, the vice-president and general manager of the Hamilton Manufacturing Company, before the delivery to the defendants at

Vancouver, to the effect that the boiler would answer the purpose for which it was designed, which from the evidence it did not.

I agree with the decision at which the learned Judge has arrived, but having the advantage of argument at length, I think it may be established on safer grounds than those which seem to have weighed with him. Having regard to the amount of expert testimony which was given, and, as frequently happens, of a contradictory nature, I think it prudent to rest the decision on other grounds than the mere question of construction, especially as, of course, a bad boiler may be made with round top and deflected plates, and a good one with square top and vertical plates; and a decision on the above ground would be not unlikely to lead to further litigation. And, again, though I think it highly probable that Munro did give a warranty, I cannot say that his statement to Palmer in Vancouver, on the taking delivery, "that if it was not all right they would make it all right," clearly amounted to such a warranty.

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A simpler and safer ground was suggested to us in the argument of Mr. *Bodwell*, derivable from the case of *Jones* v. *Bright*, 5 Bing. p. 533, and see pp. 534-43-4-6, etc., and the later case of *Drummond* v. *Van Ingen*, 12 App. Cas. 284, and see pp. 288-90-1-3-5. At page 290 Lord HERSCHELL says: "It was laid down in *Jones* v. *Bright* that where goods are ordered of a manufacturer for a particular purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision," etc. Again, Lord MACNAGHTEN says at p. 295: "I venture to think that the case under review may well be decided on the broad principle that a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view."

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The evidence in the present case is amply sufficient to justify and render applicable the above doctrine to this case.

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The plan or sketch by Gill, the engineer of the Daisy, and which the plaintiff Company had before them as instructions, is headed " for 120 lbs. pressure," and " boiler for S.S. Daisy." The circumstance that the plaintiff Company disregarded that portion of the plan which required a round top and deflected plate, and adopted the square top and vertical plate, to say the least, is far from diminishing their responsibility and implied undertaking to furnish a suitable boiler.

Not merely did the sketch require a boiler fit for the 120 lbs. pressure, but the evidence shows that this was specially insisted on. That it did not stand that pressure, and that the defendant Company were not to blame, the learned Judge has found, especially as to the absence of grease and as to a correct safety valve being used.

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I think the learned trial Judge was fully warranted in finding that the defendant Company were not to blame for the accident and in attributing it to construction ; though, as I have already intimated, the burden of proof ought not to be cast on the defendant Company on this point, for their case is that the plaintiffs undertook to supply a boiler that would stand the 120 lbs. pressure, and failed to do so.

Mr. *Russell* claimed a non-suit, and I think the counter-claim should be amended so as to lay the cause of action on the ground to which I have referred, in quoting the language of Lord HERSCHELL and Lord MACNAGHTEN in *Drummond* v. *Van Ingen*, 12 App. Cas. at pp. 290–1–5. See forms in *Bullen & Leake*, pp. 348–9–50, Vol. I., Ed. 1882. Such amendment is fully warranted by the evidence, the findings and the argument. I am not sure that the frame of the counter-claim has not considerably increased the expenses by raising issues and inviting evidence as to the relative merits of round and square tops

and deflected and vertical plates, whereas the only question was whether the plaintiff Company had furnished a boiler fit for the purpose for which it was ordered. This may be of importance on the question of costs and taxation, and may be argued along with the question of damages suffered by the defendant Company.

WALKEM, J., concurred with MCCREIGHT, J.

Plaintiffs' appeal dismissed with costs.

The cross-appeal of the defendants as to consequential damages was argued before the Full Court (Crease, McCreight and Walkem, JJ.) on April 19th, 1895.

E. V. Bodwell and *Archer Martin*, for the defendants. It is of the nature of the case, and does not require direct evidence, that the consequential damage which in fact occurred, was in the contemplation of the parties to the contract as a result of breach by such occurrence as that which took place. *B.C. Saw Mill Company* v. *Nettleship*, L.R. 3 C.P. 506, is distinguishable, as it was not shown that the carriers there knew that the machinery was on board. For cases similar to the present, in which consequential damages of the kind claimed were allowed, see *Wilson* v. *General Screw Colliery Company*, 37 L.T.N.S. 789; *The Argentino*, 13 P.D. 191; *Griffin* v. *Colver*, 69 Am. Dec. 718; *McMullen* v. *Free*, 13 Ont. 57.

Argument.

J. A. Russell, for the plaintiffs: The knowledge of the purpose for which the article is required must be brought home to the party charged. *Horne* v. *Midland Railway Company*, L.R. 7 C.P. 583; and it must also be shown that the class of damage was in contemplation of the parties, *Mayne on Damages*, 2nd Ed. p. 12, *et seq; Hadley* v. *Baxendale*, 9 Exch. 341.

Cur. adv. vult.

The Court delivered judgment on the 24th day of July, 1895.

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CREASE, J.: This is an appeal against that part of the judgment of the Hon. Mr. Justice DRAKE, delivered on the 15th February, 1894, which gave to the Victoria Lumber Company $979.03 and costs, on their counter-claim against the Hamilton Manufacturing Company.

The learned Judge, whose judgment that the Hamilton Manufacturing Company was the proper subject for an action therefor the Full Court substantially supported, disallowed the claim for demurrage for loss sustained by the Victoria Lumber Company on account of their steamer the Daisy being rendered useless for fifty-three days, from 24th May to 15th July, in consequence of the boiler manufactured for them by the William Hamilton Manufacturing Company turning out to be defective.

This claim (for fifty-three days at $30.00 a day, $1,500.00) was disallowed by the learned Judge, as I collect from the latter part of his judgment, because this liability was not in contemplation of the parties at the time of or covered by any warranty, and on the ground that the plaintiffs were not responsible for the loss of future "earnings during the time she was laid up for repairs."

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But in the case cited before the Full Court, *Jones* v. *Bright*, 5 Bing. 533, it was laid down that where an article purchased for a particular object of which the vendor was aware, in consequence of an intrinsic defect, the cause of which was not proved, failed to fulfil the purpose for which it was purchased, the plaintiff was entitled to damages.

The plaintiffs here, as appeared upon the argument, and cases cited before the Full Court, impliedly warranted the boiler to be fit for the object for which it was to be employed, namely, the towing and other similar purposes of the Victoria Lumber Company, so it fell within the scope of *Drummond* v. *Van Ingen*, 12 App. Cas. 290–5.

That case lays down the doctrine "that where goods are ordered of a manufacturer for a particular purpose he impliedly warrants that the goods he supplies are for that

purpose." And this clearly distinguishes the present case from that of the *B.C. Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 506, on which the Hamilton Company relied, and which was a case of a carrier, ignorant of the particular importance and purpose of the piece of machinery lost in the carriage, and not that of a manufacturer of goods supplied for a particular purpose, as in the present case.

The Victoria Lumber & Manufacturing Company could not carry out the objects of their saw mill without a steamer to tow their saw logs from their logging camps to the mill, and the proof of this is in the first fact that they were obliged during the time of the Daisy's repairs to hire another at $50.00 a day for that purpose ; and this necessity being the natural consequence of the defect in the boiler brings the case also within *Randall* v. *Newsom*, 2 Q.B.D. 107 (C.A.), and entitles the Lumber Company to damages.

But as to the amount of such damages, I think $30.00 a day too much. If the boiler had been good and the Daisy running in her usual manner her daily expense would have been $22.50, and they themselves state her to be worth $30.00 a day.

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The loss of the Company, therefore, and likewise the true measure of the damage, was the difference between these two amounts, that is $7.50 *per diem* for all the fifty-three days she was so thrown idle by the default of the plaintiffs.

As to the pleadings and the apportionment of the costs, there is more to be said. The costs are affected by the special manner in which the pleadings in the counter-claim were framed by the Victoria Lumber Company. These, instead of adhering to the simple form given in *Drummond* v. *Van Ingen*, L.R. 12 App. Cas. 285, that the William Hamilton Manufacturing Company undertook to make a boiler suitable for the purpose but did not do so, or to that effect, pleaded that the boiler was not constructed according to the specific plans and specifications, and from such

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defective construction the boiler was unfit for use and collapsed. Had the pleadings been thus simplified all the unnecessary expense incurred by the plaintiffs in procuring the evidence of engineers and others from great distances on the comparative merits of round top and flat top boilers, plates and waterways, would have been saved.

This having been rendered necessary by the Victoria Lumber Company's pleadings, they having thus by their own error caused that part of the expense "the cost of it must fall on themselves to pay it." *Bloomer* v. *Spittle*, 13 Eq. Cas. 431. These will therefore be deducted from the costs of the counter-claim (to which the Victoria Lumber Company are entitled) in the course of the taxation which the taxing master will regulate accordingly, and this reduction will be provided for by the decree when it is drawn up.

Judgment of McCREIGHT, J.

McCREIGHT, J.: This was a cross-appeal by the Victoria Lumber Company as to damages for loss sustained by reason of their steamer, the Daisy, being rendered useless from the 24th May till July 15th, a period of fifty-three days, in consequence of the boiler manufactured for them by the William Hamilton Manufacturing Company proving to be defective.

My brothers CREASE and WALKEM, and myself, agreed in substance with the judgment of Mr. Justice DRAKE, that an action lay therefor against the Hamilton Company, but he disallowed the above claim for damages on the ground, as I gather from his judgment, that this liability was not one which was in contemplation of the parties, and not covered by warranty, as I gather, either express or implied. On this point an argument was addressed to us on behalf of the Victoria Lumber Company and Hamilton Manufacturing Company respectively, and I have come to the conclusion that a certain amount must be allowed for the time during which the Daisy was rendered useless through the accident to her boiler, although by no means as much as is claimed by the Victoria Lumber Company.

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As already pointed out in the previous judgments of the Full Court in this cause, this case of the Victoria Lumber Company may safely be rested on the doctrine to be found in *Jones* v. *Bright*, 5 Bing. 533, and the law as laid down by Lords HERSCHELL and MACNAGHTEN in their judgments in *Drummond* v. *Van Ingen*, 12 App. Cas. at pp. 290-91-95, to the effect that "where goods are ordered of a manufacturer for a particular purpose he impliedly warrants that the goods he supplies are fit for that purpose." With respect to the damages recoverable in case of breach, as here, I think the case of *Randall* v. *Newsom*, 2 Q.B.D. p.102 (C.A.) may be usefully referred to. There the plaintiffs ordered and bought of the defendant, a coach builder, a pole for the plaintiffs' carriage, the pole broke in use and the horses became frightened and were injured. In an action for the damage the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence; held that the plaintiff was entitled to recover the value of the pole and also for damages to the horses, if the jury on a second trial should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. See marginal note at page 102, and see page 111 referring to *Smith* v. *Green*, 1 C.P.D. at page 93, which also see.

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I think that if there had been a jury in this case, and rightly directed, they would have found the damage to be the natural consequence of the accident arising from defect in the boiler. Obviously, a saw mill at Cowichan could scarcely be worked profitably without a tow boat, and an accident to the boiler would necessitate the hire of another steamer, and I do not understand that any question was made as to this at the trial. The case of the *B. C. Saw Mill Company* v. *Nettleship*, L.R. 3 C.P. 499, was relied on by the Hamilton Company, but it seems to me very distinguishable. BOVILL, C.J., says in his judgment, at p. 505 of the report, "It is to be observed that the defendant is a carrier, and

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not a manufacturer of goods supplied for a particular purpose," and he and WILLES, J., at p. 500, point out that the carrier did not know that the whole of the machinery would be useless if any portion of it failed to arrive or what that particular part was. And again WILLES, J., adds, at p. 509: "He did not know that the part which was lost could not be replaced without sending to England." Further, I observe no allusion is made to this case, either in *Randall* v. *Newsom*, or *Smith* v. *Green*, above quoted, no doubt for the reason given in the judgment of BOVILL, C.J., already quoted, that it was the case of a carrier not a manufacturer of goods supplied for a particular purpose. But as regards the amount to be recovered against the William Hamilton Company, I think the Victoria Lumber Company are not entitled to $30.00 *per diem*, as was contended, but only to be placed in as good a condition as they would have been in if no accident had taken place. The Daisy was run at an expense of $22.50 *per diem*, and worth say, as in the particulars, $30.00 *per diem*. The Victoria Lumber Company's loss was therefore $30.00, less $22.50, or $7.50 *per diem* for fifty-three days, or $397.50.

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With respect to costs, the pleadings of the defendants allege "that the boiler, etc., was not so constructed according to the said plans and specifications, and by reason of such defective construction the said boiler was not fit for the purposes for which it was required, and collapsed." I think if the counter-claim had been framed in conformity with the law laid down in *Drummond* v. *Van Ingen*, 12 App. Cas. p. 290, by Lords HERSCHELL and MACNAGHTEN, and already quoted, alleging that the William Hamilton Manufacturing Company undertook to make a proper boiler and failed to do so, the evidence of the experts in Ontario as to the relative merits of square tops and round tops, vertical and deflected plates for boilers, would not have been required or resorted to by the William Hamilton Company. The Victoria Lumber Company are of course only entitled

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at the most, to be placed in the same position as to costs as they would have been in if they had pleaded properly; and further, Lord ROMILLY says, in *Bloomer* v. *Spittle*, L.R. 13 Eq. Ca. at p. 431, that "as a general rule the costs of repairing a man's own blunder fall upon himself and he ought to pay for it." And the late Master of Rolls used to say that the principle upon which costs were awarded was that he who "uselessly caused expense should pay for it." If the Victoria Lumber Company had applied for leave to amend, as the Court has practically done, it would have been given on payment of costs. I think the taxing master in taxing the costs of the counter-claim, to which of course the Victoria Lumber Company are entitled otherwise, and subject to the above observations, should bear these principles in view, otherwise justice cannot be done, and in drawing up the decree directions should be given accordingly.

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WALKEM, J., concurred with McCREIGHT, J.

Cross-appeal allowed in part.

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Employers' liability—Stat. B.C. 1891, Cap. 10—"Workman"—Contributory negligence—Sufficiency of finding of jury—New trial.

Defendant is not entitled to a new trial upon the ground that the jury have failed to return a direct finding upon a question put to them upon the issue of contributory negligence where the other findings support judgment for the plaintiff.

From the moment the plaintiff makes out a *prima facie* case that the injury was caused by the negligence of the defendant, the *onus* is cast on the defendant, if he sets it up, to shew contributory negligence.

Held, That the plaintiff, on the facts, was a "workman" within the Act.

APPEAL to the Supreme Court from the judgment of BOLE, Co.J., at the trial entering judgment for the plaintiff in an action under the Employers' Liability Act for damages sustained from personal injuries caused to plaintiff by a pile-driver, on which he was working while in defendants' employ, falling upon him, owing, as alleged, to the omission of defendants to provide proper guy lines to support it. The statement of defence denied that the absence of guy ropes was a "defect," or that they were necessary to safety, and alleged that the plaintiff was not at the time of the accident carrying out the duties of his employment, but was acting in disobedience of orders, and that his injury was caused by his contributory negligence. It appeared from the evidence that it was the duty of the plaintiff to stand upon a platform behind the perpendicular mast or guide upon which the trip-hammer or pile-driver worked, to chock or stop the descent of the hammer by the insertion of a block after it was raised until ready for work upon a pile. The frame work consisted of a tripod upon a platform mounted on rollers. The piles were hauled up into position by means of tackle run through a sheave at

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the top of the mast. There were no guy ropes or back stays, but a man with a handspike or peavie held down the rear base of the frame when there was a forward haul in bringing a log into position. The plaintiff had been warned not to remain upon the platform while the driving was being done. At the time of the accident a pile was being hauled into position, and the plaintiff was on the platform, when the frame was pulled over on its face owing to the man with the handspike being unable to hold it down. The following questions were put to and answered by the jury: Q. 1. Were the machinery appliances and arrangements of pile-driver good as regards safety of workmen employed thereon? A. No. Q. 2. Was the want of any ropes dangerous, or did it require guy ropes to make pile-driver safe? A. Yes; in the event of guy ropes being impracticable some other appliances should have been employed to secure absolute safety. Q. 3. What was the inducing cause of the accident? A. We think reply to No. 2 question sufficiently answers this. Q. 4. Could the plaintiff have avoided the accident by the exercise of reasonable care? A. No. Q. 5. Was the plaintiff at time of accident acting in disobedience of defendants' orders? A. We are not certain as to his actions in this particular instance, but we consider that it would be his usual duty to be there. Q. 6. Was the plaintiff fully aware of the state of pile-driver? A. Yes. Q. 7. Were the defendants fully aware of the state of the pile-driver? A. Yes. Q. 8. Did the defendants exercise due care as to pile-driver being in a safe and proper condition? A. No. Q. 9. If condition of pile-driver was defective, was it by reason of the negligence of the defendants, or did they know it? A. Yes. Q. 10. What damages did the plaintiff sustain by reason of the negligence of the defendants? A. $230.00.

Statement.

The defendants appealed on the ground that the plaintiff, by reason of the nature of his occupation, was not a "workman" within the meaning of the Act, and that there was no

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finding against the defendants on the issue of contributory negligence in view of the answer of the jury that they were not certain whether the plaintiff was acting in disobedience of orders. The appeal was argued on the 8th day of May, 1895, before DAVIE, C.J., and CREASE, J.

Argument.

L. G. McPhillips, Q.C., for the appeal: Plaintiff was not a workman. His duties did not require any hard, manual labour, *Morgan* v. *London General Omnibus Company*, 13 Q.B.D. 832. The mere fact that a man works with his hands is not enough. A grocer's assistant is not a workman, *Bound* v. *Lawrence* (1892), 1 Q.B. 226; in *Cook* v. *North Met. Tramway Company*, 18 Q.B.D. 683, it was held that a tramcar driver is not a workman. [DAVIE, C.J., Sub-sec. 3 of Sec. 2 (1891, B.C. Cap. 10), "labourer or otherwise engaged in manual labour," seem wide enough to cover the plaintiff]. The plaintiff knew of the condition of the pile-driver, and was *volens* in regard to the risk of injury, *Thomas* v. *Quartermain*, 18 Q.B.D. 685; BOWEN, L.J., at p. 697; *Senior* v. *Ward*, 28 L.J.Q.B. 139, *Woodley* v. *Met. District Railway Company*, L.R. 2 Ex. Div. 384; *Thrussell* v. *Handyside*, 20 Q.B.D. 359, at p. 364. A servant is bound to obey orders; *Beach on Contributory Negligence*, 2nd Ed. pp. 452–84. There is no finding on the issue of contributory negligence, and there should be a new trial to obtain a finding. Although the *onus* of proving this defence and obtaining a finding is primarily on the defendant, it may be shifted, as we submit it was in this case, *Wakelin* v. *L. & S.W. Railway*, 12 App. Cas. 41, per Lord WATSON, at p. 48; Lord FITZGERALD, p. 52; *Davey* v. *L. & S.W. Railway Company*, 11 Q.B.D. 213, 12 Q.B.D. 70.

H. F. Clinton, contra: On the question of workman, *Grainger* v. *Aynsley*, 6 Q.B.D. 182; *Shaffers* v. *Gen. Steam Nav. Company*, 10 Q.B.D. 356; *Hunt* v. *G.N. Railway*, (1891) 1 Q.B. 601. There must be a positive finding that the plaintiff was both *sciens* and *volens*, *Smith* v. *Baker* (1891), App. Cas. 325; *Hardman* v. *Canada Atlantic Railway Company*, 25 Ont. 209.

On the question of *onus* of proof, see *Dublin, Wicklow & Wexford Railway* v. *Slattery*, 3 App. Cas. 1,155; *Wakelin* v. *L. & S.W. Railway*, 12 App. Cas. 41; *Scott* v. *B.C. Milling Company*, 3 B.C. 221.

DAVIE, C.J.: To support the defence of contributory negligence it is necessary that there should be a direct and positive finding of the facts necessary to constitute it. From the moment the plaintiff makes out a *prima facie* case that the injury was caused by the negligence of the defendants, the *onus* is cast on the defendant if he sets it up to shew contributory negligence. Here the defence is raised that the plaintiff's injury was caused by his occupying the dangerous position he did at the time of the accident, in disobedience of the orders of his employers, the defendants. The learned County Court Judge put the question to the jury : " Was the plaintiff at the time of the accident acting in disobedience of defendants' orders ?" To which they answered : " We are not certain as to his actions in this particular instance, but we consider that it would be his usual duty to be there." This answer is insufficient to sustain the defence. If it amounts to anything, it is a denial of negligence on the part of the plaintiff. The other answers of the jury sustain the judgment for the plaintiff.

Judgment.

I think that the plaintiff was a " workman " within the definition in Sec. 1, Sub-sec. 3 of the Employers' Liability Act (1891, B.C. Cap. 10).

The appeal must be dismissed with costs. There is no ground for a new trial.

CREASE, J., concurred.

Appeal dismissed with costs.

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May 31.

CONFED. LIFE. ASS. COMPANY *v.* MCINNES

THE CONFEDERATION LIFE ASSURANCE CO. v. MCINNES.

Release—Accord and satisfaction—County Court appeal—Scope of—C.C. Amendment Act, 1892, Sec. 3.

Defendant agreed to take a policy of life assurance for $10,000,00. from the plaintiff Company, which was issued and transmitted to, and stood in the hands of plaintiffs' B. C. agent, for defendant. Defendant wrote to the agent that he was unable to pay his premium notes or carry out the transaction, but that he was confident of being in a better financial position within the next seven or eight months, and continued, "I promise to take a new policy with you within that time. In the meantime I return the policy and $5.00 for the medical examination," wherepon the agent signed and delivered to him the following: "Received back from Mr. T. R. E. McInnes our policy No. 30,574, together with $5.00 for medical attendance, in accordance with terms submitted in his letter." Defendant offered to take out a fresh policy in plaintiff Company, for $1,000.00. The Company refused this offer, or to take back the original policy, and returned it together with the $5.00 to defendant, who declined to receive same. It was a term of the policy that agents of the Company were not authorized to alter or discharge contracts. Upon action upon the premium notes:

Held, by HARRISON, Co. J., on the facts, that there was no acceptance by the plaintiffs of the proposal contained in the letter, or release or accord and satisfaction of the original contract.

On appeal to two Judges of the Supreme Court (McCreight and Drake, JJ.), That no question of law being distinctly raised before or referred by the County Court Judge, no such question was open on appeal, and that the findings of fact could not be considered under the County Court Amendment Act, 1892, Sec. 3.

Statement.

APPEAL to two Judges of the Supreme Court from a judgment of the County Court of Nanaimo in favour of the plaintiff Company. The facts fully appear from the following judgment of HARRISON, County Court Judge, at the trial.

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HARRISON, Co. J.: The plaintiff sues the defendant to

recover $129.86, the amount of two premium notes for $64.00 each, given by the defendant to the plaintiffs on his applying for insurance in their company.

The defendant made application for life assurance on the 8th August, 1893, for the benefit of Laura E. McInnes (his wife) and children, and at the same time signed two premium notes both dated 1st September, 1893, one payable ninety days after date, the other payable five months after date, if his proposal were accepted by the issue of the policy.

His proposal was accepted and the policy issued, but the defendant did not pay the sums specified in the notes, or rather agreements. He asked at the time of making application that the policy be not delivered at his residence, but that he be notified when it arrived in Victoria.

Some time in September, 1893, the agent in Victoria received the policy from Toronto. In this policy the defendant's name instead of being written in full was written Thomas R. E. McInnes, and instead of being described as Victoria, B. C., where he was residing at the time of his application, he was described as at Victoria, Vancouver District. He objected to the policy in these particulars, and the policy was sent back to Toronto, and the required alteration made. There was no objection to the name or description of the beneficiary.

The defendant left Victoria and moved to Nanaimo; the policy was subsequently taken to him at Nanaimo, but instead of holding it the defendant wrote the agent stating that he regretted he would not be able to meet the notes "given by me on my policy. I intended going on with it but find myself at present unable to do so. However I am confident of being in a better financial position within the next seven or eight months. I promise to take a new policy with you within that time. In the meantime I return the policy and $5.00 for the medical examination. Trusting that this will be a satisfactory arrangement of the present

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difficulty," and the same day took the following receipt from the Company's agent: "Received back from Mr. Thomas R. E. McInnes our policy No. 30,574, together with $5.00 for medical examination, in accordance with terms submitted in his letter of November 6th, 1893. E. Dunderdale, General Agent, Vancouver Island, Confederation Life Association, Toronto."

The policy was returned to the Head Office and returned to the agent, with instructions to forward it to Mr. McInnes.

The agent sent the policy back to Mr. McInnes and returned the cheque for $5.00 which Mr. McInnes had given to him.

Defendant sent back the cheque and policy, stating "This matter was finally settled between us * * * I decline to re-open it."

The defendant now contends that he is not liable to pay the notes, as the policy was not delivered to him on the 1st September, and that through his name not being written out in full and his being described as of Vancouver District the policy was invalid.

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Delivery to him was not essential to the validity of the policy, nor was payment of the notes conditional on delivery; the condition specified in them is the issue of the policy, and the evidence shews that he desired the agent to hold the policy for him.

Nor would the description of his name partly by initials, or of his residence, as of Vancouver District instead of Vancouver Island or B.C., have invalidated the policy. But his letter shows that the policy had been issued and properly issued, and was delivered to him. The only objection was that he anticipated not being able to pay the notes when due.

The defendant further contends that on November 6th, 1893, before either note became due "he entered into a contract by way of accord or satisfaction, by the terms of which the defendant was to pay the sum of $5.00, and take

a new policy in the plaintiffs' association within seven or eight months."

That he did pay the $5.00 on the 6th November, 1893, and on the 21st June, 1894, offered to take out a new policy with the plaintiffs for $1,000.00, and the said offer was refused.

Prior to November 6th, 1893, from the view I take of the evidence, the plaintiffs had, at the defendant's request, insured his life for $10,000.00. They had fulfilled everything required of them by their contract, and had met the defendant's request in every way.

The defendant, however, had entered into an agreement which he either feared he could not or did not wish to carry out. The so-called accord and satisfaction was not, to my mind, an accord and satisfaction. Its terms were not agreed to by the agent on behalf of the Company, but it was an offer on the part of the defendant which the plaintiffs' agent agreed to submit for the Company's approval. Good faith required that this offer should be construed as the agent did construe it, as meaning that the defendant, if not compelled to pay the notes, would insure in the plaintiff Company in a policy for the same amount of $10,000.00 and of the same kind as he had previously bargained for and which had been issued by the Company.

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However, it does not matter for the purpose of this case what the defendant's offer meant. The offer was not accepted by the plaintiffs. The defendant was so informed. He was never released from his agreement, and the policy was not cancelled but held to his order by the agent in Victoria.

The defendant should pay $128.00 and $1.86 interest, according to the agreement he made with the Company, one of the terms of which was that agents were not authorized to make, alter or discharge contracts, or waive forfeitures.

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Judgment for the plaintiffs for $129.86, with costs.

Judgment for plaintiffs.

From this judgment the defendant appealed to two Judges of the Supreme Court, and the appeal was argued before McCREIGHT and DRAKE, JJ., on the 31st day of May, 1895.

Lindley Crease, for the appellant: The plaintiffs did not issue and deliver a policy within reasonable time, and therefore failed to fulfil their part of the contract. The plaintiffs' agent entered into a substituted contract with the defendant, and this contract is the only one on which the plaintiffs can now sue, there was an accord and satisfaction. If the plaintiffs' agent was not properly authorized they subsequently ratified his acts. In any event the defendant had no notice of want of authority, as the plaintiffs held the agent out as a general agent having authority to deal with all matters pertaining to their business in British Columbia.

A. E. McPhillips, contra: The contract was complete upon the issue of the policy. It is not necessary that the insured should formally accept or take away a policy in order to make the delivery complete, *Xenos* v. *Wickham*, L.R. 2 H. of L. 296. The mere manual possession of a policy is of little consequence whether it be in the hands of the insured or insurers. The restricted power of the agent was brought to the notice of the defendant, *Campbell* v. *The National Life Insurance Company*, 24 U.C.C.P. at p. 144. As to power of agent to waive conditions in policy, see *Western Assurance Company* v. *Doull*, 12 S.C.R. 446. As to implied powers of insurance agents, see *Richards on Insurance*, 2nd Ed., pp. 22-3. There was no accord or acceptance by plaintiffs of the proposal contained in defendant's letter.

Argument.

Judgment of McCREIGHT, J.

McCREIGHT, J.: We have nothing to deal with save questions of law, or mis-direction, non-direction, reception or non-reception of evidence. We cannot disturb the trial

Judge's findings of fact; at the same time we do not say his findings are wrong, in fact we believe them to be correct, and we also agree with him on the law. The contracts or agreements upon which the plaintiffs have sued and obtained a verdict preclude the defendant from any defence such as he sets up. There has been no accord and satisfaction; it is nowhere shown that there was any agreed upon substituted agreement. It was to be submitted, but, as I have already pointed out, these are not considerations for us. The appeal must be dismissed with costs.

DRAKE, J.: I agree with all that my brother McCREIGHT has said. I may say, though, that the defendant has in this case, although it is not open to him on the existing state of the statute law, had a discussion in this Court on the merits. All that we can deal with are points of law, and they must be taken in the Court below. See County Court Amendment Act, 1892, section 3 (a); and *Smith* v. *Baker*, App. Cas. (1891) at p. 349. We do not find any points of law taken according to required practice; yet the defendant has also had the advantage of a full discussion of all points of law as well as the facts. It is clear that there were dealings between the defendant and plaintiffs' general agent, and it might have been that if the defendant had entered into a new contract such as the general agent of the plaintiffs desired, or had made some satisfactory settlement, this action would never have been brought. However, we find no accord and satisfaction and no substituted agreement. All that can be said is the proposition contained in the

Judgment of DRAKE, J.

NOTE (a) "3.—In appeals from final judgments, decrees or orders, if the amount involved be under two hundred and fifty dollars, the appeal shall be limited to some question of law or the admission or rejection of any evidence, or for misdirection, and if equal to or over the said sum such appeal shall be by way of rehearing, and the statutes, rules and orders applicable to appeals in the Supreme Court shall apply to and govern such appeals."

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defendant's letter was to be submitted—it was submitted to the plaintiffs and refused.

It appeared also that the agent had no authority to conclude an agreement. The appeal must be dismissed and with costs.

Appeal dismissed with costs.

REGINA v. BOSCOWITZ.

Constitutional law—Provincial Game Protection Act prohibiting exportation of game—Whether interference with trade and commerce.

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A clause in a Provincial Statute which contained other provisions for the protection of game within the Province provided: "No person shall at any time purchase, or have in possession with intent to export or cause to be exported or carried out of the limits of this Province, or shall at any time or in any manner export, or cause to be exported or carried out of this Province, any, or any portion of the (game) animals or birds mentioned in this Act in their raw state."

Held, Affirming a conviction of defendant for having deer hides in his possession in their raw state with intent to export same; that, as the preservation of game within the Province is within the competence of the Provincial Legislature, the prohibition against export did not render the enactment *ultra vires* as interference with trade and commerce, such provision being subsidiary and incidental to the general purpose of the statute.

Statement.

CASE stated by FARQUHAR MACRAE, Justice of the Peace and Stipendiary Magistrate in and for the City of Victoria, for decision by the Supreme Court, as appears by the judgment.

The appeal was argued before DAVIE, C.J., on the 20th day of May, 1895. Judgment was rendered on the 6th day of June, 1895.

P. Æ. Irving, for the defendant.

D. M. Eberts, A.-G., for the Crown and the convicting magistrate.

DAVIE, C.J.: Section 7 of the Game Protection Act, 1895, provides that no person shall at any time purchase or have in possession with intent to export or cause to be exported, or carried out of the limits of the province, or shall at any time or in any manner export, or cause to be exported or carried out of the limits of this province, any, or any portion of the animals or birds mentioned in this Act (deer are animals mentioned in the Act) in their raw state.

The present appeal comes before the Court by way of a case stated under clause 900 of the code from a conviction of the appellant for unlawfully having in his possession, with intent to export, certain portions, to wit, hides in their raw state, of an animal mentioned in the Game Protection Act, 1895, to wit, a deer, contrary to the form of the statute in such case made and provided; and paragraph 1 of the case states that "it was admitted by the appellant that the proceedings had before the magistrate were legal and regular, and that if the provisions of section 7 of the Game Protection Act, 1895, were *intra vires* of the Provincial Legislature of the Province of British Columbia, the conviction was properly made." But the evidence upon which the conviction proceeded is annexed to the case, and expressly, by paragraph 2 thereof, made part of the case; and from that evidence it appears that the collection of furs, the subject of the present charge, were obtained not from British Columbia only, but from the adjacent foreign islands as well. I take it to be clear that, as regards skins of animals slaughtered in the adjacent foreign islands, there is nothing in the Act to prohibit their export, nor the having them in possession for export purposes, any more than the skins of deer killed by Indians or settlers in the unorganized districts of the province for the immediate

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necessities of food (section 17 of the Act distinctly enacting that its provisions shall not apply to these cases); and I think probably there would be nothing to prevent the exportation of the hides of deer killed by a farmer when found depasturing within his cultivated fields. In any of these cases, I take it, an exception arises making the export of hides permissible; and there is nothing in this case to show that the hides which are the subject matter of these proceedings are not within the exception; on the contrary, the hides coming from the foreign islands are clearly so. I call attention to these exceptions, as it will be necessary that some regulations should be made to govern future cases, and casting upon the defence the *onus* of setting up and proving the exceptions.

As, however, for the purposes of this argument the parties have agreed to waive consideration of these points, and, in the language of the case, have agreed: "That if the provisions of section 7 are *intra vires* of the province, the conviction is properly made," I pass to the consideration of this last question.

Judgment.

Section 7 is attached as being a restriction of trade and commerce, and that the Dominion Parliament alone, under its general power of legislation, and under its particular powers in connection with the regulation of trade and commerce, may declare what goods may or may not be exported from Canada.

As bearing upon the point involved in this case, section 91 of the British North America Act gives to the Parliament of Canada, besides the power generally to make laws in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the provinces, the exclusive jurisdiction to legislate for, among other things, the regulation of trade and commerce; whilst, by section 92, the province may exclusively make laws in relation to (13) property and civil rights in the province;

and (16) generally all matters and things of a merely local or private nature in the province.

With the view then of testing the validity of the section in question, and acting upon the principle of interpretation laid down by the Privy Council in *Dobie* v. *The Temporalities Board*, 7 App. Cas. 136: "The first step to be taken is to consider whether the subject matter of the Act falls within any of the classes of subjects enumerated in section 92. If it does not, then the Act is of no validity. If it does, then these further questions may arise, viz.: Whether, notwithstanding that it is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is not thereby overborne."

Undoubtedly in many cases the subject matter of legislation involves matter to some extent common to both sections 91 and 92; for instance, the distribution of estates and discharge of insolvent debtors, which is one of the subjects coming within federal control under sub-section 21, under the head of "Bankruptcy and Insolvency," would also, as pointed out in *Cushing* v. *Dupuy*, 5 App. Cas. 409, involve matters relative to procedure in civil matters, which by sub-section 14 of section 92 belong exclusively to the province; yet legislation on the part of the Dominion regulating the procedure in bankruptcy cases would be quite valid, notwithstanding that procedure is a matter exclusively within the jurisdiction of the province. Similarly, although by sub-section 15 of section 91 "banking" is exclusively within the jurisdiction of the Dominion, yet, as shown by the *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, the provinces, under the power to regulate taxation, have the right to impose direct taxes on banking institutions.

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It becomes then necessary to look to the general scope of the statute in question. If the real scope and intention of a statute passed by a legislature under section 92 is to deal

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with some or one of the subjects of section 91, then, clearly, the enactment is void. But, if the general scope and intention of the statute is only to regulate matters coming within section 92, then the legislation will be valid; although, as subsidiary to the general object and intention, matters may have incidentally to be dealt with which come within the express language of section 91.

Sections 91 and 92 must, as remarked by the Privy Council in *Citizens Insurance Company* v. *Parsons*, 7 App. Cas. 96, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Applying then these principles to the present case, it seems abundantly clear that the general scope and intention of the Game Protection Act, 1895, is, as its name implies, the preservation of the game of the province. So far, then, the general object of the Act is one relating to property and civil rights, and is "essentially local," as applying only to the game of the province. It is, as remarked by KILLAM, J., in *R.* v. *Robertson*, 3 Man. L.R. 620, "to secure the increase, or to prevent at any rate, so far as possible, the decrease of the supply of game within the province, in order that the people of the province may enjoy the sport of pursuing and killing the birds or animals mentioned in the Act, or may have at hand a ready supply of them for food or for profit," and, as he continues to say, "All of the enactments against having them in possession or exporting them are evidently so many accessories to the prohibition upon the killing at certain seasons, and are all plainly directed to the purposes mentioned."

Judgment.

I cannot see anything in the exercise of the power undoubtedly possessed by the Legislature to preserve the game of the province which is in any way overborne by the exclusive right of the Dominion to regulate trade and commerce, so as to prevent the Legislature prohibiting

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export as incidental to and as carrying out the general scheme of game protection in the province.

The contention, therefore, upon which the appellant has chosen to rest this case, that of the unconstitutionality of section 7, clearly fails, and the appeal must be dismissed. As, however, this is a test case, and the appellant could, had he chosen not to waive them, have defeated the prosecution upon some of the preliminary points referred to in the commencement of my judgment, I think there should be no costs. The Game Protection Act very usefully empowers the Government to make rules and regulations for carrying out the true intent and meaning of the Act, and for the protection of game in the province. I entertain no doubt that rules and regulations can be so drawn as to facilitate the enforcement of the provisions of the Act relative to the export of game, or parts thereof, which provisions I am fully satisfied, are perfectly constitutional and valid.

Judgment.

Appeal dismissed.

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BOULTBEE v. ROLLS.

Bill of Sale—Fraud—Plaintiff particeps fraudis—Estoppel.

In an action to set aside a bill of sale as fraudulent against the plaintiff who was a creditor, and, as far as the evidence disclosed, the only creditor, of the grantor, it appeared that the plaintiff himself had advised upon and drawn up the bill of sale.

Held, That he had no *locus standi* to attack it.

That, on the facts, the conveyance was not fraudulent.

APPEAL by the claimant from the following judgment of

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BOLE, Co. J., in favour of the plaintiff, the execution creditor, and setting aside the bill of sale in question as being fraudulent and void as against the plaintiff.

BOLE, Co. J.: In this case the Sheriff having seized under an execution against James F. Rolls, at suit of John Boultbee, certain goods, stock-in-trade in the apparent possession of the execution debtor, one William Rolls having claimed same as his property by virtue of a certain bill of sale dated the 14th day of August, 1893, and made between said James F. Rolls (claimant's cousin) and said claimant, it became necessary to have the present action tried. The only evidence which I can consider among that offered, is the bill of sale and the oral testimony of James F. Rolls. The bill of sale itself purports to be for the very inadequate consideration, having regard to the value of the property conveyed, of one dollar. Mr. Rolls' evidence, so far from explaining what on the face of it looks unsatisfactory, removed all doubts from my mind as to the time, history and nature of the transaction, as after hearing him state that the property and stock-in-trade were at the time of the execution of the bill of sale for one dollar, worth really $5,000.00, and his admission that about the same time he also conveyed for a nominal consideration $5,000.00 worth of real estate (all he had) to his said cousin, William Rolls; that neither then nor since has William Rolls, who lives in Chicago, taken possession of the goods assigned or received any money thereout, except one small sum of fifty dollars during a casual visit to Vancouver; that William Rolls never asked for or got any accounts of the profits and losses of the business which still went on as usual under the exclusive control of James F. Rolls, who acted in all respects as the owner thereof, I am coerced to the conclusion that the bill of sale relied on comes within the purview of the statute and was voluntarily given by

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the grantor therein, he being at the time in embarrassed circumstances, with the intention to defraud and delay his creditors by placing his property out of their reach.

I therefore declare:

1. The conveyance of 14th August to be fraudulent and void as against the creditors of James F. Rolls.

2. I give judgment for the debt and execution against the debtor's interest in the property seized.

Judgment will, therefore, be entered for plaintiffs Boultbee and Hall, with costs in usual form.

Judgment for plaintiffs.

From this judgment the claimant appealed to two Judges of the Supreme Court, and the appeal was argued before DAVIE, C.J., and WALKEM, J., on the 6th day of June, 1895. Judgment was delivered on the 14th day of June, 1895.

Judgment of DAVIE, C.J.

DAVIE, C.J.: This is an appeal from the decision of the County Court Judge for New Westminster, declaring a certain absolute bill of sale of the grantor's stock-in-trade of drugs, goods and merchandise in favour of William Rolls, dated the 14th day of August, 1893, by James F. Rolls, who at the time of the bill of sale and previously, carried on the business of a chemist and druggist in Vancouver, to be fraudulent and void as against creditors. The matter came before the County Court upon an interpleader summons taken out by the sheriff, who had seized the goods under an execution for $285.00 (debt and expenses) upon a judgment recovered by Boultbee against James F. Rolls, the grantor of the bill of sale in issue. It was objected at the outset that the appeal was upon matter of fact only, and that no such appeal lies as, by section 17 of the County Courts Amendment Act, 1893, appeals are limited to questions of law; but section 17 has apparently no force, as under section 8, section 17 comes into force only when pro-

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claimed, and I cannot find that it has been proclaimed. If section 17 then is not in force, the appeal is governed by section 3 of the County Courts Amendment Act, 1892, which gives an appeal both as to fact and law, when the amount involved is (as in this case) over $250.00. On the other hand, it was urged by the respondent that there had been no proper service of the interpleader process upon the respondent, and that therefore the County Court Judge had no jurisdiction over him, but the County Court Judge was satisfied of the proof of service, and I am of opinion that his decision on the point is final.

The bill of sale in question was drawn by or under the supervision of the respondent, who is described in the affidavit of the attesting witness, his clerk, as "a conveyancer." The grantee is a cousin of the grantor and carries on similar business in San Francisco. There was no money paid as consideration for the transfer, which embraced goods to the value of $5,000.00, the expressed consideration for the bill of sale being the nominal sum of $1.00 ; and we are also informed that contemporaneously with the bill of sale the grantor conveyed all the real estate he possessed, worth a further sum of $5,000.00, to the same grantee for nominal consideration. Of even date with the bill of sale was a separate agreement between the grantor and grantee, under which it is mutually agreed that for the term of his natural life the grantor shall be employed as manager of the business at a monthly salary of $60.00, so long as the business be carried on at Vancouver ; or $100.00 if the cousin should remove the business to Kaslo or elsewhere away from Vancouver. In either case the grantor was, in addition to his salary, to receive a commission of five per cent. on all the gross sales of the business whilst he should continue as manager. Provision is made in the agreement for the keeping by the intended manager of proper and correct books of account, statements from which were to be furnished the cousin every six months ; all receipts of the

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business were to be deposited to the credit of the cousin in a chartered bank; and there was a further provision in the deed that if the manager should at any time be incapacitated through illness or otherwise from managing the business the cousin should provide him a home and all the necessaries of life free of expense for so long as the incapacited manager should require. There is also a clause in the agreement whereunder the cousin agrees to assume and pay, and does thereby assume, all the existing liabilities of James F. Rolls, the grantor of the bill of sale, in connection with the business theretofore carried on by the grantor at Vancouver, "a list of which liabilities is hereunder annexed," but there is no list or schedule attached to the deed, nor was there any evidence to shew that such a list had ever been annexed or even prepared, nor is there any evidence to shew that James F. Rolls owed any debt at the time of the transaction in question, except to the conveyancer, Boultbee, and a debt to the Merchants' Bank, which was secured, and has since been released; nay, the uncontradicted evidence of James F. Rolls states that he had no creditors that he knew of, save Boultbee, and that at the time of the transfer he had settled with all of his creditors that he knew of. It has not been shewn that James F. Rolls contracted any debt after the transfer or that, with the exception of Boultbee, he owes a dollar to anyone to-day. Now, whilst a voluntary transfer of property such as this undoubtedly was, would be utterly valueless as against any creditor defrauded thereby, it is abundantly clear that a man who is not in debt may make any disposition of his property that he likes, and that, unless it can be shown that the voluntary settlement is with the intent to defeat, delay or defraud creditors, it is valid and unassailable. See *Ex parte Mercer, in re Wise*, 17 Q.B.D. 290.

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James F. Rolls states in his evidence that his reason for giving the bill of sale was family jealousies, which seems to be a more likely reason than any intention to defraud

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creditors, when the only creditor to be defrauded was the very man who drew the document, and who was the grantor's professional agent and adviser in the transaction. Whether I am right in this view or not, it is distinctly stated, and not contradicted, that, with the exception of the Merchants' Bank, which, as before mentioned, was secured, and has since released the debt, there was no creditor except Boultbee, and Boultbee tells us that James F. Rolls, at the time of the transaction owed him $250.00, the subject of the present claim (the particulars fyled in Court do not support a claim to even that amount, but, in the view I take, this is immaterial). It is, as I have before mentioned, distinctly stated, and not denied, that Boultbee was not only aware of, but himself, or by his clerk, drew these papers; and, moreover, was James F. Rolls' agent and adviser in the transaction, and Boultbee comes into Court and tells us that the primary object of the bill of sale was to protect James F. Rolls from his creditors.

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As there were no creditors at the time except Boultbee, this object to protect as against creditors must have had reference to Boultbee himself and to any future creditors. But there is no creditor, nor anyone to complain, save Boultbee, the man who drew the deed, advised upon it, and understood perfectly, as he tells us, what was its primary object. If then it was intended to be a fraud, as he now claims, which I am far from saying it was, he was a party to, or the agent to effect such a fraud. Can he, now that he finds himself the victim of his own fraud, place himself in the same position as if he had never been a party to it? I think not. "*In pari delicto melior est conditio possidentis.*"

I think the appeal must be allowed with costs.

Judgment of WALKEM, J.

WALKEM, J.: The facts of this case sufficiently appear in the judgment just delivered. In my opinion they fail to establish the charge of fraud, which is the subject-matter of the interpleader issue tried by the learned County Court

Judge. The grantor of the bill of sale had no creditors at the time of execution of that document except the plaintiff and the Merchants' Bank, which was then secured and has since been paid. The bill of sale and contemporary documents mentioned in the evidence were the direct outcome of the professional advice given by the plaintiff to the grantor, and were drawn up by him and executed at his instance, as embodying the intention of the defendant to provide for his relative the grantee. The course now taken by the plaintiff in virtually impeaching his own conveyance and agreement as being fraudulent, for if the documents are fraudulent now they were so when he prepared and had them executed, is, to say the least of it, not creditable if the arrangement was fraudulent; nothing less in that view could be said of his professional conduct and advice. However, in view of the facts, the bill of sale in my opinion is not fraudulent, and the plaintiff having prepared it and had it executed, must be taken to have assented, as a creditor, to its terms. He cannot, therefore, complain; and even if his complaint were true, he would not be entitled to any consideration at the hands of this Court.

The appeal must, therefore, be allowed with costs.

Appeal allowed.

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ESNOUF v. GURNEY

Bills of Sale Act—Verbal sale not prohibited—Subsequent receipt for consideration and lease back—Whether documents requiring registration.

B made a verbal sale of the goods in question to the plaintiff, who paid him part of the price, in two instalments, and took from him written receipts therefor. Plaintiff then executed a lease of the goods to B, who continued in apparent possession thereof.

The goods having been seized by the Sheriff under a *fi. fa.* upon a judgment obtained by the defendants against B, the plaintiff claimed them, and, upon trial of an interpleader issue:

Held, That verbal sales of goods are not prohibited by the Act, which contains no provision requiring written evidence of such sales to be made or registered.

That such verbal sales, if *bona fide*, are good against subsequent execution creditors of the vendor, though the chattels are suffered to remain in his apparent possession.

That the lease in question was not the contract of sale, or a memorandum thereof, but was a subsequent independent transaction, and that neither it nor the other writings were documents requiring registration under the Act.

INTERPLEADER issue to try the validity of the claim of the plaintiff to certain goods seized by the Sheriff under an execution upon a judgment of the defendants against one Braden. The facts fully appear from the headnote and judgment.

Statement.

P. S. Lampman, for the plaintiff: If there is no bill of sale the statute does not apply, *Ramsay* v. *Margrett* (1894), 2 Q.B. 18, per ESHER, LOPES and DAVEY, L.JJ., at pp 18–26–8. There having been a completed verbal contract of sale, the subsequent lease back must be treated as an independent transaction, *re Watson*, 25 Q.B.D. 27.

Argument.

A. E. McPhillips, for the defendants: The whole policy of the Act is to protect creditors from secret transfers by

requiring a visible sign of the transaction. If the words "bill of sale" will fairly bear a construction conformable to that evident intention, they should be so construed.

DRAKE, J.: This is an interpleader issue to try the right to certain furniture seized by the Sheriff on the 22nd January, 1895, under a writ of *fi. fa.* issued by the defendants against John Braden.

The facts show that in April, 1894, the plaintiff purchased of Braden the furniture in a house on View street occupied by Braden, for $850.00.

Of this sum $500.00 was paid on 30th April, and the balance on 12th June. The receipt given by Braden is as follows: "April 30th, 1894. Received from Richard Esnouf five hundred dollars ($500.00) on account for goods in residence 83 View street. John Braden." The second receipt is for $341.00 in full of all demands, and dated 12th June, 1894.

On the 1st of May Braden agreed to hire the furniture from the plaintiff at $20.00 a month; he at that time was expecting to leave the province within a month.

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The plaintiff required a memorandum of the letting and hiring, and filled up a printed paper which was used by him in his business as a furniture dealer as a conditional sale agreement. The document was signed by Braden, and the only thing clear in it is that he was to pay $20.00 a month for the furniture specified therein. Both parties agree it was a hiring and letting only, and not a conditional sale, and in corroboration of this it was verbally agreed that the plaintiff could remove any portion of the furniture at any time. He acted on this, and removed at various times a considerable portion of the furniture, and replaced the articles removed by others. Braden continued to occupy the house on View street and rent the furniture until the execution was put in. The rent was duly paid for the furniture up to February last. The chief contention by

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Mr. *McPhillips* on behalf of the defendants was that this sale to the plaintiff, J. Braden, was void as not being registered under the Bills of Sale Act; that there was no change of possession; that the document purporting to be a lease was in fact a conditional sale, and not being registered under Cap. 21 of 1892 was void as against execution creditors. From the evidence I find that the sale from Braden to Esnouf was a verbal sale, an offer made by one and accepted by the other. The receipts were not the contract, but were given for the plaintiff's security to show he had paid the money he had offered to give for the furniture.

The Bills of Sale Act does not affect parol contracts of purchase and sale. That Act applies only to purchases and assignments by way of mortgage, which are evidenced by some writing.

The term bill of sale in our Act, Cap. 8 of 1888, includes bills of sale, assignments, transfers, declarations of trust without transfer and other assurances of personal chattels, but do not include the following documents, and then follows a list of documents which need not be registered. It will be seen that verbal sales are not included, because there is nothing in such a case that can be registered. Is it, therefore, necessary that verbal sales should be evidenced by some written document? There is nothing in the Act that says so, and it is to be presumed that the Legislature would have used apt words to include verbal contracts if it had been the intention that personal chattels should not be sold unless by some document in writing. In *Charlesworth* v. *Mills* (1892), App. Cas. 231, it was held that if a document was intended by the parties to be part of the bargain to pass the property, then, in whatever form it was, it might be deemed a bill of sale; but if this bargain was complete without it, so that the property passed independently of it, then it was not a bill of sale. If the purchaser asks for a receipt of the purchase money, that is not part of the

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bargain to pass the property, and in *Ramsay* v. *Margrett*, (1894) 2 Q.B. 18, the husband sold household furniture to the wife, and gave a receipt for the purchase money, it was held that the property passed independent of the receipt, and the receipt did not require registration as a bill of sale. In the present case I am of opinion that the sale was made by parol, and although no ostensible change of possession was made, there was a taking possession by the plaintiff evidenced by a lease of the furniture and a subsequent removal of portions of it as clearly indicated the change of ownership.

FRY, J., in *United £40 Loan Club* v. *Bexton*, cited in *Re Watson*, 25 Q.B.D. 33, says it is to be borne in mind that the Bills of Sale Acts do not require that any transaction shall be put in writing; but if a transaction be put in writing then it shall be registered, otherwise it shall be void; and BOWEN, L.J., in *North Central Waggon Company* v. *Manchester & Sheffield Railway*, 35 C.D. 205, 13 App. Cas. 554, says the Bills of Sale Acts do not avoid parol agreements; they do not avoid anything except documents which are defined in the interpretation clause, but if independently of a document, the rights of the parties have been effectively altered or dealt with either in law or equity, avoiding the document can produce no result, it cannot operate to the disadvantage of that which stands *proprio vigore* independently of the document, and at p. 207 he says the Legislature, for its own wise purposes, had not ventured to strike at transactions, but only at documents, so that if a person could make his transaction complete in law or equity without the document, the Act could do nothing to effect his rights. Here the plaintiff, *bona fide*, bought and paid for the furniture in question by parol; there is no document that could be registered, and the Bills of Sale Act does not apply.

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The subsequent hiring of the goods I find not to be a contract of sale and hiring; and even if it was so, the non-

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registration does not render it void as against execution creditors, as they are not mentioned in the Conditional Sales Act.

For these reasons I think there should be judgment for the plaintiff, with costs.

Judgment for the plaintiff.

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v.
MUIRHEAD & MANN ET AL

THE BOARD OF SCHOOL TRUSTEES OF VICTORIA

v.

MUIRHEAD & MANN AND THE ALBION IRON WORKS COMPANY, LIMITED.

Joint tort—Feasors—Contribution—Indemnity of innocent agent.

Where an act is innocently done under the express direction of another, which occasions an injury to the rights of a third person, the principal must indemnify the innocent agent.

Statement.

CASE stated for the opinion of the Court as follows: The plaintiffs, who are the Board of School Trustees for the City of Victoria, being desirous of procuring a number of school desks for use in the public schools in Victoria, in ignorance of the fact that the Globe Furniture Company, of Walkerville, Ontario, held a patent for the Dominion of Canada, conferring on them the exclusive right to manufacture and sell a certain pattern of desk known as the Globe desk, gave a contract to the defendants, Muirhead & Mann, to manufacture and deliver to the plaintiffs 640 school desks of the pattern of the plaintiffs' invention, at a certain price then stipulated in such contract, viz., $2,638.80, and in manufacturing and supplying such desks the defendants, Muirhead

& Mann, gave a sub-contract to the defendants, the Albion Iron Works, Limited, to manufacture and deliver the iron work for such desks for the price of $1,536.75. Both defendants were in ignorance of the Globe Furnishing Company's patent, and in such ignorance manufactured the material for such desks, and, having completed the order, delivered the same to the plaintiffs in compliance with the contract. The Globe Furnishing Company having discovered the contract, manufacture and supply aforesaid, brought an action against the plaintiffs and the defendants for the infringement of their patent. The sole issue raised by the pleadings in such suit was the denial pleaded by each defendant to the suit of the infringement of patent of the Globe Manufacturing Company. Upon proof of the patent, and of the facts alleged in the first paragraph of this case, the Globe Furnishing Company recovered judgment against the present plaintiffs and defendants, jointly and severally, in the sum of $755.00 as damages for such infringement, with costs, which have been taxed at $411.34, making $1,038.84 in all. Statement.

The question for the opinion of the Court is: Who is to pay the judgment, or in what shares or proportions is such judgment to be borne as between the plaintiffs and defendants respectively? and judgment is to be entered upon the case accordingly. The question was argued before DAVIE, C.J., on the 11th July, 1895.

P. S. Lampman, for the plaintiffs.

George Jay, Jr., for the defendants Muirhead & Mann.

A. P. Luxton, for the Albion Iron Works.

DAVIE, C.J.: I am of opinion that the entire burthen must be borne by the School Trustees. The special case finds that the infringement of patent complained of by the Globe Manufacturing Company in the case of each party was in ignorance of the Globe Company's rights. Had it been intentional the case would have been different, for the Judgment.

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law recognizes no contribution as between wrongdoers ; but that means as between intentional wrongdoers. The firm of Muirhead & Mann and the Albion Iron Works were simply the agents of the Trustees in filling the order for the desks. They acted under the express direction of the Trustees, and, according to well recognized principles of law as laid down in *Betts* v. *Gibbins*, 2 Ad. & El. 57 ; *Toplis* v. *Grane*, 5 Bing. N.C. 636, and *Dugdale* v. *Lovering* L.R. 10 C.P. 196, where an act is done by A under the express direction of B, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with B's directions, A is bound to indemnify B against the consequence thereof. Acting upon this principle, therefore, the Trustees are bound to indemnify Muirhead & Mann and the Albion Iron Works against the infringement of patent which they have innocently directed. I, therefore, direct the judgment to be entered in favour of Muirhead & Mann for the sum of $1,116.34, being the amount paid by them under the Globe Furnishing Company's judgment ; but inasmuch as I consider that Muirhead & Mann and the Albion Iron Works should have claimed indemnity in the suit, and by not doing so have occasioned the additional litigation of this suit, I award them no costs, but, on the contrary, direct that the School Trustees' costs of this suit shall be borne and paid by the defendants Muirhead & Mann and Albion Iron Works in equal proportions.

Judgment.

Judgment accordingly.

LARSEN v. NELSON AND FORT SHEPPARD RAILWAY COMPANY *ET AL.*

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McCREIGHT, J.

1895.

Jan. 12.

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Mechanics' Lien Act, B.C. 1891—Whether lien given by for work done on railway—Whether applicable to railway within the exclusive legislative authority of the Dominion—Conflict of laws.

The Mechanics' Lien Act, 1891, B.C. Cap. 23, Sec. 8: "Every mechanic's lien shall absolutely cease after the expiration of thirty-one days after the work shall have been completed, etc., unless in the meantime the person claiming the lien shall fyle * an affidavit, * stating in substance (*c*), the time when the work was finished or discontinued * which affidavit shall be received and fyled as a lien against such property, interest, or estate. The Registrar-General, District Registrar, and every Government Agent, shall be supplied with printed forms of such affidavits, in blank, which may be in the form or to the effect of Schedule "A" to this Act, and which shall be supplied to every person requesting the same and desiring to fyle a lien. The form of affidavit in the Schedule "A" had the clause: "That the work was finished or discontinued on or about the —— day of ——."

Per SPINKS, Co. J.: Discharging the lien; that an affidavit stating the time when the work was finished, as "on or about," etc., was insufficient.

Upon appeal to the Supreme Court, the Court expressed no opinion as to the correctness of the ruling of the learned County Judge, but declined to maintain his judgment on that ground.

Per CREASE, J.: The requirements of the various sections of the Dominion Acts governing the railway in question are so at variance with the recognition of mechanic's liens thereon under a Provincial statute, that it is impossible for the two to stand together, and therefore the Dominion legislation must prevail.

Per McCREIGHT, J.: The language of the Mechanics' Lien Act, B.C. 1891, Sec. 4, is insufficient to confer a lien upon a railway in respect of work done thereon.

The provisions of the Act as to the priority of mechanics' liens upon the property charged being inconsistent with the provisions of the Dominion Railway Act, 1888, as to the priority of mortgages upon railways, it is to be inferred that the Provincial Legislature did not intend the Act, and it is not to be construed to apply to railways within the control of the Dominion Parliament.

Statement.

APPEAL to two Judges of the Supreme Court from the

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judgment of SPINKS, Co. J., dismissing an action in the County Court of Kootenay, holden at Nelson, to enforce a mechanic's lien. The judgment of the learned County Court Judge proceeded upon the ground that the statement in the affidavit fyled in support of the lien, under section 8 of the Mechanics' Lien Act, B.C. 1891, "that the said work was finished and discontinued on or about the 10th day of January, 1894," was not a sufficient statemeut of the time when the said work was finished or discontinued, as required by section 8. The defendants, Corbin, Duryea and Chapin, as trustees for debenture holders of the Nelson & Fort Sheppard Ry. Co., held registered mortgages, prior in date to the lien, upon the railway and all its works and assets for a sum greater than the amount of the mechanic's lien.

In the year 1891 the said Railway Company was incorporated by an Act of the Provincial Legislature, Cap. 58, and the B.C. Railway Act of 1890, Cap. 39, was made applicable by the Special Act.

Statement.

In the year 1893 the Dominion Legislature passed an Act, Cap. 57, respecting the said railway; it was declared "to be a work for the general advantage of Canada," and to be "a body corporate and politic within the legislative authority of the Parliament of Canada, and to have all the franchises, powers," etc. conferred upon it by virtue of the British Columbia Act of 1891, Cap. 58, but subject to all debts, obligations or liabilities of the Company, and to any rights in any suit then pending, etc.; and in particular that the Railway Act of Canada, 1888, Cap. 29, should apply instead of the B.C. Railway Act, 1890, Cap. 39, to all matters and things to which the Railway Act of Canada would apply if the Company had originally derived its authority to construct and operate its railway from the Parliament of Canada, and as though it were a railway constructed or to be constructed under the authority of an Act passed by the Parliament of Canada.

A number of objections to the lien were discussed at

length, but only the points upon which the judgment was delivered are reported.

E. V. Bodwell and *A. E. McPhillips* for the appeal: The statement of the time when the work was finished is sufficient as "on or about" such a day, *Truax* v. *Dixon*, 17 Ont. 366; Sec. 8, provides for an affidavit "stating in substance (c) the time when the work was finished or discontinued," and "every Government agent shall be supplied with printed forms of such affidavits in blank, which may be in the form or to the effect of Schedule A to this Act, which shall be supplied to every person requesting the same and desiring to fyle a lien." The form given in Schedule A, in this particular, is "(3) that the work was finished or discontinued on or about the —— day of ———," and the affidavit in question strictly follows the form. This is sufficient, *French* v. *Bellew*, 1 M. & S. 302; *Meek* v. *Ward*, 10 Hare, 709; *Regina* v. *Atkinson*, 17 U.C.C.P. 295; *Ex parte Johnson, Re Chapman*, 50 L.T.N.S. 214.

Argument.

The language of section 4 of the Act clearly provides that "every contractor doing or causing work to be done upon or in connection with the clearing, excavating, filling, or grading any land in respect of a railway * * * or other work at the request of the owners of such land, shall, by reason of such work, have a lien or charge for the price of such work upon such * * * fixtures or other works." The last words must be treated as separate from those immediately preceding them and to have a general reference to all the classes of works enumerated in the clause including railways.

As to the objection that the Act does not apply because the railway was declared to be for the general advantage of Canada, and brought under the control of the Dominion Parliament, the statute provides for a certain method of enforcing a debt and provides a remedy *in rem* for a certain class of creditors, and therefore deals with a question of

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property and civil rights. The fact that the remedy is given against the property of a class of undertaking the constitution and operation of which is a subject of Dominion legislative jurisdiction is immaterial. A railway may be sold under a writ of *fi. fa.* in an action to recover a right wholly created by and the procedure in relation to which is wholly provided by a provincial statute. See *Redfield et al.* v. *Wickham*, 13 App. Cas. 467. If the provisions of the Dominion Railway Act in regard to the priority of certain classes of mortgages of a railway, which is a collateral and incidental matter, not within the exclusive constitutional control of the Dominion Parliament as primarily relating to the control of railways, are in conflict with the provisions of the Provincial Statute giving the express right to a lien, then the Dominion Statute must give way. But there is no such conflict; the priority given is over vendor's liens.

Where the general scope and intention of the statute is only to regulate matters coming within section 92, namely, as here, upon a question of property and civil rights, then the legislation is valid; although, as subsidiary to the general object and intention, matters may have incidentally to be dealt with which come within the express language of section 91, *Dobie* v. *Temporalities Board*, 7 App. Cas. 136; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Citizens' Insurance Company* v. *Parsons*, 7 App. Cas. 96.

Argument.

Gordon Hunter, contra: The learned County Court Judge was right in disposing of the case upon the preliminary objections which rendered further discussion of the facts unnecessary. *Pooley* v. *Driver*, 5 Ch. D. 460, at p. 468; *Tattersall* v. *Nat. Ship Company* (84), W.N. 32; *Metropolitan Board of Works* v. *New River Company*, 2 Q.B.D. 67.

Section 4 of the Mechanics' Lien Act does not in terms confer a lien in respect of railways, there being a *casus omissus* which the Court cannot supply. In any event, the Act does not apply to a Dominion railway, but if it

purports to so apply, it is, *pro tanto, ultra vires*. The power to sell such a railway under a mechanic's lien must be conferred by Dominion Statute, inasmuch as there is no right of law to do so even in a judgment creditor or debenture holder, *Gardner* v. *London Railway*, L.R. 2 Cap. 201 ; *Blake* v. *Herts & Essex Waterworks Company*, 41 Ch. D. 399 ; *Galt* v. *Erie*, 14 Gr. 499 ; *Phelps* v. *St. Catherines Railway*, 19 Ont. 501.

Section 6 of the Act referring to the priority of a mechanic's lien upon mortgaged property is inconsistent with section 95 of the Railways Act, 1888 (Can.), therefore it is reasonable to suppose that the Provincial Legislature intended the Lien Act to apply only to railways within the exclusive legislative authority of the Province. See *Macleod* v. *Attorney-General for New South Wales* (1891) App. Cas. 455 ; *Railton* v. *Wood*, 15 App. Cas. 366, for the canon of construction to be applied under such circumstances. The Dominion Act exclusively applies, *Monkhouse* v. *G.T.R.*, 8 O.A.R. 637 ; *Clegg* v. *G.T.R.*, 10 Ont. 703, and is undoubtedly constitutional, *Union Bank* v. *Tennant*.

Argument.

The declaration that the railway is for the general benefit of Canada, with its consequences, is futile, if it can be sold piecemeal under the provisions of a Provincial Act vesting such a jurisdiction in County Court Judges.

CREASE, J.: This is an appeal from the judgment of a County Court Judge rendered against the plaintiffs in an action for the enforcement of a lien under the B.C. Lien Act, 1891, Cap. 23, by the plaintiffs as sub-contractors with Daniel C. Corbin, the contractor, for supplying the materials and labour for the construction of the Nelson & Fort Sheppard Railway.

Judgment of CREASE, J.

The lien is for $318,000.00. The contract was dated 11th April, 1893, and the work was finished on or about the 10th January, 1894.

The facts of the case as gathered from the admissions of

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the lien affidavit and those freely made by counsel on both sides are sufficiently set forth in the judgment of my brother MCCREIGHT, with a perusal of which I have been favoured, and in which I concur, so that I need not recapitulate them here.

The turning point of the case appears to be this: Whether under the facts submitted and admitted which appear sufficiently full for the purpose and the statutory provisions, Provincial and Dominion, incorporating and governing the railway in question, such an undertaking can properly become the subject of a mechanic's lien at all.

After a long and careful consideration of the facts and the arguments of the learned counsel on both sides, and a comparison of the B.C. Mechanics' Lien Act, the various provisions and sections of the Act incorporating this Railway Company in 1891, Cap. 58; the B.C. Railway Act of 1890, Cap. 39, particularly section 9, sub-sections 3, 9, 10 and 17; the Dominion Act of Incorporation 56 Vic. Cap. 57, and particularly of the Railway Act of Canada, 1888, Cap. 29, sections 93–6 and 278–80, I am forced to the conclusion that the Nelson & Fort Sheppard Railway was not intended to be, and cannot be, made the subject of a mechanic's lien. An examination into the requirements of the various sections of the Dominion Acts which now govern it, as if the Company had originally derived its authority to construct and operate its railroad from the Parliament of Canada, and as though it were a railroad constructed, or to be constructed, under the authority of an Act, are so entirely at variance with the recognition of mechanics' liens thereon under a Provincial Statute, and *a fortiori* of the enormous lien of $318,000.00, so long latent, that it is impossible to consider the two as existing together, and the Dominion legislation on the subject, therefore, must prevail.

Judgment of CREASE, J.

A public railway, which it may be observed *en passant* has been declared to be a work for the general advantage of Canada, though I do not lay undue stress on that—guided

as it is by and subject to the provisions of the Railway Acts I have mentioned—is saved from the disastrous results which would follow the admission of a liability such as that claimed here, which might be unlimited in amount, a long time latent, and at the most inconvenient time spring into life, and the existence of which would sap the Railway Company's credit and borrowing powers, cripple its resources and operation, and not only impair its ability to afford a now indispensable mode of locomotion to the general public, but possibly threaten its very existence. On a railway established, constructed and operated under the Acts above referred to, which govern the Fort Sheppard & Nelson Railway Company, the mechanics' lien cannot, and does not, exist.

Judgment of CREASE, J.

The able and exhaustive arguments of Mr. *Gordon Hunter* on behalf of the bondholders, and the learned counsel on the other side, are so fully discussed by my learned brother in his judgment, that I am unable to add anything useful to his observations save that I entirely concur with him in the reasons he has advanced, and in the conclusion that the judgment of the learned County Court Judge now under appeal (the reasons given for which I do not follow) should be and is hereby confirmed, and the appeal dismissed with costs.

McCREIGHT, J.: It appears that D. C. Corbin contracted with the Railway Company for furnishing the material and for the construction of the Nelson & Fort Sheppard Railway, and that the plaintiffs were sub-contractors with the said D. C. Corbin for the same purpose.

Judgment of McCREIGHT, J.

That the said work was finished on or about the 10th of January, 1894.

That the said contract between the plaintiffs (who are lien claimants under the B.C. Act, 1891, Cap. 23) and Corbin, by reason whereof the plaintiffs furnished the materials and constructed the said railway, was executed

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on the 11th of April, 1893, and that prior to said date the said Railway Company contracted with said Corbin for the furnishing of the materials and construction by him of the said line, and that subsequent to the execution of both of said contracts the said Railway Company, on the 1st of July, 1893, mortgaged the land grant of the Company, as well as the railway line and appurtenances, to the Manhattan Trust Company, for the purpose of securing the payment of bonds executed and negotiated by said Railway Company. I understand there were separate mortgages of the land grant and of the line, though executed on the same day, the 1st of July, 1893, and registered on the 5th of October following.

I have been obliged to take this statement of facts from undisputed portions of the plaintiffs' lien affidavit sworn on the 6th of February, 1894, and admissions properly made by counsel during the argument. Considering the very large amount of the lien claim, *i.e.*, over $300,000.00, it would have been much better to have had the evidence taken in the usual manner ; but I think, owing to the very proper course adopted by counsel, that most, if not all, of the important questions between the plaintiff lien holders and the mortgagees may be decided satisfactorily on the materials before us.

Judgment of MCCREIGHT, J.

In the year 1891 the said Railway Company was incorporated by an Act of the Provincial Legislature, Cap. 58, and the B.C. Railway Act of 1890, Cap. 39, was made applicable by the Special Act.

In the year 1893 the Dominion Legislature passed an Act, Cap. 57, respecting the said railway. It was declared "to be a work for the general advantage of Canada," and to be "a body corporate and politic within the legislative authority of the Parliament of Canada, and to have all the franchises, powers," etc., conferred upon it by virtue of the B.C. Act of 1891, Cap. 58, but subject to all debts, obligations or liabilities of the Company, and to any rights in

any suit then pending, etc., and in particular that the Railway Act of Canada, 1888, Cap. 29, should apply, instead of the B.C. Railway Act, 1890, Cap. 39, to all matters and things to which the Railway Act of Canada would apply if the Company had originally derived its authority to construct and operate its railway from the Parliament of Canada, and as though it were a railway constructed, or to be constructed under the authority of an Act passed by the Parliament of Canada, etc., etc.

The Railway Act passed in 1888, Cap. 29 must, therefore, determine the rights of the mortgagees in this action, for the special Act of the Dominion was assented to on the 1st of April, 1893, and, as already mentioned, the contract by which the plaintiffs claim as lienholders was not executed until the 11th of April following.

The sections of the Railway Act of Canada, 1888, Cap. 29, dealing with the powers to borrow money by debentures, bonds, etc., to be secured by mortgage, appear to be sub-sections 93–8, as well as others to which I shall refer presently. By section 95 the bonds, debentures, or other securities, are to be "the first preferential claim and charge" upon the property of the Company, and by section 143 they take precedence even over the lien for purchase money unpaid by the Company when they purchase land. This provision strongly points out the policy of the Dominion in securing such mortgages in the fullest possible manner, for a vendor's lien can be enforced by sale where a mechanic's lien cannot. See *King* v. *Alford*, 9 Ont. 643-54, a case, no doubt, present to the draughtsman of the Railway Act. In truth, as one might expect, mechanics' liens are not recognized by the Dominion Railway Act, nor even, as I think I shall shew presently, by the Provincial Railway Acts, especially where they have been assisted by grants of land from the Government.

Sections 278–80 of the Railway Act, 1888, Cap. 29, dealing with sales of a railway to a purchaser, not having

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corporate powers, are quite irreconcilable with the Mechanics' Lien Act, 1891, Cap. 23. See especially sections 6 and 16 of the latter Act. The design and the machinery of the two Acts, the Dominion and Provincial, cannot possibly co-exist.

The judgment of the County Court Judge might, I think, thus, and on this single ground, be affirmed ; for, of course, a mechanic's lien is a mere creation of the statute law, and there is no privity of contract between the plaintiffs, Larsen & Welsh, and the N. & F.S. Railway Company ; but interesting and important questions as to the validity of the alleged lien in regard to the Provincial Act were argued at such length and with so much care that it may be only proper to take notice of one or two of those most insisted on, though several appeared to raise difficulties more or less formidable.

Mr. *Hunter*, for the mortgagees, argued as to section 4 of the Act of 1891, Cap. 23, that it was defectively framed so as to give no lien in respect of the "doing or causing work to be done upon, or in connection with, the clearing, excavating, filling, grading, draining or irrigating any land in respect of a railway, mine, sewer," etc. In other words, that whilst there is a lien enacted or created correlative to the previous member of the section dealing with the "doing or causing work to be done upon the construction, erection, alteration or repair, either in whole or in part of, or in addition to, any building, erection, wharf, bridge, or other work," the last expression being construed according to the well-known maxim, *noscitur a sociis*, there is no correlative to the latter member of the section to which I have above referred, and so no lien capable of being created therefor. And whilst the objection is formidable, according to the usual rules of construing statutes, in the present case I am by no means sure that the omission of a lien in respect of a railway was altogether undesigned.

Judgment of McCREIGHT, J.

The Provincial Act of 1891, Cap. 58, *i.e.* the Nelson &

Fort Sheppard Railway Company Act, 1891, incorporated the sections of the B.C. Railway Act, 1890, Cap. 39, of which section 9, sub-section 3, shows the company may take public land for the use of their railway and works, with the consent of the Lieutenant-Governor-in-Council, but not "alienate" the same, and by sub-section 2 they may borrow by bonds and debentures, and secure the payment of the same by mortgage of the property of the Company, including, I suppose, all such lands. See especially 1891, Cap. 58, sections 9, 10 and 17. These provisions are favourable to borrowing by way of mortgage, just as the Can. Railway Act, 1888, Cap. 29, but with as little intention as that Act discloses of practically preventing the making of mortgages, by allowing mechanics' liens, as in the present case, of enormous amount. Indeed, if the present lien of $318,000.00 prevails, mortgages, as regards B.C. railways, become impossible, especially as the mortgagee will have, perhaps, no notice of the intention to create such liens until he has made, perhaps, enormous advances. Larsen & Welsh being neither owners or contractors are not affected with section 9 of the Lien Act of 1891.

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A better illustration of the destructive character of mechanics' liens, supposing they exist, as regards railroads in B.C., could scarcely be found than in the present case.

An additional argument against the probability of the B.C. Legislature having intended to create mechanics' liens on railways, especially those which are assisted by Government, may be found on perusal of the Mechanics' Lien Act, 1891. That Act took away the lien of the man who furnished materials, or the material man, because no doubt such lien was dangerous to a mortgagee or purchaser, and it retained only the lien, which was more easily guarded against. It would be a strange contradiction if the Legislature contemplated in the same enactment that in the case

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of a railway there might be a secret mechanics' lien to the amount of $300,000.00 or $400,000.00.

The mode of legislation to be found in section 4 of the Mechanics' Lien Act of 1891 is unfortunate, and I fear, in the present case, disastrous, but is, after all, only similar perhaps to what I gather even the Imperial Legislature is obliged to permit, see *Knill* v. *Towse*, 24 Q.B.D. at pp. 195–96, where Mr. Justice MATTHEW says, evidently in a tone of regret, alluding to the complicated and obscure manner in which Acts are now drawn: "It has indeed been suggested that to legislate in this fashion, keeping Parliament, in truth, in ignorance of what it is about, is the only way in which, at the present day, legislation is possible." But I may add, as he has done, that it is unfortunate that such a mode of legislation should be adopted "in practical matters of every day concern."

However this may be, I think this case may be decided on Dominion legislation, and I am not sure that I should have alluded to Provincial legislation except out of respect to the elaborate arguments which have been addressed to us, and the judgment of the learned County Court Judge must be affirmed, though not for his reasons, with costs. I give no opinion as to ground on which he decided.

Appeal dismissed with costs.

HAGGERTY v. THE CITY OF VICTORIA.

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HAGGERTY v. VICTORIA

Municipal Corporation—Discretion of to refuse lowest tender for contract work —Mandamus—Injunction.

Acts within the discretionary powers of a Municipal Council are not subject to judicial control, except where fraud is imputed and shewn, or there is a manifest invasion of private rights.

Injunction to restrain the Corporation from proceeding with a contract awarded to other than the lowest tenderer, refused, and action dismissed.

MOTION for injunction. The plaintiff's claim was for a declaration that the action of the Council of the Corporation of the City of Victoria in awarding the contract for the construction of the Beaver Lake cofferdam, filter beds and reservoir, to Messrs. Walkeley, King & Casey at the amount of their tender therefor, $83,500.00, was unreasonable, improper and unlawful, the plaintiff having put in a tender fulfilling all the preliminaries and requirements called for to do the work for $66,943.00; and for an order restraining the defendants from executing or further proceeding with the said contract, or having any work done or money expended thereunder. In the advertisement calling for tenders there was the reservation that the lowest or any tender would not necessarily be accepted. Statement.

J. Stuart Yates, for the plaintiffs, cited *Turner* v. *Wright*, 6 Jur. N.S. 809; *New London* v. *Brainard*, 22 Connect. 552.

D. M. Eberts, A.-G., for the defendant.

McCREIGHT, J.: This is a motion for an injunction, and first for a declaration that the action of the City Council which resulted in awarding a contract to Messrs. Walkley, King & Casey, was unreasonable and improper; and then an injunction to restrain the Council from proceeding with such contract. Judgment.

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It seems that the tender of Haggerty, which is the lowest tender, was $66,943.00; John Dean, $88,800.00; and Walkley, King & Casey, $83,500.00. There is no suggestion of improper motive on the part of the Council; on the contrary, it appears from an affidavit of Storey read on behalf of the plaintiff, that the special committee submitted a report signed by the Mayor, Alderman Bragg, the Water Commissioner, and the Engineer in charge, to the effect that the tender of Messrs. Walkley, King & Casey was the lowest for which the work could be satisfactorily done.

The consideration of the report was deferred, and it was finally adopted by the Council. I have no power to interfere in such a case. The discretionary powers of the Council are not subject to judicial control, except where the power is exceeded or fraud imputed and shown or there is a manifest invasion of private rights. *Dillon on Corporations*, 4th Ed., Vol. I., Sec. 94, p. 152, and see further, Sec. 95, p. 154, where it is said that "generally judicial tribunals will not interfere with municipal corporations in their internal policy and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened."

Judgment.

The same authority states, at p. 1,015, section 833, that mandamus is held not to lie to enforce the award of a contract to the lowest tender.

Motion refused with costs.

IN THE MATTER OF THE HORSEFLY MINING CO.

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IN *Re* SUPREME COURT REFERENCE ACT, 1891.

"Court"—"Judge" — Reference to particular Judge—Whether authorized by statutory power to refer to the Supreme Court.

By the Supreme Court Reference Act, 1891, section 1, "The Lieutenant-Governor-in-Council may refer to the Supreme Court of British Columbia, or to a Divisional Court thereof, or to the Full Court, for hearing and consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same."

Under this Statute the Lieutenant-Governor-in-Council assumed to refer a certain question and issue "to the Honourable Mr. Justice DRAKE for decision and report."

On appeal to the Full Court from the report of Mr. Justice DRAKE:

Held, That there was no power to refer otherwise than to the Supreme Court, and that the proceedings appealed from before Mr. Justice DRAKE were *coram non judice*.

Statement.

APPEAL from a report of Mr. Justice DRAKE upon a reference to him as under the Supreme Court Reference Act, 1891.

A. L. Belyea, for the appeal.

E. V. Bodwell and *Lindley Crease, contra.*

Judgment of CREASE, J.

CREASE, J.: After hearing the arguments of counsel on both sides in the appeal submitted to us, and the documentary evidence before us, I am of opinion that from the terms of the reference under Order-in-Council decreeing reference to a Judge by name simply and not to "the Supreme Court," that a reference to such Judge and his decision thereunder are not a reference and decision made in conformity with the Supreme Court Reference Act, 1891, and are therefore null and of none effect as such.

Section 1 of that Act prescribes that "the Lieutenant-Governor-in-Council may refer to the Supreme Court of

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British Columbia, or a Divisional Court thereof, or to the Full Court, for hearing and consideration any matter which he thinks right to refer, and the Court shall thereupon hear and consider the same."

"Section 5. The opinion of the Court shall be deemed a judgment of the Court, and an appeal shall be therefrom as in the case of a judgment in an action."

Judgment of CREASE, J.

In all our Statutes and Rules of Court whenever the word "Court" is used, unless otherwise specially provided by statute, the Court referred to is intended, and not a Judge. In all these when the power conveyed is intended to be conferred on a Judge alone as well as on the Court, the words "Court or a Judge thereof" are employed. The other grounds of appeal were not argued, and there are no costs.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: I think that as the Statute of 1891, Cap. 5, Sec. 1, whilst referring to "the Supreme Court of British Columbia, or to a Divisional Court, thereof or to the Full Court," does not authorize reference to a Judge or such Judge as the Lieutenant-Governor-in-Council shall direct, therefore the matter could not be dealt with by DRAKE, J. I may add that the distinction between the Court and a Judge is carefully preserved in all Statutes and Rules relating to proceedings.

Judgment of WALKEM, J.

WALKEM, J.: By the Supreme Court Reference Act, 1891, Sec. 1, "the Lieutenant-Governor-in-Council may refer to the Supreme Court of British Columbia, or to a Divisional Court thereof, or to the Full Court, for hearing and consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same."

By Sec. 2, "The Court is to certify to the Lieutenant-Governor its opinion on the question referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action; and any Judge who differs from the opinion of the majority may,

in like manner, certify his opinion, with his reasons therefor, to the Lieutenant-Governor-in-Council.

By Sec. 5, "The opinion of the Court shall be deemed a judgment of the Court, and an appeal shall be therefrom as in the case of a judgment in an action."

The issues and questions referred to Mr. Justice DRAKE were those respecting the proposed renewal of a mining lease in favour of the Horsefly Mining Company, which renewal was opposed by certain free miners; and also some of the covenants in the subsisting lease, which were attacked on behalf of the same miners, on the alleged ground that they were *ultra vires*.

We are all of opinion that a discussion of the objections raised by the miners would be needless, as the reference made to Mr. Justice DRAKE was not made in accordance with the provisions of the first section of the Statute, for that section requires that the reference should be made to one of the three tribunals as designated, viz.: the Supreme Court of British Columbia, the Divisional Court, or the Full Court. Now, neither one of these tribunals is Mr. Justice DRAKE. He is a member or Judge of all of them, but the statute does not say that the reference may be made to any of the several Courts or to any Judge thereof. Moreover, section 2 of the Act contemplates that the Court whether a Supreme, Divisional, or Full Court, shall consist of three or more Judges, for it provides for the contingency of a difference of opinion occurring between them, by stating that any Judge who differs from the majority may certify his opinion and reasons therefor to the Lieutenant-Governor-in-Council.

Judgment of WALKEM, J.

The reference, consequently, conferred no jurisdiction upon Mr. Justice DRAKE, and his report therefore should, as an abortive judgment, be vacated. No order should be made as to costs.

Appeal allowed.

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LAI HOP v. JACKSON.

LAI HOP v. JACKSON.

Voluntary settlement—Creditors' suit—Settlor solvent at date of settlement—Liability incurred subsequently——13 Eliz. Cap. 5—Settlor engaging in hazardous undertaking.

Where a settlor, not indebted at the time, transfers the bulk of his property shortly before engaging in a trade of hazardous character, such settlement may be declared void as against subsequent creditors, and the burden of proof of *bona fides* of the settlement rests on the settlor—following *Mackay* v. *Douglas*, L.R. 14 Eq. 106.

ACTION by the plaintiff, a judgment creditor of the defendant, W. R. Jackson, to set aside a bill of sale from him to his wife, the defendant, Mary Jackson, as fraudulent and void as against the plaintiff, under 13 Elizabeth, Cap. 5. The bill of sale was made on the 14th of July, 1894, and duly registered within the twenty-one days, as required by the Bills of Sale Act. It covered the whole of the defendant's property, consisting of an undivided half-interest in a certain liquor saloon, and his household goods and effects. The plaintiff's judgment was obtained on the 18th day of October, 1894, the action being for the price of certain opium sold and delivered to him on the 16th day of August, 1894. The bill of sale in question was admittedly made without consideration. The action was tried before DRAKE, J., without a jury, on the 30th day of July, 1895.

Statement.

The defence was that the transfer was made when the defendant was in solvent circumstances and not in contemplation of insolvency, and was *bona fide* and without intent to defraud present or future creditors. The facts more fully appear from the judgment.

E. V. Bodwell, for the plaintiff.

A. L. Belyea, for the defendants.

Judgment.

DRAKE, J.: The plaintiffs are judgment creditors of W.

R. Jackson, by virtue of a judgment obtained on the 15th October, 1894.

The judgment was given in respect of a note drawn by two defendants in favour of the plaintiffs on the 16th August, 1894. The defendant, prior to 10th July, 1894, was one-half owner of the Delmonico Saloon, and the furniture and fixtures belonging to a hotel of that name. On that day he made a conveyance to his wife of all his interest therein, as well as of the furniture in his residence.

No consideration passed for these deeds, and they were not given as security for any money owing by him to his wife. The deeds were registered, and the defendant continued to carry on the business in the hotel and saloon without any change, and the house was, and still is, in his name.

He alleges that in all matters he was agent for his wife, but he never accounted to her for the returns of the business, or consulted her in respect of the supplies ordered and debts incurred.

Judgment.

The business of the saloon had been going behind since March, 1894, since which time there were no profits made. The defendant had no other property except some shares in the schooner Triumph, which also stood in his wife's name, and this interest was sold in January, 1895, and the proceeds used by the defendant in the business.

The defendant alleges that at the time he executed these deeds to his wife he only owed current accounts estimated at about $1,000.00, but that all the debts then owing have since been paid. The defendant apparently had opium transactions with others before the transaction which resulted in the judgment; but he had none with the plaintiffs previously.

These opium transactions were, in fact, smuggling opium into the United States, the profits of which were large and the risk great.

The defendant states that a man named Jocelyn asked

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him to advance the money to buy opium, which he refused, alleging he had not the cash, but said he would give his note at a month. Afterwards he went with Jocelyn to the plaintiffs and signed the note, but had no conversation with Lai Hop about it.

Man Chung, the Chinaman who carries on the business in the name of the plaintiffs, states that he wanted cash for the opium, and the defendant said he had the money but wanted it for fan-tan, a gambling game; and he further told him he was the owner of the saloon which the witness knew; and on the strength of these statements the plaintiffs took his note at thirty days. I am, on this evidence, inclined to place more credit on Man Chung's statement than that of the defendant.

The opium was handed to Jocelyn, and the defendant says he was to have half the profits, if any, for finding the money. This transaction, in my opinion, was a hazardous speculation, and outside the defendant's legitimate business.

Judgment.

I do not think it was actually in contemplation at the time of the assignment to the wife, but it was similar business to that which he had done on previous occasions, and which he might do again. I cannot distinguish this case from *Mackay* v. *Douglas*, L.R. 14 Eq. 106, where it was held that when a settlor takes the bulk of his property out of the reach of his creditors shortly before engaging in a trade of a hazardous character, such settlement may be set aside in a suit on behalf of creditors who became such after the settlement, although there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect; and the burden rests upon the settlor of shewing that he was in a position to make it.

It is not necessary to shew that the settlor contemplated becoming indebted at the time he made the agreement.

This case was followed in *Ex parte Russell*, 19 Ch. D. 588,

where LINDLEY, L.J., says that *Mackay* v. *Douglas* is one of the most valuable decisions we have on the statute of Elizabeth. In this case the defendant was not only carrying on a hazardous business, but was open to an offer to extend it, and he said to himself: "If I succeed I shall make a large sum for myself; and if I fail, my creditors will have to bear the loss." This is the very thing the statute of Elizabeth was meant to prevent.

In *Ex parte Mercer*, 17 Q.B.D. 290, on which the defendant relied, the facts were very different. At the time the defendant made the settlement, it was shown that he was able to pay his debts without the aid of the property comprised in the settlement. This fact alone would have a distinct bearing on the ultimate result.

Then the defendant had parted with everything he possessed, and could not pay one dollar of the debts due by the business he had been carrying on. He did pay them, but clearly not out of his own funds, but out of the property transferred to his wife. This transfer undoubtedly would hinder delay and defeat creditors if it was intended to have any binding effect. That it did not do so was not owing to the deed, but to the manner the defendant acted after the execution of the deed. It is enough if, at the date of the settlement, the settlor was not in a position actually to pay his creditors. The law will infer that the settlement was made to defeat them. *Taylor* v. *Coenen*, 1 Ch. D. 636; *Ridler* v. *Ridler*, 22 Ch. D. 74. I think the clear inference here is that the settlement was made to protect his property against creditors; it was made without consideration, and was not *bona fide*.

Judgment.

There must be judgment for the plaintiffs, with costs, to set aside both the bills of sale, subject, nevertheless, to the mortgage to the Hudson's Bay Company. As to that, there should be an account in case the parties cannot agree.

Judgment for plaintiff.

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Practice—Judgment in default of defence—Specially endorsed writ—Demand for statement of claim—Rules 73, 182 (c), 243—Costs.

The claim endorsed on the writ of summons was for a liquidated amount, but did not give the dates and items of credits. The defendant entered an appearance upon which was a note demanding a statement of claim, but did not serve on the plaintiff such demand as provided by S.C. Rule 182. The plaintiff signed judgment in default of a defence.

Upon application to set aside the judgment:

Held, per DRAKE, J., granting the application, that the writ was not specially endorsed as not shewing dates and items of goods sold or credits.

On appeal to the Divisional Court (Crease and McCreight, JJ.):

Held, reversing DRAKE, J., and allowing the appeal: That to obtain judgment in default of defence it is not necessary that the writ of summons should be specially endorsed.

Semble, An endorsement on a writ of summons claiming balance due on a promissory note giving particulars of the note but not of the credits, is a good special endorsement.

APPEAL by the plaintiff Mason, executrix of Joseph Mason, from an order of DRAKE, J., setting aside the judgment signed by her in default of defence.

Statement.

The writ of summons was endorsed with a claim for $7,103.71, being for balance of principal and interest due on a promissory note, giving particulars, and for "balance for mining supplies sold and delivered due at this date, as per account rendered," without giving any items; credit was given for two payments of $1,000.00 and $5.00, but the dates of such payments were not given, and also for amount of "contra account, $369.30," without giving any dates or items, and for "Alabama Company's account, $109.00," without specifying what the account was for.

The defendant, on March 5th, 1895, entered an appearance, the memorandum thereof containing a note requiring a statement of claim, but did not serve the plaintiff with

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any notice requiring a statement of claim; and on March 27th, 1895, the plaintiff, without delivering a statement of claim, signed the judgment. On April 26th, defendant took out a summons to set aside the judgment, and the application was, on April 29th, 1895, heard before DRAKE, J., who gave the folowing judgment:

DRAKE, J.: The plaintiff, in her representative capacity, sues Mrs. Nason, in her representative character, for balance due on a promissory note due August, 1885, and also for goods sold and delivered. Mason died in 1890. The claim alleges a payment in 1891 of $5.00 on the note. This would be after the death and may or may not be sufficient to avoid the Statute of Limitations. The claim for goods sold and delivered is entered July 29th, 1891, "To balance of account due on this date," and credit is given August 2nd, by two other accounts. On this latter claim it is not clear that the supplies were furnished to deceased Nason in his lifetime or to the executrix in her personal capacity. If the latter, although the action would lie the claim should shew the distinction.

Judgment of DRAKE, J.

The dates and items of goods sold should be given in every case in order that the defendant may be in a position to know what the claim actually is, in order to admit or deny liability, *Parpaite Freres* v. *Dickinson*, 38 L.T. 178; *Smith* v. *Wilson*, 5 C.P.D. 25; *Walker* v. *Hicks*, 3 Q.B.D. 8. When the defendant was sued on balance due on a promissory note he was held entitled to particulars of payment, *Manchester Advance, &c., Company* v. *Walton*, 68 L.T. 167. The defendant entered an appearance and demanded a statement of claim, notwithstanding judgment was entered for want of defence.

I think the writ is not a specially endorsed writ and the judgment must be set aside with leave to the defendant to defend. Costs to be defendant's costs in any event.

Judgment set aside.

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From this judgment the plaintiff appealed to the Divisional Court. The grounds of appeal were: That the writ was specially endorsed; that no statement of claim having been demanded the plaintiff was entitled to sign judgment; that the plaintiff had been guilty of *laches* and had acquiesced in the judgment; that the defendant had not properly appeared to the writ of summons; and that in any event the judgment for the claim on the promissory note should stand.

The appeal was argued before CREASE and MCCREIGHT, JJ., on the 12th of May, 1895. Judgment was rendered on the 23rd of July, 1895.

L. P. Duff, for the appeal: The writ is specially endorsed. *Aston* v. *Hurwitz*, 41 L.T. 521; *Bickers* v. *Speight*, 22 Q.B.D. 7; *Supreme Court Rules, Appendix C. Sec. IV.*; *Myatt* v. *Green*, 13 M. & W. 377; *Hobson* v. *Middleton*, 6 B. & C. 295; *Miller* v. *Keane*, 24 L. R. Ir. 49; *Iggulden* v. *Terson*, 2 D.P.C. 277; *Manchester* v. *Walton* 5 R. 147. No demand for a statement of claim having been served plaintiff was entitled to sign judgment in default of defence, *Supreme Court Rules* 182–196–242–246 Ann. Prac. 1895, pp. 515–225–311; *Odgers on Pleading*, Ed. 1892, p. 210; *Bullen & Leake*, Ed. 1885, Pt. II. pp. 2–37; *Smith* v. *Wilson*, 4 C.P.D. 392; *Bissett* v. *Jones*, 32 Ch. D. 635.

Argument.

W. J. Taylor, contra: The writ is not specially endorsed and therefore not a statement of claim under Order XX., Rule 1, Ann. Prac. 1895, p. 507. Particulars of dates and items are indispensable, *Manchester Advance Company* v. *Walton*, 68 L.T. 167; *Parpaite Freres* v. *Dickinson*, 38 L.T. 178; *Walker* v. *Hicks*, 3 Q.B.D. 8; defendant is entitled also to particulars of a lump sum credit, *Godden* v. *Corsten*, 28 W.R. 305. As a matter of practice a demand for a statement of claim is seldom served, the plaintiff has to search appearance, and the note requiring a statement of claim endorsed on the appearance by the defendant is sufficient notice of the demand.

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CREASE, J.: This is an appeal from the order of Mr. Justice DRAKE, of 29th April, 1895, setting aside the judgment obtained by plaintiff on 27th March, 1895, and all subsequent proceedings thereunder, on the ground that the writ of summons in this action was not specially endorsed. The action in this case was by plaintiff, executrix of Mason, against the defendant, executrix of Nason, for $7,103.71 balance due on a promissory note made by Nason on 12th August, 1885, for $3,846.85 and interest at one per cent. per month until paid, of which Mason at his death was the lawful holder for value.

The amounts due on this note and certain credits on account, year by year from 1885 down, and an account for mining supplies sold and delivered by Mason to Nason in July, 1891, and two credits thereon, were endorsed on the writ. There was no separate statement of claim.

There were two points argued with much persistence and pressure of authority by defendant's counsel, which call for comment now, but cannot I think be sustained as invalidating Mrs. Mason's judgment. These were: (1) That the writ is not a specially endorsed writ and that the validity of the judgment is dependent on that. (2) That defendant ought to have received a statement of claim under Order XX. Rule 1. As to the first point, an examination of the Supreme Court Rules will be a sufficient answer.

Judgment of CREASE, J.

Take first, Order XIV. S.C. Rule 83. That shews the course to be pursued under the summary proceeding for obtaining final judgment on a specially endorsed writ. It necessitates an application to a Judge (on affidavit verifying the cause of action and the amount, and that affiant believes there is no defence) for leave to sign final judgment for the amount so endorsed with interest and costs. That is evidently not the course adopted here.

Supreme Court Rule 73, which treats of "Default of appearance," is applicable where the writ of summons is not confined to specially endorsed writs (as under Order

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XIV.) but applies where the writ is "endorsed for a liquidated demand whether specially or otherwise," and therefore is not confined to writs specially endorsed. Where the plaintiff's claim can be considered as only for "a debt or liquidated demand," like the old action for debt, before the Common Law Procedure Act of 1892, sections 25–7, introduced the summary proceedings for final judgment on a specially endorsed writ under Rule 15, which I have described, then Rule 242 of Order XXVII. will apply.

A subsequent Rule (246) deals with the case where the plaintiff's claim is for "a debt or liquidated demand and for detention of goods and pecuniary damages or pecuniary damages only."

This rule cannot possibly be taken to mean that the words "a debt or liquidated demand" are to be confined to the "debt or liquidated demand" and nothing else which is required of a specially endorsed writ under Order III., Rule 15, where "the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant."

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From a consideration of these rules and the facts of this case, I think judgment was rightly signed in default of pleading, and that it is unimportant whether the endorsement in the present case is a good special endorsement or not. This construction is sustained by the practice in England under identically the same rules (Annual Practice, 1894, 225).

After declaring that special endorsement is a condition precedent to judgment in default of defense, where defendant appears and demands statement of claim, and plaintiff relies solely upon the endorsement of the writ, and Supreme Court Rule 182, it was held in *Bissett* v. *Jones*, 32 Ch. D. 635, that special endorsement is not otherwise a condition precedent to judgment in default of pleading under Order XXVII., Rules 2–3–6–7–9, which are the same as our own rules. Although in this case a good special endorsement was not necessary, there are authorities for considering that

the present endorsement was sufficient, had one been required in the case, *Aston* v. *Hurwitz*, 41 L.T. 521, and this notwithstanding the insertion of the credits in the last items after the account for goods delivered, *Hobson* v. *Middleton*, 6 B. & C. 295.

The second point which was strongly contested by the learned counsel against the appeal was plaintiff's allegations in the third and seventh grounds of appeal, viz., that "no statement of claim having been demanded in accordance with the Rules of Court in that behalf, the plaintiff was entitled to judgment," and "the defendant not having appeared to the writ of summons, in accordance with the rules in that behalf, the plaintiff was entitled to enter judgment in default of appearance."

The facts were proved by the affidavit of *Gordon Hunter*, of 6th May, 1895. In opposing plaintiff's view of the law on the judgment, and in considering himself entitled to set the judgment aside, defendant's counsel is misled by his recollections of what the old law was under Order XX., Rule 1 (b), which required a statement of claim to be delivered rather than what it now is.

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Under the old rules of 1880 Order XX., Rule 1 (a), it was established that "if the defendant shall not state that he does not require the delivery of a statement of claim"—that is, if the defendant said nothing—the plaintiff "shall deliver a statement of claim." But the new Rules of Court, 1890, Order XXI., Rule 1 (a), S.C.R. 182, have established an exactly opposite rule, the object being to save expense, for that says "subject to the provisions of Rule 81," etc., "no statement of claim need be delivered unless the defendant at the time of entering an appearance, or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor that he requires a statement of claim to be delivered." So now defendant's forgetfulness or neglect to deliver a written notice under Order XX., Rule 1 (b), does not relieve the plaintiff from delivering a statement of

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claim, and if the defendant wants one he must now give notice to the plaintiff or his solicitor that he does require it; and it must be a distinct, separate writing.

This was not done by the defendant here, so she has to stand by the consequences of the omission. The object of the new rules (Order XX., Rule 1 (a), *et sequentes*) which was declared, I think, in *Anlaby* v. *Prætorius*, 20 Q.B.D. 764 (which settled that the proper endorsement on the writ was of itself a statement of claim), was to avoid running up costs by having unnecessary papers, and so Order XX., Rule 1 (e) to save all expense consistent with the interests of justice.

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For these reasons it is clear that the judgment was duly and properly signed. But since the Judge's order setting aside that judgment was made, a new set of considerations has arisen.

The learned Judge then dealt with an affidavit of merits, upon which the judgment was set aside upon terms.

Judgment of McCREIGHT, J.

McCREIGHT, J.: In this case, as Mr. Justice DRAKE observes, the plaintiff, in her representative capacity, sues Mrs. Nason, also in her representative character, for balance due on a promissory note which fell due August, 1885, and for goods sold, etc. It has been contended that the writ is not a specially endorsed writ, and cases were relied upon to prove that proposition; but I think the validity of the judgment by no means depends upon that, and that perusal of the Supreme Court Rules shews this to be so. A specially endorsed writ and the summary proceeding by its use were introduced by the Common Law Procedure Act, 1852, sections 25–27; see *Aston* v. *Hurwitz*, 41 L.T. 521. It pre-supposes not that the defendant is in default through not delivering a defence, and so judgment signed as in this case, under Rule 242, but that the plaintiff having his tackle in good order, to use an expression of Mr. Justice WILLES, under Rule 15 invokes Rule 83 by applying to a Judge for

liberty to sign final judgment. Order XIII., Rule 73, dealing with default of appearance, refers to a writ of summons being "endorsed for a liquidated demand, whether specially endorsed or otherwise," and therefore not restricted to specially endorsed writs. Order XXVII., dealing with "default of pleading," refers to a case of the plaintiff's claim being "only for a debt or liquidated demand." Such claims were the subject of the old action of debt, and, of course, long before the C.L.P. Act of 1852, when special endorsements were first suggested. Rule 246 deals with the case of the plaintiff's claim being "for a debt or liquidated demand, and also for detention of goods and pecuniary damages," etc., etc. In such case "debt or liquidated demand" cannot possibly be restricted to a good, specially endorsed writ under Rule 15, which deals only with the case "where the plaintiff seeks merely to recover a debt or liquidated demand in money," etc., etc., as was strikingly illustrated by the cases in the Court of Appeal, *Ryley* v. *Master; Sheba Gold Mining Company* v. *Trubshawe; Wilks* v. *Wood; London & Universal Bank* v. *Clancarty;* and *Lawrence* v. *Willcocks* (1892) 1 Q.B., from pp. 674 to 702. The construction placed upon the similar English rules is plain to the effect that judgment might be signed in default of pleading, as in the present case; see Annual Practice, 1895, p. 225, where it is said that "special endorsement is not otherwise a condition precedent to judgment in default of pleading," referring to Order XXVII., Rules 2–3–6–7–9, which are identical with our Order XXVII., Rules 2–3–6–7–9, and p. 515 of the Annual Practice, 1895, is to the same effect, and see pp. 250–505 of the Annual Practice, 1894, shewing that no change of opinion has taken place during those years. It seems to me, therefore, quite immaterial whether the endorsement is a good special endorsement or not. But I may say that I am inclined to think that it is good; see *Aston* v. *Hurwitz*, 41 L.T. 521; and see Schedule A, in C.L.P. Act, 1852, No. 4, and S.C.

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R. App. C. Sec. IV., and as to the contra accounts of August 2nd, 1891, the items must presumably be more within the knowledge of the defendant than the plaintiff, who so need not state them ; see *per* BAYLEY, J., in *Hobson* v. *Middleton*, 6 B. & C. at p. 302. But Mr. *Taylor*, for the defence, argued that the defendant under Order XX., Rule 1 (b) was entitled to receive a statement of claim. Following, however, the well known canon of construction which requires consideration of the old law in the interpretation of the new, I can by no means accede to this contention ; Order XXI. of the Rules of 1880, Rule 1 (a), did state that "if the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall," etc., etc. In other words, mere silence on the part of the defendant did not relieve the plaintiff from the duty to deliver a statement of claim. But the corresponding provision of the Rules of 1890, Order XX., Rule 1 (b), is very different, for it says : "Subject to the provisions of Rule 81," etc., etc., "no statement of claim need be delivered unless the defendant at the time of entering appearance, or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor that he requires a statement of claim to be delivered." In other words, the defendant's silence or omission to notify the plaintiff or his solicitor in writing, under Order XX., Rule 1 (b), now does relieve him (the plaintiff) from delivering a statement of claim ; and if the defendant requires it he must now give notice in writing to the plaintiff, etc., that he requires it. The affidavit of *G. Hunter*, sworn 6th of May, shews distinctly that this has not been done. The forms in the appendix illustrate, if illustration is required, the meaning of the Rules and Appendix A, Part II., No. 1 and No. 2, entitled, "Memorandum of Appearance in General" and "Notice of Entry of Appearance" respectively, contrast in a way which cannot be confused with Appendix A, Form No. 6, entitled "Memorandum of Appearance," which the defendant has

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adopted in the present case. The policy of the Rules, especially of those of 1890, is to diminish expense (of course consistently with efficient administration of justice) as much as possible; see Order XX, Rule 1 (e), and the above rules and forms of 1890, contrasted with those of 1880, seem to point in that direction.

I think for the above reasons, contrary to the judgment of Mr. Justice DRAKE, that judgment was regularly signed.

Appeal allowed.

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Mineral laws—Precious metals—Whether included in the Statutory grant to E. & N. Railway Company—47 Vic. Cap. 14, section 3—Right of Free Miners to enter on private property for mining purposes—Crown Lands Act. 1888, Sec. 95.

A statutory grant of lands "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder," does not include the precious metals.

The interpretation of general terms in a statute cannot be assisted by reference to the interpretation clause in another statute by which the same terms are in it given a special construction.

Under Sec. 95 of the Crown Lands Act, 1888, all lands in the Province, both public and private, are subject to the right of entry by free miners to search for the precious metals, subject to the conditions precedent contained in the Placer Mining Act, 1891, Cap. 26.

MOTION for injunction. The facts fully appear in the judgment.

Theodore Davie, A.-G., for the plaintiff: The precious Argument.

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metals in, upon and under the public lands are not incidents of the lands but belong to the Crown, and a grant of the lands, without further words expressly conveying the precious metals *eo nomine*, does not pass them to the grantee, *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*, 14 App. Cas. 295; *Woolley* v. *The Attorney-General of Victoria*, 2 App. Cas. 163: the words "mines, minerals and substances whatsoever," mean mines of the kind of substances which pass with the lands or are referred to in the grant.

The plaintiff had a right to enter on the lands of the defendants to mine for the precious metals under C.S.B.C. 1888, Cap. 66, Sec. 95 (a).

C. E. Pooley, Q.C., contra: Ores, minerals, and substances whatsoever, include gold ore. As to the meaning of minerals, see the interpretation clauses in the Mineral Acts, 1891–4.

DRAKE, J.: This is a motion by the plaintiff to restrain the defendants from interfering with the plaintiff in his alleged right to mine for gold in a certain placer claim in Alberni District known as Blue Ruin claim, and by consent of both parties the motion was turned into a motion for judgment.

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On 21st June, 1894, the plaintiff, a free miner, located a claim on China Creek, Alberni, and duly recorded the same with the mining recorder at Alberni, and all necessary preliminaries were complied with to enable the plaintiff to prosecute his work. On the 23rd June, 1894, the plaintiff was summarily ejected by the defendants.

NOTE.—(a) Sec. 95. Nothing herein contained shall exclude free miners from entering upon any land in this Province and searching for and working minerals: provided, that such free miner, prior to so doing, shall give full satisfaction or adequate security, to the satisfaction of the Commissioner, to the pre-emptor or tenant in fee simple, for any loss or damage he may sustain by reason thereof.

The defendants case is, that by Act 47 Vic. Cap. 14, Sec. 3, the Legislature of British Columbia granted certain lands in Vancouver Island, which included the land in question, to the Crown as represented by the Dominion Government, to aid in the construction of the Esquimalt and Nanaimo Railway, and that on the 21st April, 1888, the Crown, by deed, granted to the defendant all the lands granted to them by the Provincial Legislature, and claim that by the terms of the deed and Act, they are entitled to all the precious metals in or under the said lands.

The statute in question was passed to carry out an agreement which had been arrived at between the Dominion and Provincial Governments, and was confirmed by a Dominion Statute of 47 Vic. Cap. 6.

By the Provincial Act, 47 Vic. Cap. 14, Sec. 3, the land granted to the Dominion is defined by metes and bounds, and is stated to include all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever. The grant from the Crown to the defendants uses the same terms as to the land and its appurtenances as that contained in 47 Vic. Cap. 14, Sec. 3.

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The Attorney-General, on behalf of the plaintiff, relies on the judgment of the Privy Council in the case of *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*, 14 App. Cas. 294.

Mr. *Pooley*, for the defendant, argues that although gold and silver are not expressly mentioned, yet they are included in the term "minerals and substances whatsoever," and points out that the term "lands" would have been quite sufficient to pass everything but the precious metals; that the terms used sufficiently indicate an intention to include both gold and silver, especially as in the then existing and antecedent legislation of the Province the term "mineral" was used to define gold and silver.

By the gold mining ordinance of 1867, Cap. 123 of the Consolidated Acts of 1877, the term "mine" is stated to

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mean any vein, stratum or natural bed of auriferous earth, and in the Mineral Act, Cap. 82, of the Consolidated Statutes of 1888, Sec. 2, "minerals" include all minerals, precious or base (other than coal) found in veins or lodes, or rock in place, and whether such minerals are found separately or in combination with each other. And by the Crown Lands Act, Cap. 98, of the Consolidated Acts, 1877, Sec. 80, and Cap. 66 of the Consolidated Acts of 1888, Secs. 95–6, it is enacted that nothing therein contained should be construed so as to interfere with the rights of miners under the Mineral Act or subsequent Acts relating to gold mining.

The use of a general term to indicate the precious metals in these statutes does not in my opinion extend the meaning of the term minerals when used in any other Act. The interpretation clause in these Acts is merely a dictionary to define particular expressions in the Acts to which it is attached, and unless there is any clause incorporating the Mineral Act in the statute in question in this case, I do not consider that I can give to the terms used any other meaning than their ordinary legal signification. If I might hazard a conjecture why the special terms which are used in the present Act were inserted, it is possible that the parties interested in the agreement did not desire to have their right to coal and coal oil questioned, as coal is expressly excepted in the Mineral Act and does not pass under the term "mineral" there.

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Gold or silver mines, as Lord WATSON says in the case of *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*, until they have been aptly severed from the title of the Crown and vested in the subject, are not regarded as *partes soli* or as incidents of the land in which they are found. The question is, have these royal mines been severed from the title of the Crown by the language used.

Here, under the terms "mines," "minerals," "substances," they would not pass. The statute in question commences

with coal and coal oil, indicating in my opinion all minerals and mines which would pass under the term of "lands" in ordinary cases in a grant to the subject, and has no reference to mines royal.

A further question arises in this motion, and that is, have the defendants the right to prevent the extraction of gold or silver from their lands, owned and occupied by them, by free miners? The rights of miners to enter upon land for mining purposes is apparently not limited to Crown lands. See Secs. 11–12, Placer Mining Act, 1891, Cap. 26.

Independent of statutory authority, no person has a right to trespass on private lands, but Sec. 95 of the Crown Lands Act, 1888, authorizes free miners to enter upon any lands in the Province to search for and work gold and silver, following in substance the language used in the Act existing at the date of the grant of these lands to the Crown.

These lands, in my opinion, are therefore subject to the right of entry by free miners to search for the precious metals, subject to the conditions precedent contained in Sec. 11 of the Placer Mining Act, 1891, Cap. 26, which conditions both parties admit have been complied with.

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I therefore give judgment for the plaintiff with costs.

Judgment for plaintiff.

From this judgment the defendants appealed to the Full Court, and the appeal was argued before CREASE, MCCREIGHT and WALKEM, JJ., on the 10th day of May, 1895. Judgment was delivered on the 7th day of August, 1895.

Hon. *C. E. Pooley, Q.C.*, for the appellants.

Hon. *D. M. Eberts, A.-G., contra.*

Judgment of CREASE J.

CREASE, J.: This is a test case which puts in issue the exclusive rights of the E. & N. Railway Company to the precious metals in what is known as the E. & N. or Island Railway belt.

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Briefly stated, the facts are as follows: The plaintiff, William Herbert Bainbridge, a free miner under the British Columbia Gold Mining Acts, having duly fulfilled all the preliminary requirements of the law for the purpose, and having taken up, recorded and worked a gold mining claim at Alberni, called the Blue Ruin placer claim, within the said belt, was ejected by the defendant Company as a trespasser.

Thereupon he obtained an injunction against them, which, by consent was turned into a motion for judgment before the Supreme Court.

Mr. Justice DRAKE, at the hearing on the 2nd October, 1894, by his judgment, now before us on appeal, established the two questions raised in the case in favour of the plaintiff:

1. That the precious metals, gold and silver, had not been conveyed by the Crown to the Company; and 2. That such being the fact, a free miner, on fulfilling the ordinary statutory conditions in that behalf, had the same right to mine and work a placer claim for gold within that belt, as he had in other private lands in the Province.

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It is conceded that the title to the lands and minerals within the Island Railway belt depends on the statutes, local and Dominion, and the Crown grant affecting it, cited *in extenso* on both sides, and set out in the appeal book. And the two points at issue depend on the construction which the law places on those authorities.

It is admitted also that the plaintiff's mining claim is situated within the Island Railway belt, and included in the lands, the fee in which is granted to the defendant Company.

The Railway Company claim that the Province, by the B.C. Act, 47 Vic. Cap. 14, 1884, ratified and confirmed by the Dominion Act, 47 Vic. Cap. 6, 1884, and the Crown grant from the Dominion to the Company, 1887, each,

passed the same public lands and all mines and minerals whatsoever, in the same language, which also included the right to the precious metals.

They further maintain that, by implication, such of the legislation of B.C. as to private lands, before and at that time, which deals with gold mines, points with sufficient clearness to the interpretation, which includes the precious metals in their grant, and claim a decision in their favour.

But an examination into the actual wording of the statutes and of the grant, and the settled construction which the law places upon the wording employed in them, do not bear out that conclusion.

The 47 Vic. Cap. 14, B.C. (the Act relating to the Island Railway, the graving dock and the railway lands of British Columbia), and the grant of April 21, 1887, made in pursuance thereof, after granting the lands of the railway belt to the Railway Company, granted also "all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on, or under such lands" unto and to the use of the said Company, its successors and assigns "forever," subject to certain conditions and stipulations, which do not affect the present case.

These words, "mines, minerals and substances," it has been long settled, are not "precise and apt" to grant with them a grant of the royal mines of gold and silver. From the earliest time, in an unbroken chain down to the present, nothing less than unmistakable language conveying the gold and silver is allowed by law to pass these royal mines and metals. The law on the subject in England is the law in British Columbia, and has been so, at least, since 1858.

As far back as the time of Elizabeth, and before (see Plowden, 310–33) it was settled that "nothing of prerogative can pass without express and determinate words," and since then the precious metals have always been recognized as a part of the prerogative rights of the Crown; and the

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above rule for their transmission has ever since then been strictly observed and handed down.

In the case reported in 1 Plowden, 336 (a) *Re Earl of Northumberland's mines*, "all the Justices and Barons agreed that a mine royal, whether of base metals containing gold and silver, or of pure gold and silver, only may, by grant of the King, be severed from the Crown, etc., by apt and precise words."

They also agreed that "the words in the letters patent conveying 'land' and 'mines' should be taken to common intent, and shall not make the ores royal, or the mines royal to pass, to convey which there ought to be in the patent precise words expressing them." And there are none such here.

Nay—even more strongly—for he says "that in many cases the construction of law may, for the benefit of the King, be against the expressed letters of the grant; as, when the King granteth the Manor of Dale, and all manner of underwoods, mines and quarries in the same; yet the mines of gold and silver shall not passe."

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And the other high authorities Davis 576, Littleton 116, Hobart 243 all express themselves on the point to the same effect.

In a later case (1877), before the Court, *Woolley* v. *Attorney-General of Victoria*, 2 App. Cas. 163, in an appeal before the Privy Council, the same rule of construction is emphatically confirmed.

There the question was whether upon the sale of waste lands of the Crown, the gold which might be found therein passed to the purchasers, there being no words in the grant of the Crown expressly granting it.

Sir James COLVILE, delivering the judgment of the Court, speaking of the rule in the "Mines Case" I have referred to (1 Plowden 336), laid down that "it is perfectly clear that ever since that decision it has been settled law in England that the prerogative right of the Crown to gold and silver

found in mines will not pass under a grant from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass."

In another part of the same judgment the same learned Judge says: "There is no reference to the rights of the Crown in the precious metals to be found under the soil; and it is a recognized principle of the construction of statutes that the prerogative right of the Crown can be affected only by express words or necessary implication."

In the case under citation it was conceded that "this rule must be taken to have been introduced as part of the common law of England into the colony of Victoria."

And it is not disputed that the same rule has been introduced and obtained here as part of the common law of England in British Columbia.

In a case of considerable importance heard before the Privy Council in 1889, *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*, 14 App. Cas. 295, the question raised was whether the grant by the Province of certain public lands to the Dominion—the Canadian Pacific Railway belt—where the expression "lands" admittedly carried with it the baser metals, "mines and minerals," and I might add for this case "substances," as incidents of land also carried with it the right to the precious metals.

Lord WATSON, in a long and well considered judgment reviewing all the authorities on the question from Plowden downward, delivered the decision of the Court that "*jura regalia*" (of which the right to gold and silver is one) "are not accessories of land." And he declared that the precious metals within that railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia.

With regard to the Company's contention that the use and interpretation of the words "mines and minerals" in several British Columbia Acts passed before, as well as at

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the time of the grant, indicated the intention of the Crown that the words "all mines and minerals whatsoever" in the grant shall include "gold and silver," a very short examination, however, of these shews not only that such could not have been the case, but that the B.C. House of Assembly has been anxious, if only for the sake of the miners themselves, in all their legislation and Crown grants, whether relating to land or mines, carefully to give public notice in them that the Crown retains intact all its prerogatives with regard to the precious metals.

In 47 Vic. Cap. 10 Sections 1–61–69 (the B.C. Mineral Act) and amending Acts, under which the plaintiff claims—and which was passed at the same session as the Island Railway Act—the word "mineral" is declared to mean and include "all minerals precious and base (other than coal) found in veins, or lodes, or rock in place," and the Crown grant under it is declared "to pass and transfer the right to all metals precious or base (other than coal) found in veins, lodes, or rock in place."

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But this only refers to the rights which the Legislature intended to be conveyed to gold miners under the particular Acts in which such special sections occur.

And shews that when they wished the precious metals in any case to pass, having the power to do so, the Legislature knew very well how to do it, and invariably used "apt and precise" and clear words to effect that object.

Whereas, in this case, they did not do so; the only inference is that they omitted to do so designedly, and that their real intention was that by the words used in the railway grant the precious metals should not pass.

The same observations and reasoning apply to the B.C. Acts referring to the royal prerogatives, passed before the railway grant, such as the Mineral Acts and Land Acts, and the forms of Crown grants attached to them.

Throughout, the Legislature seems to have taken as a matter of course the long-established rule that the Crown

only expresses its intention to part with the precious metals by apt and precise words, the meaning of which cannot be mistaken.

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I am therefore of opinion that the judgment of Mr. Justice DRAKE must be supported, and the appeal dismissed with costs.

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McCREIGHT, J.: The law seems to be so thoroughly settled to the effect that mines of gold and silver will not pass by a grant from the Crown without express words granting them (*Woolley* v. *Attorney-General of Victoria*, 2 App. Cas. 163, and see the distinct admission of the counsel for the appellant at page 165, whilst arguing before the Judicial Committee to the above effect, and the judgment of the Court at page 166) that it would not be right to dwell on all the authorities to the same effect, such as *Earl of Northumberland's mines*, Plowden 310, where it is said that "nothing prerogative can pass without express and determinate words," with which agree Abert's reports 243, Davis 57 B, Lyttleton's reports 116, Mayor 175, and see *Woolley* v. *Attorney-General of Victoria*, 2 App. Cas., at p. 167. The Judicial Committee say in their judgment at page 166 that the point is "simply whether upon the sales of waste lands of the Crown, etc., the gold that might be found in such lands passed to the purchasers, there being no words in the grant from the Crown expressly granting it. Now, whatever may be the reasons assigned in the case in Plowden for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that position has been settled law in England, that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown unless by apt and precise words the intention of the grant is expressed it shall pass. It was fairly stated by the learned counsel for the appellant that this rule must be taken to have been introduced as part of the

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common law of England into the colony of Victoria." See also *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295. These authorities seem to me to leave no doubt that under 47 Vic., Cap. 14, Sec. 3, B.C., the words "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever therein, thereupon and thereunder," do not pass gold and silver, that is the precious metals. No doubt the Local Legislature might have, by apt and express words, altered the law in this respect, but as the Judicial Committee say in *Woolley* v. *Attorney-General of Victoria*, "it is a regular principle of the construction of statutes that the prerogative rights of the Crown can be conveyed only by express words or necessary implication;" and when we come to look at the British Columbia Acts, it is apparent the Legislature have always been anxious to retain unimpaired the rights of free miners, or, to adopt the grave and respectful language of the law, the prerogative rights of the Crown in respect of the precious metals; and with a view, no doubt, to prevent misapprehension, care has always been taken that in Crown grants to individuals (Cap. 16, 47 Vic.) notice of the retention by the Crown of its prerogatives in reference to precious metals should be inserted. Again, in 47 Vic. Cap. 10 we find the word "mineral" included all minerals, precious or base, other than coal found in veins or lodes. By Sec. 61 the word mineral as used in this Act shall mean and include all minerals, precious and base, other than coal found in veins or lodes. Again, in Sec. 69 we find, "Such Crown grant shall be deemed to transfer and pass the right to all minerals, precious or base, excepting coal," etc., and the same expression is to be found in the form of Crown grant, page 39. These Acts were passed during the same session as that in which the Act relating to the Island Railway was passed, and show that the Legislature knew well that the precious metals could only be conveyed by apt and precise words, and were certainly far

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from showing any disposition to alter the law in that respect, or in any way to affect the prerogatives of the Crown in reference to precious metals. Not merely do these contemporaneous Acts of the Province shew this, but antecedent legislation is in the same direction. See the form of Crown grant in the Mineral Ordinance of 1869, and Secs. 80 and 81 of the Land Act of 1875, continued or re-enacted by the Land Act of 1884, and see form No. 7 of Crown grant in the schedule reserving to free miners the right to enter on land alienated by the Crown and search therein for precious metals.

For these reasons I think the judgment of Mr. Justice DRAKE is correct, and the appeal should be dismissed with costs.

WALKEM, J.: By Sec. 3, Cap. 14 of the statutes of 1884, the Provincial Legislature "granted" (I am quoting the words) "to the Dominion Government for the purpose of constructing, and to aid in the construction of, a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable * * * all that piece or parcel of land situate in Vancouver Island, and described as follows" (here follows the description), "and including all coal, coal oil, ore, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder." In furtherance of the same project, the Dominion Government, subsequently by patent from the Crown, granted the same tract of land and inclusive substances to the Esquimalt & Nanaimo Railway Company, the now appellants in this action. Briefly stated, the question we have to determine is whether the words "all mines, minerals and substances whatsoever," etc., had the effect of divesting the Crown as represented by the Province of its prerogative right to the precious metals. In *Woolley* v. *Attorney-General of Victoria*, 2 App. Cas. 163, the Judicial Committee, after referring to the *Earl of Northum-*

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berland's mines case, 1 Plowden 310, makes the following observation: "It is perfectly true that ever since that decision it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown unless, by apt and precise words, the intention of the Crown be expressed that it shall pass." The words "all mines, minerals and substances whatsoever thereupon, therein and thereunder," are certainly very comprehensive, and in their ordinary sense would probably be deemed to include precious as well as base metals; but in the present instance their meaning is controlled and limited to base metals by the several words which precede them, in accordance with the maxim *noscitur a sociis;* and consequently that meaning cannot be expanded so as to include prerogative rights or *jura regalia*, which admittedly do not exist in respect of the grant of the coal, coal oil, lands, beds of clay, and stone, slate and marble quarries mentioned.

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It seems to me that the Legislature, by its very act of minutely particularizing the substances mentioned, designedly meant to exclude the precious metals. Had it been otherwise, the term precious metal, or perhaps royalties (as in Sec. 109 of the B.N.A. Act), or some equivalent term would have been found in the section. Nor, in my opinion, was the omission to include the precious metals an oversight on the part of the Legislature, for during the same session it had before it a measure in amendment of what is erroneously known as the Gold Mining Act, 1882, in which "mines" and "minerals" are respectively defined, in substance, as auriferous earth or rock, or lodes or veins containing any minerals excepting coal. (Sec. 45 Vic. Cap. 8; 46 Vic. Cap. 19). While thus careful to define these words in the general mineral Acts, it has left them to be defined in the present instance according to the well known rule I have referred to. In any event, there are no apt or precise words in the section to shew that the Legislature intended to part

with the prerogative rights of the Crown, and even if that were doubtful, that fact of itself would be in favour of the Province, whom the plaintiff, as a "free miner," licensed by the Government to mine for gold, may be said to vicariously represent. In *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*, 14 App. Cas. 295, Lord WATSON observes that "gold and silver mines, until they have been aptly severed from the title of the Crown and vested in a subject, are not regarded as *partis soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land and the base metals which it contains stands upon a different title from that to which its right to the precious metals must be ascribed." This judgment may, in my humble opinion, be said to strengthen that given in the case of *Wooley* v. *The Attorney-General of Victoria*, first cited. The appeal must be dismissed with costs.

Appeal dismissed with costs.

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Practice—Arrest—Capias—C.S.B.C. Cap. 42, Secs. 7-9-10—Affidavit to hold to bail—Writ of execution—Præcipe for—Necessity of—Rules 463-67-950—Judgment—Right of Court to reopen before order issued.

Per DAVIE, C.J.: Rule 463, providing "No writ of execution shall be issued without the party issuing it, or his solicitor, fyling a *præcipe* for that purpose," is imperative, and plaintiff was not absolved from compliance by tendering a *præcipe* for a writ of *ca. sa.* to the officer of the Court and accepting his statement that it was not necessary.

Under section 7 of the Execution Act the provisions of 1 & 2 Vic. (Imp.) govern the form of the affidavit for *ca. re.*, and an affidavit to hold defendant to bail to answer an action for an ordinary debt is sufficient without the allegations required by section 10 in an affidavit for a *ca. sa.*

Sec. 9 of the Act, providing that "No person shall be arrested or held to bail for non-payment of money unless a special order for the purpose be made on an affidavit establishing the same circumstances as are necessary for obtaining a writ of *ca. sa.* under this Act, and in such case the arrest, when allowed, shall be made by a writ of attachment corresponding as nearly as may be to a writ of *ca. sa.*," has relation only to arrests for non-payment under judgments and orders of the Court analagous to process for contempt, and does not apply to ordinary bailable process for debt.

On appeal to the Divisional Court (Crease, Walkem and Drake, JJ.): The Court held the defendant was entitled to be discharged on a point not taken by counsel, and delivered a verbal judgment dismissing the appeal without costs.

The next day, before the order was drawn up, counsel for plaintiff brought authorities to the attention of the Court contrary to the view upon which the appeal was dismissed, and asked leave to re-argue.

Held, That it is in the discretion of the Court to vacate an order before it is drawn up. Upon re-argument,

Held, Affirming DAVIE, C.J., upon the same grounds, That the affidavit required by 1 & 2 Vic. Cap. 10 for *ca. re.* was sufficient to support that writ and the *ca. sa.* (2) Overruling DAVIE, C.J., that the non-fyling of the *præcipe* for the *ca sa.* was an omission attributable to the act of the officer of the Court, and should be relieved against under Supreme Court Rule 950, and the appeal from order discharging defendant allowed with costs.

Statement. APPLICATION by the defendant by summons in Chambers

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to set aside a writ of *ca. sa.* for irregularity, upon the ground that the writ, being a writ of execution, was issued without the fyling of a *præcipe* for that purpose in the office of the Registrar who issued it, as required by Supreme Court Rule 467. The defendant upon this motion also maintained that the *ca. sa* was irregular, as having been issued without a Judge's order based upon the affidavit required by section 10 of the Execution Act, C.S.B.C. 1888, Cap. 42. The defendant had been in the first instance arrested and held to bail upon a writ of *ca. re.* issued upon a Judge's order, but maintained that such order and *ca. re.* were invalid for want of a proper affidavit. His contention was that the requirements of an affidavit to hold to bail, for any debt, were

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NOTE—Sec. 7. Nothing in this Act shall in any way be deemed to limit the operation and effect of the Homestead Act, or of an Act of the Imperial Parliament passed in the first and second years of the reign of Her Majesty, Cap. 110, and intituled "An Act for abolishing arrest on *mesne* process in civil actions, except in certain cases for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England.

Sec. 8. No person shall be arrested or imprisoned on any judgment whatsoever recovered against him as a debtor at the suit of any person, except as hereinafter provided.

Sec. 9. Process of contempt for non-payment of any sum of money, or for non-payment of any costs payable by any decree or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money, except as hereinafter mentioned, and unless a special order for the purpose be made on an affidavit establishing the same facts and circumstances as are necessary for obtaining a writ of *capias ad satisfaciendum* under this Act, and in such case the arrest when allowed shall be made by means of a writ of attachment, corresponding as nearly as may be to a writ of *capias ad satisfaciendum*, R.L. No. 61, Sec. 2, 1885, Cap. 8, Secs. 1-3.

Sec. 10. In cases in which the defendant has been held to special bail upon a writ of *capias ad respondendum*, or upon a writ of *ne exeat regno*, issued on a Judge's order, it shall not be necessary after judgment signed, or decree made, before suing out a writ of *capias ad satisfaciendum* or a writ of attachment to obtain a Judge's order for the issuing thereof, or to make or fyle any further or other affidavit than that upon

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governed by section 9 of the Execution Act, *supra*, and that it must disclose the same circumstances as are required by section 10 for the issue of a *ca. sa.*, and that the omission of the allegation "that the defendant, unless he be forthwith apprehended, will quit this Province with intent to defraud his creditors generally, or the plaintiff in particular," etc., invalidated the proceedings *ab initio*, and left the plaintiff, when issuing the *ca. sa.*, in the same position as if the defendant had not been arrested on the *ca. re.*

Charles Wilson, Q.C., for the defendant, supported the motion.

L. G. McPhillips, Q.C., contra.

Judgment of DAVIE, C.J.

DAVIE, C.J.: This was a motion to set aside a writ of *capias ad satisfaciendum*, issued on the 29th of July, and the principal ground on which the application was supported was that a Judge's order was necessary for the issuance of the writ, based on an affidavit under the latter part of

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which the order authorizing the defendant's arrest was obtained in the first instance; but where the defendant has not been so held to special bail, if the plaintiff in the action, by the affidavit of himself or some other party, shews to the satisfaction of a Judge of the Supreme Court, or, if the case be in a County Court, shews to the Judge or acting Judge of such Court that he has recovered judgment or obtained a decree for the payment of money against the defendant for the sum of one hundred dollars or upwards, exclusive of costs, and also by affidavit shews such facts and circumstances as satisfy the Judge that there is good and probable cause for believing either that the defendant, unless he be forthwith apprehended, is about to quit this Province with intent to defraud his creditors generally, or the said plaintiff in particular, or that the defendant hath parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken into execution, such Judge may, by a special order, direct that a writ of *capias ad satisfaciendum*, or a writ of attachment, as the case may be, may thereupon be issued, according to the practice of the Courts in which the proceedings in the first instance have been instituted, R.L. No. 61, Sec. 3, 1885, Cap. 8, Sec. 2.

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Sec. 10 of the Execution Act, C.S.B.C. 1888, Cap. 42, shewing intent to quit the Province with intent to defraud creditors generally.

The facts shewed that the defendant had been held in custody, in default of bail, under a *ca. re.*, and the plaintiff, having taken judgment for his debt, issued a *ca. sa.* under the first part of section 10, without any Judge's order or further affidavit; but it was contended by Mr. *Wilson*, on behalf of the judgment debtor, that the original *ca. re.* had been wrongly issued, inasmuch as no affidavit had been fyled shewing that the debtor's intended absence from the country was with intention of defrauding his creditors, and he relied upon section 9 of the Execution Act, which enacts that no person shall be detained, arrested, or held to bail for non-payment of money except as hereinafter mentioned, and unless a special order for the purpose be made on an affidavit establishing the same facts and circumstances as are necessary for obtaining a writ of *ca. sa.* under that Act; and he argued that, as to obtain a *ca. sa.* it is distinctly provided that there must be an affidavit shewing an intention to defraud creditors, equally so must there be such an affidavit when you seek to detain a person, or hold him to bail upon a *ca. re.*, as section 9 provides, as before pointed out, that no person shall be detained, arrested, or held to bail for non-payment of money unless upon the same facts as would authorize the *ca. sa.*, and, as well as moving to set aside the *ca. sa*, Mr. *Wilson* moved, upon a separate motion paper, to set aside the writ of *ca. re.* which had been issued at the outset of the proceedings.

Judgment of DAVIE, C.J.

I found myself unable to accede to Mr. *Wilson's* argument in attacking the *ca. re.*; firstly, because the Judge's order was conclusive authority for its issue, and there had been no attempt to discharge the order; and secondly, because I considered that section 9 has no bearing whatever upon a writ of *ca. re.*, which issues upon the sole authority of 1 & 2 Vic. Cap. 110, which statute is distinctly recog-

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nized as being in force by section 7 of the Execution Act. I considered that arrest under a *ca. re.* was not a detention for "non-payment of money," but a collateral proceeding only to enforce the appearance of a defendant to an action for recovery of money, and that section 9 had reference only to the non-payment of money, the right to which had been ascertained by the judgment of some competent tribunal.

But a further ground was urged by Mr. *Wilson* against the *ca. sa.* which I held to be fatal, viz., its issuance without a *præcipe*. The writ of *ca. sa.* is a "writ of execution" both in fact and by express provision of Rule 463, and Rule 467 provides that no writ of execution shall be issued without the party issuing it, or his solicitor, fyling a *præcipe* for that purpose. The affidavit of J. Theo. Wilson in support of the application shewed that the writ of *ca. sa.* had been issued without a *præcipe*, and I held the affidavit of Mr. Plunkett that at the time of issuing the writ he had tendered a *præcipe* therefor, but had been informed by the officers of the Registry office that the *præcipe* was not required for the issuing of the writ, to afford no answer to the objection.

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For the officer to tell Mr. Plunkett that that was not required which the rules imperatively say shall be used, in no way, I think, relieved Mr. Plunkett of the obligation to comply with the rules. It was a mere matter of opinion on the part of the officers, and Mr. Plunkett does not, in his affidavit, shew that the officer refused to receive the *præcipe*. I am far from saying that even had the officer actually refused to receive the *præcipe*, that such refusal would have warranted the plaintiff in issuing the writ without it. I rather think that in such case it would have been the province of the plaintiff to apply to a Judge to compel the officer to fyle the *præcipe;* the wrong-doing of the officer in refusing to receive the *præcipe* could hardly justify the wrong-doing by the plaintiff also in issuing the writ with-

out it. At all events, no case of refusal is shewn, and I think there can be no doubt that had Mr. Plunkett insisted on fyling the *præcipe*, the officer would not have refused to receive it. In matters affecting personal liberty, the practice and forms prescribed by law must be strictly followed, and not having been in this case, the writ of *ca. sa.* must be set aside.

As the parties may wish to bring the matter before the Divisional Court, I shall suspend the discharge of the defendant for fourteen days, and he will be discharged at the end of that time unless the Divisional Court otherwise orders. The defendant is entitled to the costs of the motion.

Defendant discharged.

Statement.

Charles Wilson, Q.C., on the 2nd of August, in view of the appeal, moved before the Chief Justice to set aside the writ of *ca. re.*

L. G. McPhillips, Q.C., contra.

Judgment of DAVIE, C.J.

DAVIE, C.J.: Mr. *Wilson* now moves to set aside the order for the issue of the *ca. re.* and the writ itself, on the ground that the affidavit to hold to bail was insufficient, in that it disclosed no intention on the part of the defendant to leave the country with intent to defraud his creditors generally.

In my judgment of yesterday I gave my reasons for holding that no such statement in the affidavit is necessary. In my opinion, in bailable proceedings we are governed entirely by 1 & 2 Vic. Cap. 110, and that statute, and the practice thereunder, requires only that you should satisfy the Judges of probable cause for believing that the defendant is about to quit the jurisdiction. I see no reason to change this view.

A further ground alleged against the *ca. re.* was that it was issued without a *præcipe*, but I think that there is

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nothing in this point, as a *ca. re.* is not a writ of execution as a *ca. sa.* is.

The motion must be dismissed with costs.

Motion dismissed with costs.

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The plaintiff appealed to the Divisional Court from the order of the Chief Justice setting aside the writ of *ca. sa.*, and the defendant appealed to the same Court from his order refusing to set aside the writ of *ca. re.* and all subsequent proceedings in arrest, and the cross-appeals were argued on the 8th day of August, 1895, before CREASE, WALKEM and DRAKE, JJ.

Argument.

A. E. McPhillips, for the plaintiff, on both appeals: As to the want of a *præcipe*, our Rule 467 is not more peremptory than the English Rule 71 of Hil. Term, 1853: "No writ of execution shall be issued till the *postea* is seen by the proper officer and a *præcipe* entered," etc. Under above rule, see *Usborne* v. *Pennell*, 10 Bing. 531, where it was held that defects in the *præcipe* were no ground for setting aside the writ, *Boyd* v. *Durand*, 2 Taunt. 161, a case in which an affidavit that a *præcipe* was tendered to the proper officer and refused was considered sufficient, *Probert* v. *Rogers*, 3 D.P.C. 170. Without going the length of saying that mistaken advice or refusal of the officer would vary the *prima facie* imperative character of the rule, we submit that, under the circumstances, this is a proper case for the Court to relieve the plaintiff under Rule 950 from what would otherwise be the effect of the error.

Charles Wilson, Q.C., for the defendant, on both appeals: *Usborne* v. *Pennell* proceeds on the ground that a *præcipe* was not required by any rule of Court. In cases involving the liberty of the subject requirements and pre-requisites of procedure must be strictly construed and adhered to. It is not a proper case for the abrogation of an imperative rule. The jurisdiction under Rule 950 was not intended for such cases.

As to the *ca. re.*, section 9 of the Execution Act is explicit that no person shall be arrested on such a writ unless upon the same affidavit as is required for a *ca. sa.* by section 10. The reason is apparent: Section 10 provides that in case the defendant has been held to special bail upon a *ca. re.* the plaintiff may have a *ca. sa.* after judgment without further order or affidavit, leaving the *ca. sa.* to stand upon the original affidavit required for the *ca. re.* In view of such a provision it would be anomalous to have a difference between such affidavit and that for a *ca. sa.* in the first instance, otherwise the pre-requisites to the right of execution upon the person of a defendant would not uniformly depend upon the same degree of misconduct on his part, *i. e.* proof of his intent to defraud, but upon the more or less accidental circumstance of whether he was arrested before judment or not. "Held to bail" imports *mesne* process and not arrest to enforce payment under decrees, &c., and "for non-payment of money" means for ordinary debt.

Argument.

If there is any conflict between sections 7–9 the latter section must govern. There is no conflict. The statute 1 and 2 Vic. Cap. 110 (Imp.) limits and cuts down the right of arrest upon *mesne* process by requiring an affidavit of certain facts as a pre-requisite. Section 7 provides that nothing in this Act shall limit the operation and effect of 1 & 2 Vic. Cap. 110, *i. e.*, all the limitations to the right of arrest therein provided are to remain. Section 9 does not limit the operation of that statute but, while adopting it in full, superadds a further limitation of the right of arrest by requiring as an additional pre-requisite a further allegation in the necessary affidavit. It is only by this construction that sections 7–9–10 of the Execution Act can be reconciled and given full effect to.

Judgment of DRAKE J.

DRAKE, J.: It appears to me that the writ of *ca. sa.* should be set aside upon the short ground that it was improperly issued without a Judge's order, as required by

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section 10, except in the case of a defendant who had been held to special bail. In this case the defendant was not so held, as he remained in custody from the time of his arrest and did not give bail to the action. I do not think that the absence of the *præcipe* should, under the circumstances, be held fatal.

CREASE and WALKEM, JJ., concurred.

Appeal dismissed without costs.

August 9th.

A. E. McPhillips, for the plaintiff, by leave of the Court, now spoke to the question and asked leave to re-open the matter upon the ground that the view of the Court of the meaning of the words "held to special trial," was contrary to the authorities, which counsel had no opportunity of introducing in argument, as the point was not taken, except by the Court. The order dismissing the appeal had not been drawn up or issued. He cited *Re Swire*, 30 Ch. D. 239; *Tucker* v. *New Brunswick, &c. Company*, 44 Ch. D. 249; *Re Crown Bank*, 44 Ch. D. 634; *Hatton* v. *Harris* (1892), App. Cas. 547.

Argument.

Charles Wilson, Q.C., contra: The Court cannot re-open an argument and reverse their decision upon the main question after the judgment has been pronounced, *Preston Banking Company* v. *Allsup*, 12 R. 147; *Re Swire* 30 Ch. D. 239; *Re Risca Coal Company*, 31 L.J. Ch. 283–429.

Judgment of CREASE, J.

CREASE, J.: On preparing to read our judgments on the cross-appeal herein Mr. *C. Wilson, Q.C.*, without desiring again to re-commence the discussion which had already taken place before the Court, begged before the judgment was delivered to submit a case, *The Risca Coal Mining Company's* case, 31 L.J. 283–429, to the consideration of the Judges, which strongly insisted that as soon as a decision such as this had already been given "left the lips of the

Judges," when noted by the Registrar, it was a complete judgment, which could not again be opened by the Court, and asked the Court to consider whether, that being the case, they would deliver what might be a futile judgment.

As the point has not been raised by either side during the previous argument, the Court took time to consider and examine it.

After conference and consideration of authorities, especially seeing that the decision they had orally delivered was before they had seen the cases of *Hamilton* v. *Mingay*, 1 U.C.Q.B. 22; *Edwards* v. *Jones*, 5 D.P.C. 585; *Walker* v. *Lumb*, 9 D.P.C. 131; Arch. Q.B. Prac. Ed. 1885, p. 1495, which altered the views they had orally expressed, and in view of the authorities, *Re St. Nazaire Company*, 12 Ch. D. 88; *Preston Banking Company* v. *Allsup*, 12 R. 147; *Miller's* case, 3 Ch. D. 661–99; *Canadian Land Company* v. *Dysart*, 9 Ont. 511; *In re Suffield & Watts, Ex parte Brown*, 20 Q.B.D. 693; *Fritz* v. *Hobson*, 14 Ch. D. 542, and considering that a very short time had elapsed since the oral decision had been made before the above cases had come to their knowledge, and their oral judgment had neither been drawn up nor perfected, they considered in the interests of justice it was necessary to follow what these cases declared the law to be on the question before the Court for decision.

Judgment of CREASE, J.

On examining the case of the *Preston Banking Company* v. *Allsup*, 12 R. 147, before Lord HALSBURY and Lords Justices LINDLEY and A. L. SMITH, those learned Judges concurred in the opinion, that in the case of an application to alter an order on the ground of a slip or oversight, or in a case where the order had not been drawn up, or had not expressed the real decision of the Court, the Court would have jurisdiction to alter it, or if a summons had proceeded on the theory that an order complained of was right, but that circumstances had since occurred which rendered a supplemental order necessary, the Court might entertain

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the application ; but it was of the utmost importance, that there might be some finality in litigation, that when once the order had been completed it should not be liable to review by the Judge who made it. Lord Justice A. L. SMITH was also of opinion that an application to re-hear a matter before the order has been drawn up and perfected, or to vary an order which has been drawn up not in accordance with the order pronounced by the Judge, or an application that the Judge should make an order supplemental to the order drawn up, could be entertained and decided by the Judge, but he had no jurisdiction to re-hear an order once made and perfected ; adding, "Lord Justice FRY put the law on the right foundation when he held, in *Re Suffield and Watts*, 20 Q.B.D. 693, that so long as the order had not been perfected the Judge has the power of reviewing the matter, but when once the order has been completed the jurisdiction of the Judge over it has come to an end." I am of opinion, therefore, that this Court has full jurisdiction to re-hear this matter, and to render a valid decision now thereon.

Judgment of CREASE, J.

WALKEM and DRAKE, JJ., concurred.

Order dismissing appeal re-opened, and appeal directed to stand for re-argument.

August 12th.

Argument.

A. E. McPhillips, for the plaintiff : The point upon which the judgment was given was not taken or argued by counsel. The words "held to special bail" mean arrested on a *ca. re.*, and not necessarily that the defendant furnished the bail, *Hamilton* v. *Mingaye*, 1 U.C.Q.B. 22 ; *Edwards* v. *Jones*, 5 D.P.C. 585 ; *Walker* v. *Lumb*, 9 D.P.C. 131 ; Arch. Prac. Ed. 1885, p. 1495.

Judgment of CREASE, J.

Charles Wilson, Q.C. : The defendant desires to press the arguments upon the points raised by him and previously argued.

CREASE, J.: Mr. *Charles Wilson, Q.C.*, for the defendant, appealed against the order of the Chief Justice dismissing defendant's motion to set aside the order for a *ca. re.* herein and the writ itself, on two grounds:

(a) That it disclosed no intention of defendant to leave the country with intent to defraud his creditors.

(b) That the *ca. re.* was issued without a *præcipe*, which is a necessary preliminary to its issue.

Mr. *Wilson's* other application was to set aside a *ca. sa.* issued against the defendant on the 29th July, chiefly on the ground that a Judge's order was necessary on the issuance of the writ under the latter part of section 10 of the Execution Act, and that the affidavit should have shewn defendant's intention to quit the Province with the intent to defraud his creditors generally. The position of the case stood as follows: On the 30th January, 1895, the defendant was arrested for debt under a *capias ad respondendum* and detained in custody in default of bail. While in such custody judgment, on the 12th February, was signed against him for the debt and costs; and on the 29th July a *capias ad satisfaciendum* was issued without any affidavit such as that required by the latter part of section 10 of the Execution Act, to the effect that the defendant is about to quit the Province with intent to defraud his creditors, but relying, under the first part of section 10, on his having been held to special bail under the *ca re.*

Judgment of CREASE, J.

Two separate applications were made by summons before the Chief Justice to discharge the defendant out of custody on the *ca. sa.* and *ca. re.*

Whereon the Chief Justice, at the hearing, dismissed the application to set aside the *ca. re.* with costs, but set aside the *ca. sa.* without costs for want of a *præcipe.*

At the same time, to facilitate an appeal to the Divisional Court, he ordered the defendant's discharge in fourteen days, unless the Divisional Court should otherwise order.

Defendant appeals from these orders.

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The questions raised turn upon the construction of sections 7–8–9–10 of the Execution Act.

After considerable debate and canvassing of authorities, I am of opinion that section 9 of the Execution Act must be read as independent of section 10.

Section 9 refers especially to contempt for "non-payment of money," such as certain costs, trustees' matters and the like, ordered by a decree, for which attachment is the usual remedy, enforced in conscience against the person, and the affidavit referred to by section 9 relates to the procuring of a writ of attachment analogous to a *ca. sa.* and refers to such proceedings and money alone.

The bailable proceedings for a *ca. re.* are those under 1 & 2 Vic. Cap. 110, which is made part of the Act by section 7, and, as the Chief Justice lays down, we are governed in bailable proceedings by that statute, and the practice thereunder, which require only that you should satisfy the Judge that there is probable cause for believing that the defendant is about to quit the jurisdiction, and the *capias ad respondendum* once obtained, and the defendant held to special bail, the *capias ad satisfaciendum* follows under section 10, and is therefore in this case valid.

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If a defendant is not held to special bail and it is sought to hold him under a *capias ad satisfaciendum*, a Judge's order must be obtained under the conditions of the last part of section 10. This construction makes all parts of this division of the Execution Act work together harmoniously.

The other application that the *ca. sa.* should be set aside because the *præcipe* which Mr. Plunkett tendered to the proper officer in due course and form and time, and by him refused as unnecessary, and therefore not taken or entered, was I think for this purpose, and under the circumstance sufficiently pressed as that its refusal must be considered as *actus curiæ*. For the defendant to have waited for a

summons and decision of the Judge would have been to risk the very object of the writ.

A *præcipe* is not now a part of the writ, but rather a notice of it, and the proper officer shewed that he so considered it by preparing the writ upon such notice, and the writ must therefore be taken to be sufficient, neither was the defendant thereby injured.

That being the case, the writ of *ca. sa.* must be deemed to have been and to be valid, and the application to set it aside dismissed, but as the act of the officer of the Court was the cause of expense, without costs.

The plaintiff having succeeded is entitled to the costs of this appeal.

DRAKE, J.: This is a cross-appeal by the defendant from the judgment of the Chief Justice refusing to set aside the writ of *ca. re.*, and, by consequence, the writ of *ca. sa.* issued herein, on various grounds, but eventually the question centred in the construction to be placed on sections 7–8–9–10 of the Execution Act. The facts are that the plaintiff obtained a writ of *ca. re.* on 30th of January, 1895, under which the defendant was arrested on the 12th day of February; judgment was signed for $975.00, and costs to be taxed, which brought the judgment up to $1,059.65. The defendant remained in custody, and on 29th July a writ of *ca. sa.* was issued under which the defendant is now held.

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The defendant's contention is that, under section 9, the affidavit on which the *ca. re.* issued should have contained in addition to the requirements of 1 & 2 Vic. Cap. 110, a statement that the defendant was about to quit the Province with intent to defraud his creditors, because the same statements are to be included in the affidavit which are necessary to obtain a *ca. sa* under section 10.

Section 9 first deals with monies ordered to be paid by decree or order, and says that with regard to such payments the process of contempt is abolished, and it goes on to enact

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that no person shall be detained, arrested, or held to bail for non-payment of money (this means non-payment of money which used to be enforced by process of contempt) except under the conditions therein mentioned.

I agree with the Chief Justice that this section does not refer to ordinary writs of *ca. re.*; a *ca. re.* is not issued for non-payment of money, but to detain the defendant until the plaintiff obtains judgment and the defendant can obtain his liberty by giving bail.

The proceedings to be followed for obtaining a *ca. re.* are those pointed out in 1 & 2 Vic. Cap. 110, which, if there was any doubt as to the applicability of that Act to the Province, it is cleared away by section 7.

Then comes section 10, which is a section independent of section 9. That section says if a defendant has been held to bail upon a *ca. re*, it shall not be necessary to make any other affidavit than that authorizing the defendant's arrest in the first instance.

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But if the defendant has not been arrested (holding to special bail means arrest on a *ca. re.*), a *ca. sa.* cannot be obtained without a Judge's order and affidavit setting out certain facts.

By thus construing the Act, full effect is given to each section, and they apparently carry out the object of the Legislature.

To further emphasize the fact that this is the correct interpretation, it may not be amiss to note that in equity the orders of the Court were enforced by writ of attachment, and section 9 still continues that mode of coercion, for it says an arrest when allowed shall be by attachment corresponding to a writ of *ca. sa.*

I am therefore of opinion that the writ of *ca. sa.* was, and is, valid without any Judge's order or any further affidavit, and that the appeal should be allowed with costs.

With respect to the other appeal, that the defendant should be discharged because there was no *præcipe* fyled

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before the writ was taken out, the rules require that a *præcipe* be fyled for every writ of execution.

The affidavit of Mr. Plunkett shews that he tendered a *præcipe* when the writ was applied for, but he was informed by the Deputy Registrar that it was not necessary—a clear mistake on the officer's part. It was suggested he should have applied to a Judge to compel the officer to take the *præcipe*—to do so might have caused such a delay as would have rendered his execution abortive, and I do not think that the plaintiff should be prejudiced by this mistake. He tendered a *præcipe*, and having done so he had complied with the rule. A *præcipe* is, after all, only instructions to the Registrar to issue the writ. In old times it was the name given to the writ itself; now it is nothing more than instructions to the officer. The defendant has not been prejudiced, and I do not think the mistake of the officer should enure to the plaintiff's detriment; and this is a case which calls for the exercise of the judicial discretion under Rule 950. Neither do I think it is a case for costs.

Judgment of DRAKE, J.

WALKEM, J., concurred.

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Practice—Summons for judgment under Order XIV.—Evidence—Defendant outside jurisdiction—Service on partner of former solicitor—Whether sufficient—Mode of proceeding where opposing solicitor removed pendente lite—Waiver.

Defendant appeared to the action by D., a solicitor, and then went to reside outside the jurisdiction. D. being elevated to the Bench, plaintiff afterwards obtained a summons for judgment under Order XIV., and served it upon H. (of the firm of H. & L. D.), the former partner of D. H. refused to accept or acknowledge the service. The plaintiff left the summons at the office of H., who returned it. DRAKE, J., upon the return day mentioned in the summons, treated the above as good service thereof, and, no one appearing for the defendant, made an order giving the plaintiff leave to sign judgment for the amount claimed. The defendant appointed L. D., partner of H., solicitor *ad hoc*, and appealed to the Divisional Court from the order.

Held, per MCCREIGHT, J. (Walkem, J., concurring), over-ruling an objection that the defendant had no *status* on the appeal for want of notice to plaintiffs of appointment of a new solicitor to bring the appeal; that the plaintiffs, by serving D. with the original summons for judgment, and, as it appeared they had done, writing H. & L. D. for the grounds of appeal, had waived the objection.

That the order appealed from was not an *ex parte* order in the sense that an application to rescind it should have been made before DRAKE, J., instead of appealing to the Divisional Court. (*Flett* v. *Way*, 14 Ont. P.R. 123, distinguished).

That the proper method of bringing the defendant before the Court on the summons for judgment was by *subpœna* to name a solicitor, which *subpœna* could be substitutionally served though the defendant had gone abroad since the service of the writ of summons, and that the judgment was a nullity. [*Fry* v. *Moore*, 23 Q.B.D. (C.A.) 395, and *Wilding* v. *Bean*, 1891, 1 Q.B. 100, distinguished.]

Order XIV., though allowing affidavit evidence instead of the oral evidence usually adduced at a trial, does not supersede the rules of evidence, and it was necessary that the foreign judgment sued on should be strictly proved.

Statement. APPEAL to the Divisional Court from an order of

DRAKE, J., giving leave to the plaintiff to enter final judgment against the defendant Sayward.

Gordon Hunter & Lyman Duff, for the appeal.

E. P. Davis, Q.C., contra: The facts fully appear from the judgment.

McCREIGHT, J.: In this case a difficulty arose through the present Chief Justice having been, whilst in the profession, solicitor on the record for the defendant, and accordingly having entered an appearance for him. The Chief Justice was sworn in on the 11th March, 1895, and, of course, incapable of acting as an attorney after that date. There is a correspondence referred to in the affidavit of James H. Lawson, sworn 15th May, A.D., 1895, marked as an Exhibit C, which shews that after abandoning proceedings by a summons taken out on or before the 8th May, 1895, the plaintiffs, by their solicitors Messrs. *Bodwell & Irving*, on the 14th May, 1895, took out another summons under Order XIV. on the same day, and served it, as stated in their letter to Messrs. *Hunter & Duff*, "at the office recently occupied by Mr. THEODORE DAVIE (the present Chief Justice), who is the solicitor on the record, and whose business we, *i.e.*, Messrs. *Bodwell & Irving*, see by an advertisement in the Colonist, you took over": "We write this to you as an explanation why we serve you notwithstanding the letter written by you to us returning the papers served upon you some days ago."

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This letter was replied to by Messrs. *Hunter & Duff* on the same day, returning the papers. Upon this summons being brought on for hearing before DRAKE, J., on the 20th May, and no one appearing for Sayward, the order now appealed from was made.

On the 21st May Mr. *Lyman Duff*, as solicitor for the purposes of the application of the said defendant, gave notice of appeal, and the case was argued before my brother WALKEM and myself on the 30th May. The first objection

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raised by Mr. *Davis* for the plaintiff, respondent, was that whereas THEO. DAVIE was solicitor on the record, the notice of appeal was given by *Lyman Duff*, and no notice of change of solicitor was given, although essential. Now, undoubtedly, upon the change of the solicitor, or upon his death or being struck off the rolls (which seems to afford the nearest analogy to the present position), notice should be given to the opposite party of the appointment of the new solicitor, and without such notice the proceedings by the new solicitor would be irregular. See *Ryland* v. *Noakes*, 1 Taunt 342; and Arch. Q.B. Prac. Ed. 1885, 111; but the question is whether there is not in this case ample evidence of waiver of irregularity in the omitting to give notice of the change.

The service of the summons for judgment on the 14th May with Miller, a clerk in the office of *Hunter & Duff*, in their office, No. 21 Bastion street, etc.; see the affidavit of Lawson, clerk to Messrs. *Bodwell & Irving*, as to such service, taken in connection with the letter of Messrs. *Bodwell & Irving* of the same date to *Gordon Hunter*, and the order of Mr. Justice DRAKE, of the 29th May, obtained through such service, can only be understood in one way, and that is as dealing with *Hunter & Duff* as solicitors for Sayward, and therefore rendering it unnecessary for them to give notice of the change, or of the fact that they had subsequently become such solicitors. I have used the expression "obtained through such service," as the posting up a true copy of the summons, etc., in the office of the Registrar, as well as the service at the alleged residence of the defendant on Fort street, seem to have been unauthorized, and, therefore, ineffectual proceedings—an appearance at one time having been duly entered, though it subsequently became abortive by the appointment of Mr. DAVIE to theChief Justiceship. Again, the letter of Messrs. *Bodwell & Irving*, of the 28th May, to Messrs. *Hunter & Duff*, asking for the grounds of their appeal, seems to be clearly a waiver; see *Fairley* v. *Hebbs*, 3 Dowl. 538–540; *Mar-*

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gerem v. *Mackilwaine*, 2 New Rep. 509, and Arch. Q.B. Prac. Ed. 1885, 110, as to the waiver of the irregularity "by treating the new solicitor as the solicitor in the cause." Indeed the facts here approach very nearly to an estoppel. Messrs. *Hunter & Duff* might well consider notice of the change superfluous under the circumstances; see *Cornish* v. *Abington*, 4 H. & N. 549. The next point raised by Mr. *Davis* was that insufficient grounds of appeal were given, though particulars were demanded; but it seems to me that the points that the "Court had no jurisdiction to proceed further in the action, and if the Court had such jurisdiction, that Mr. Sayward was not served with the summons and was not before the Court when the order was made," were serious points, and gave sufficient notice of what was to be and what was argued before us. I think it appears by the affidavits that Sayward was not before the Court when the order of DRAKE, J., was made, *i.e.*, on the 20th May, of this year. The proper mode of bringing him before the Court, in Chancery cases at all events (and I think from the language of Order VII., Rule 3, of the English Rules, corresponding to our Rule 30, as to change of solicitor, also in Common Law cases), was by subpœna to name a solicitor; see cases cited, and the statement as to the practice, page 253 of the Annual Practice, 1895. It appears also from the same passage "that the subpœna is served personally, but that where personal service cannot be effected the Court will order substituted service." In this case personal service on Sayward, an American subject now resident in California, would have been not merely illegal, but, for obvious reasons, highly improper (compare what is said in *Hewitson* v. *Fabre*, 21 Q.B.D. 6), and a Judge would, no doubt, on proof of the circumstances, have ordered substituted service of subpœna, as was done in *Gibson* v. *Ingo*, 2 Phillips 402, and *Dean* v. *Lethbridge*, 26 Beav. 397, and this substituted service is as good as actual service; see same case of *Gibson* v. *Ingo*. But the question

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arises as to the effect of complete omission to serve it in any manner, whether that is merely an irregularity which may be waived or a nullity which cannot be waived, and certainly the language of Lord COTTENHAM in *Gibson* v. *Ingo*, 2 Phillips 402, seems to imply that an order for a subpœna on the defendant to appoint a new attorney was necessary; see also *Ratcliff* v. *Roper*, 1 P. Wms. 420, where it was held that "a subpœna *ad fac. attor. not.*" must be taken out and served, because till then the party is not in Court. In truth, the difficulty seems to be serious, for in *Roberts* v. *Spurr*, 3 D.P.C. 551, the Court pointed out that there being no person before the court against whom a judgment could be signed, owing to the plaintiff not having, as he might or ought to have done, according to the practice in the year 1835, entered an appearance for the defendant the judgment signed against him, the defendant, was a nullity.

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I gather from the remarks in the Annual Practice, 1895, at page 253, and Homestead and Langton, page 468, that the subpœna to appoint a new attorney is now the only correct practice at law as well as in equity as "the best practice," see *Newbiggin-by-the-Sea Gas Company* v. *Armstrong*, 13 Ch. D. 310. Had a Judge been applied to in this case for substituted service upon Sayward of proceedings, he would doubtless have acted according to the practice I have referred to as stated in the above Treatises on Practice, and in Daniel's Ch. Pr. 6th Ed. p. 48. I did not understand Mr. *Davis*, who gave us a careful argument, to contest this, but he seemed to consider that the case *Fry* v. *Moore*, 23 Q.B.D. 395, (C.A.), rendered substituted service of the subpœna in a foreign country inappropriate or void, but I can find no trace of any such doctrine; and in *Gibson* v. *Ingo*, before referred to, Lord COTTENHAM directed substituted service of the subpœna though the defendant was abroad and not likely ever to return, *Fry* v. *Moore*, see *Wilding* v. *Bean* (1891) 1 Q.B. 100, deals merely with original writs for service out of the jurisdiction and shews that the Judicature

rules in that behalf never interfered or could interfere with original writs for service within the jurisdiction, or rather perhaps the converse, namely, that original writs for service within the jurisdiction could not be invoked for the purpose of service without the jurisdiction so as thereby practically to do away with the code established by Order XI. for such last mentioned service, *Re Cliff* (1895) 2 Ch. 23 (C.A). All this, of course, has no application to interlocutory proceedings in an action relating to very different matters, *e.g.* the order now in question. I have treated, as I think is the case, the omission of the subpœna to appoint the attorney as making the order of Mr. Justice DRAKE a nullity. But Mr. *Hunter's* position seems to me to be fully sustained if we treat it as a mere irregularity. I don't understand that the waiver was contended, for Mr. *Davis* contended that an application should have been made to DRAKE, J., to set aside his order instead of appealing to a Divisional Court, but I do not so read C.S.B.C. 1888, p. 256, sections 59–60–67. The order was clearly interlocutory, *Salaman* v. *Warner* (1891) 1 Q.B. 734 (C.A). An opposite practice may have arisen in England in consequence of section 50 of the Judicature Act, 1873, but that section was never in force in British Columbia, and the words of the sections above quoted seem distinct. I see that in Ontario the words *ex parte* order which the Judge or Master in Chambers has power to re-consider have been considered to include or cover cases going by default where through some slip cause has not been shewn, *Flett* v. *Way*, 14 Pr. Rep. 123. Here there was not any intention, as far as I gather, on the part of Sayward to shew cause before DRAKE, J., and therefore no such slip. I think the order appealed against might and should be set aside on the above grounds, but there is another which though not argued must not be lost sight of. Order XIV., though allowing affidavits instead of the oral evidence usually adduced at a trial, does not supersede the rules of evidence as to foreign judgments being provable

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only by documents duly authenticated. The mode of proof is referred to in Roscoe on Evidence, 16th Ed. 121. Here, though we have legal proof perhaps of the judgment of the Judge of first instance in Washington Territory, we have none as to the decision of the Supreme Court of the United States on the writ of error. Indeed, one of the affidavits on the part of Sayward made by counsel leaves the impression that no such document could be produced from that Court of last resort, for the simple and conclusive reason that no final judgment had yet been rendered by the Supreme Court of the United States. The Order-in-Council of the 4th December, 1894, allowing such defence, was complained of, but perusal of the case of *Scott* v. *Pilkington*, 31 L.J.Q.B. 81, and the judgment at page 89, shews that this is merely a legal statement as to "the equitable interposition of the Court to prevent the possible abuse of its process." As far as legal evidence goes, Sayward, if compelled to obey the order appealed from might have to seek, and seek in vain, for a return of money which, as it may appear hereafter, he was perhaps unjustly and illegally compelled to pay under an erroneous judgment. The affidavits made by the opposing counsel are instructive in making us feel the benefit of proper rules of evidence as regards the proof of foreign judgments. The Judicial Committee say, in *Jones* v. *Stone* (1894) A.C. 122, that Order XIV. was "only intended to apply to cases where there could be no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay." Mr. Justice WILLS, in *Paxton* v. *Baird*, (1893) 1 Q.B. 139, says that order cannot apply "unless a person takes out a summons for judgment under it, he has his tackle, so to speak, in good order." I have discussed some points, perhaps not raised in argument, but Lord ESHER says, in *Emden* v. *Carte*, 19 Ch. D. 323, (C.A.) "it is the duty of the Judge to take all the points which the case fairly raised, although those points are not taken by the

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counsel." I think the order of Mr. Justice DRAKE should be set aside with costs, but only of the appeal.

WALKEM, J., concurred.

Appeal allowed with costs.

IN RE BELL-IRVING AND CITY OF VANCOUVER.

IN THE MATTER OF THE VANCOUVER INCORPORATION ACT, 1886, AND THE MUNICIPAL ACT, 1892, AND BY-LAW 159 OF THE CORPORATION OF THE SAID CITY.

Statutes—Construction of—Vancouver Incorporation Act, 1886, Sec. 127.

Section 127 of the Vancouver Incorporation Act gives the right to vote on by-laws requiring the assent of the electors to certain persons rated to the amount of $500.00 of real property on the Revised Assessment Roll "on which the voters' lists of the City are based.'

The by-law in question was submitted to the electors upon the Assessment Rolls for the current year, which had not then been finally revised.

Held, That the words *supra*, "on which the voters' lists* are based," are descriptive merely, and do not mean the voters' lists which must at that time be used in an election for Councillor.

Remarks on the impropriety of effectuating an inference by the interpolation of language not found in a statute.

An agreement relating to the railway enterprise to be assisted by the by-law was referred to as "made and concluded" between the contracting Railway Companies, but the agreement was set forth in the by-law, and appeared without signatures; in fact, at the date of the publication of the by-law, it had only been executed by one of the Railway Companies.

Held, That there was no misrepresentation of fact such as to avoid the by-law on that ground.

RULE *nisi* to quash By-law 159 of the City of Vancouver, upon the ground, *inter alia*, that the voters' lists on which the voting thereon took place was not based upon the proper

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Assessment Roll, and that the said by-law as published and finally passed contained material misstatements, amongst others that an agreement between the Burrard Inlet & Fraser Valley Railway Company, of the one part, and the Northern Pacific Railway Company and the Seattle, Lake Shore & Eastern Railway Company, of the other part, which is set out in full in the said by-law, was signed by the parties thereto, whereas the same was not signed by the parties thereto.

E. P. Davis and *A. Williams*, for the applicants.

A. J. McColl, Q.C., and *A. St. George Hamersley, contra.*

McCREIGHT, J.: This was a rule *nisi* to quash a by-law of the City of Vancouver which was voted upon and finally passed on the 26th September last intituled a By-law in the aid of Burrard Inlet & Fraser Valley Railway Company.

The rule was argued before me at great length, and many objections raised by counsel for Bell-Irving which I shall deal with *seriatim*. The first and the most relied upon was that an improper list of voters was used, namely, one taken from the Revised Assessment Roll of 1892 instead of that of 1891.

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The words of the 127th section of the Incorporation Act of Vancouver, 1886, and sub-section 1 of the same, upon which this contention was mainly based, are, at least so far as material to this question, as follows: "127. The right of voting on by-laws requiring the assent of electors shall belong to the following persons, being males or *feme soles* of the full age of twenty-one years, being rated to the amount of five hundred dollars of real property on the Revised Assessment Roll on which the voters' lists of the City are based, held in their own right, or, in cases of males, in the right of their wives, and each person so qualified shall be entitled to one vote only."

Sub-section 1. "After a by-law requiring the assent of the electors has passed its second reading, and before date

of the submission of the same to the electors, the City Clerk shall prepare a list of the persons who are entitled to vote on the proposed by-law in accordance with the preceding section."

It was forcibly contended for Irving that to give full effect to the words of the section "on which the voters' lists of the City are based," the election having taken place in September, 1892, and the voters' lists of the City not having been finally revised and corrected till about 1st November, 1892 (see section 123), section 127 must be necessarily taken as referring to the "voters' list" of the previous November or the 1st November, 1891, which, of course, was "based" on the Revised Assessment Roll of February, 1891, and that the City Clerk in performing his duties under sub-section 1 of the same section as above should accordingly have had recourse to the Assessment Roll from which that voters' list had been taken, that is the Revised Assessment Roll of 1891 and not of 1892. I have had a good deal of doubt as to whether this contention was not made out, but am now satisfied that the words in section 127 "on which the voters' lists of the City are based" are merely descriptive, or for the purpose of identification and for the guidance of the clerk, and that he acted correctly when he considered the Revised Assessment Roll referred to in that section was that of February, 1892 (as to this date see section 35, sub-section 1, and sections under the headings "Assessments" and "Court of Revision").

Judgment.

It was pointed out to the counsel for Irving that his contention pre-supposes a serious interpolation after the words "are based" in the section, *e.g.*, "and when and as the same shall have been finally revised and corrected as aforesaid," or perhaps more appropriately as suggested by counsel shewing cause against the rule "which would have been the lists to be used if the said voting had been for the election of a Councillor."

How very sparingly and under a kind of necessity inter-

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polations are to be used by Judges may be seen by the cases referred to in Maxwell on Statutes, p. 209, 1st Edition; Wilberforce on Statutes, p. 118; and Hardcastle on Statutes, p. 100, last edition; and as to the tendency to restrict the powers of the Judges to the simple construction of the words used in the Act, see *Queen* v. *Judge of the City of London Court* (1892) 1 Q.B. 273 (C.A.)

At some future day section 308 of the Municipal Act of Ontario (see Harrison's Municipal Manual, 5th Edition, p. 226), or similar legislation, may be introduced into the Province, but that, of course, can only come from the Legislature, and must not be anticipated by a Judge. Counsel for the City also used what seemed to me a cogent argument that if the Assessment Roll of the year, February, 1892, was not to be used, but recourse had to that of 1891, the same construction must hold good for every antecedent year, the year 1886 included; but as that was the first year of the municipal existence of Vancouver, that, of course, would be absurd, and certainly not intended by the Legislature, as there was no separate machinery to meet that exceptional occasion. I think also that, as was argued, the Municipal Act of 1892 being a Consolidated Act [see sections 116 (2) and 117] points to the policy of the Legislature as being in favour of the most recent and existing ownership of land being fully represented in voting on such by-laws.

Judgment.

When these matters were pointed out, and that Irving's counsel were seeking in substance to interpolate a second factor or condition precedent to the right to vote, the first, of course, being that the voter must be rated on the Revised Assessment Roll, the counsel shifted their attack on the by-law by surrendering, as I understood them, any such proposed interpolation or its equivalent, but still contending that the Revised Assessment Roll for 1892 should not have been used, but that of 1891.

I have referred at length to their first contention and the

answer to it, for they really determine this second question as well as the first.

In truth, this new contention pre-supposes an interpolation in 127, perhaps more lengthy and startling than the former, and may be expressed thus, that "in case of a by-law being voted upon, and if such voting takes place before the 1st of November in any year or the earlier revision of the voters' lists, then resort must be had to the Revised Assessment Roll of the preceding year, but if after the first of November or earlier revision then to the Revised Assessment Roll of the current year." If any one will try to read any of the above interpolations into section 127 he will find the result to be more than awkward. I have discussed this first objection at length, not that I now feel any doubt about it, but because it was so long and strenuously argued, and is of such great interest and importance, and shall only refer to a test given by Lord BRAMWELL, in *Muirhead* v. *Muirhead*, 15 App. Cas. 306, "that if the negative of the proposed interpolation agreed with the rest of the document it should not be read in." I see nothing in the Act requiring resort to an old assessment roll instead of the last.

Judgment.

As to the second objection, that the by-law as passed contained material false statements, counsel for Irving contended that the by-law purported that the agreement therein referred to was executed between the two companies, the Burrard Inlet & Fraser Valley Company and the Northern Pacific Railway Company, and that the words "made and concluded" averred as much, whilst it was admitted that none but the Northern Pacific had signed at the date of publication of by-law.

But perusal of the by-law indicates absence, not presence, of signatures and formal execution of any kind, and see the attestation of the notary Wallbridge; and besides, contracts may be considered sometimes binding though actually unsigned, *Brogden* v. *Metropolitan Railway Company*, 2 App. Cas. 667; *Winn* v. *Bull*, 7 Ch. D. 32; *Bonnewell* v. *Jenkins*,

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8 Ch. D. 70; *Lewis* v. *Brass*, 3 Q.B.D. 667; *Williston* v. *Lawson*, 19 S.C.R. 673; *Dalrymple* v. *Scott*, 19 O.A.R. 477.

What the Courts consider false representations is a good deal discussed in *Smith* v. *Chadwick*, 20 Ch. D. 27, and 9 App. Cas. 187. I think no one could have been misled by the by-law, and it is admitted, I believe, now that the contract had been duly executed.

The third objection was, that the by-law was based on the fact that the agreement was unsigned at the time of its passage. This objection seems to have been scarcely discussed, and I do not see its weight or know of any case bearing on it. Mr. *McColl* cited a case to shew that this was immaterial on a motion to quash. At all events, having regard to cases cited in Harrison's Municipal Manual, 5th Ed., p. 242, note, I think I am not called upon to interfere on this point.

Judgment.

As to the fourth objection, that the by-law does not comply with section 104 (8) of the Municipal Act of 1892, counsel for Irving complained of omission of conditions (as to effect of failure to observe, etc.) contained in section 104 (8), but it was answered that the expression making the by-law void or "of no validity" only means voidable at the election of the party not in default, see *Hughes* v. *Palmer*, 34 L.J.C.P. 279, and that this is the meaning of section 104 (8) is obvious from the conclusion of that sub-section, which makes it optional for the Council to pass a by-law putting an end to the transaction under the circumstances of delay, etc., and this to evidence their election. Some Manitoba cases were cited to shew that the expression "void" or "of no validity" must be construed as absolute. They, however, had reference to pre-emptions where the policy of the Legislature was clear to prevent pre-emption being made at the instance of mere land speculators and not by *bona fide* settlers, and I think the same has been held in this Province. This *ratio decidendi* of course has no application to the present question.

Objections five and six were argued together. They were that the by-law does not specify rate to be levied for interest and sinking fund, and that the by-law does not provide for raising sufficient for sinking fund and interest.

The answer to that is, I think, that the by-law complies with 55 Vic. Cap. 62, Sec. 5, as interpreted in connection with the corresponding sections in the Acts of 1886 and 1889, as now repealed or amended.

It was argued that instead of $3,157.05 to be raised annually for the payment of the principal debt of $300,000.00, at the end of forty years, that the annual sum of $7,500.00, or of $300,000.00 divided by forty should have been required; in other words, that the interest on sinking fund should not have been taken into account. This contention seems to me to be in conflict with the concluding member or latter part of 55 Vic. Cap. 62, Sec. 5, especially having regard to its history before referred to. I cannot interpolate after the words of the Act "and also a sum to be raised annually for the payment of the debt when due," the following or like words, "by the way of principal and sufficient irrespective of its interest to pay the amount when due." The four per cent. for interest in the repealed Act of 1889, 52 Vic. Cap. 40, Sec. 13, was of course too small and calculated to cast an unnecessary burden upon ratepayers.

The eighth objection was, that the Court of Revision reduced the assessment without jurisdiction, which deprived a number of voters of their vote, and that there was no jurisdiction to reduce except on complaint and after hearing individual complaints.

Cases were cited by counsel for Irving in support of this contention, but they were chiefly Ontario cases on the Ontario Municipal Act.

There the duty of the Court of Revision is judicial, see Harrison's Manual, page 755. In the Vancouver Act of 1886 there are words in the two first lines in section 44 amply sufficient as it seems to me to give ministerial powers to the

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Court to revise and correct without any special complaint, and which I do not find in the Ontario Act, and which, according to the rule in such cases, I must take to have been advisedly inserted.

I am told the practice has been for the Court of Revision —I am not speaking of the Vancouver Court—to exercise this ministerial jurisdiction, and I think this has been to my own experience, and considering the serious fluctuations which have taken place in the value of real estate in the Province during many years, it must almost necessarily be so.

Admitting, for the sake of argument, that a notice was necessary, I cannot say that given by Lister Gill, having regard to the language of section 44 of the Act of 1886, is insufficient. The presumption, moreover, is that the alleged deprived voters, who must have been freeholders to the amount of about $600.00, would, according, I believe, to common experience, have voted in favour of the by-law. Moreover, it is not denied that if all the $600.00 freeholders had voted against the by-law it would still have been carried by a majority of thirty-two.

Judgment.

Objection 9 was a complaint of *ultra vires*, *i.e.* that there was no power to issue debentures to the company, but only to give cash ; and it was argued for Irving, that as regards section 142, sub-sections 85 to 88 inclusive, the words " for the like purpose " in sub-section 87 refer only to sub-sections 85–6 and to sub-section 88. I think he contended for a very narrow construction of the expression " for the like purpose."

Sub-sections 85 to 89 inclusive, all contained under the heading " railways," throw light upon each other, and the headings of different portions of a statute are to be referred to to determine the sense of any doubtful expression in a section ranged under any particular heading, *Hammersmith Railway Company* v. *Brand*, L.R. 4 H.L. 171.

Objection 10 was that the necessary notice under sections

122–5, Municipal Act, 1892, as to time for moving to quash was omitted. To this it was answered by counsel for the City that the omission of notice, though important under general Act for the purpose of promulgation, is not in the special Act, and is only important as to time of moving to quash.

I think it may be fairly argued that this is a fair construction of section 4 of the Consolidated Act of 1892, which only makes that Act applicable to Vancouver, where it is not "repugnant to" or "inconsistent with" its acts of incorporation ; besides, I may say Irving had abundant time to move his rule, and there was no suggestion of wilful suppression, and the point can hardly be said to be apparent on the face of the by-law.

Judgment.

It is also claimed that the by-law was so worded that it could be altered after its passage, and that this was contrary to section 129 of the Vancouver Act, 1886, but the perusal of that section shews it applies to alterations by the Council only and not as between the companies referred to in the by-law.

The rule must be discharged, according to the practice, with costs.

Rule nisi discharged.

NOTE.—This judgment was over-ruled by the Divisional Court (Begbie, C.J., Crease and Walkem, JJ.) See *Post.*

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IN RE BELL-IRVING AND CITY OF VANCOUVER.

IN THE MATTER OF THE VANCOUVER INCORPORATION ACT, 1886, AND THE MUNICIPAL ACT, 1892, AND BY-LAWS 166 AND 167 OF THE CORPORATION OF THE SAID CITY.

Municipal law — Statutes — Construction of — Conflict of laws — Vancouver Incorporation Act, 1886—Municipal Act, 1892.

By the (special) Vancouver Incorporation Act, 1886, section 129, by-laws for raising money not for ordinary expenses must receive the assent of the electors, "and when such assent is received no such by-law shall be altered, amended or repealed by the Council except as hereinafter provided." The (general) Municipal Act, 1892, section 113, dealing with the same class of by-laws, provides, "No such by-law shall be altered or repealed except with the consent of the Lieutenant-Governor-in-Council."

The City of Vancouver passed a By-law, No. 159, aiding a railway by gift of Municipal debentures. A question having been raised as to whether this by-law should have been voted upon by the electors upon the roll of 1891, instead of, as was the case, upon that of 1892, two new By-laws, Nos. 166 and 167, for the same purpose, were introduced and submitted to, and respectively received the assent of, each group of electors. These by-laws were similar to each other, but varied in substantial particulars from By-law 159. After they were passed, an order of the Lieutenant-Governor-in-Council was obtained assenting to the alterations which they made in By-law 159.

Upon motion to quash By-laws 166 and 167, as altering By-law 159, contrary to section 129, *supra*.

Held, *per* DRAKE, J.: That section 113 of the General Act, *supra*, applied and that the assent of the Lieutenant-Governor-in-Council validated the by-laws though obtained after they were passed.

Upon appeal to the Full Court:

Held, *per* BEGBIE, C.J., CREASE and WALKEM, JJ., over-ruling DRAKE, J., and quashing the by-laws: That section 129 of the special Act, *supra*, exclusively governed.

That section 113 of the subsequent general Act, *supra*, did not apply, and that, in any event, the language of that section was not enabling but necessitated the consent of the Lieutenant-Governor-in-Council as an additional restriction upon the power to amend by subsequent by-law.

Per BEGBIE, C.J., and CREASE, J. : The provisions of section 128, Sub-sec. 3, are imperative, and the by-laws were bad for not setting out the total amount required to be raised annually to pay the debt and interest, etc.

Per curiam: That it was no objection that the by-laws provided for handing over debentures of the city to the Company to be aided, instead of the money proceeds thereof.

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APPEAL from a judgment of DRAKE, J., dismissing a rule *nisi* to quash By-law 166 of the City of Vancouver as *ultra vires*. By consent of counsel the application was treated as including a motion to quash By-law 167 to the same effect.

E. P. Davis in support of the rule.

A. J. McColl, Q.C. and *A. St. G. Hamersley, contra.*

DRAKE, J. : On the 9th January last, a rule was obtained calling on the Corporation to shew cause why By-law 166 should not be quashed, on the following grounds :—

1. That it was *ultra vires*, inasmuch as there is no power in the Corporation to issue debentures to be handed over to a company in aid of a railway.

2. That the by-law repeals, alters or amends a money By-law (159) previously passed contrary to the provisions of section 129 Vancouver Incorporation Act, 1886.

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The argument on this By-law (166) was by consent made applicable to By-law 167, and the judgment in the one case was to govern the other.

On the first ground, sub-sections 85 to 88 of section 142 were referred to. The latter section is the one which governs in the present case, but that section uses different language in speaking of bonuses to railways ; it authorizes tne Corporation to pass by-laws for granting bonuses too.

The other sub-sections speak of subscribing for shares, guaranteeing payment of a company's debentures and issuing debentures, and handing over debentures by way of bonus. Then the section goes on to say " and for the issuing of debentures in the same manner as in the preceding section, which sanctions the delivery of the debentures

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to the Company aided." I see no reason why, when a bonus is granted either in cash or the equivalent for cash, the Corporation may not deliver the actual debentures to the undertaking. There are obvious objections to the more restricted meaning which Mr. *Davis* wishes to place upon the language of this sub-section. Corporation debentures might not be worth par, and in such a case if they granted a bonus of a specified sum they would have to make it good by the issuing of additional debentures, which would interfere with the stipulations which all money by-laws must contain.

The second ground is more important. The language of section 129 is clear; the exception mentioned in that section accentuates the affirmative character of the clause.

Mr. *McColl* contended that section 104, sub-section 8, of the General Act, 1892, gave distinct authority to the Corporation to repeal a money by-law, as the clause was not repugnant or inconsistent with the local Act; see section 4. The cases enumerated in this sub-section authorizing a Corporation to repeal a money by-law are limited to delay in construction or operation of the work aided.

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The repeal in the present case is certainly not based on any such grounds, because the By-law 159 was only passed on the 26th September, 1892, and the Company have six months to commence substantial construction; and, therefore, no delay could be urged, and the recitals in By-law 166 shew that the repeal was for a very different reason.

It was further alleged by Mr. *McColl* that a literal construction of section 129 would lead to an absurdity, because, in fact, no by-law, however imperfect, could be amended. When the language of a statute is clear, it is only necessary to give effect to it, and not interpret it so as to refine away its clear meaning. However inconvenient the result of a literal interpretation of a plain statute may be, the Court cannot on such grounds add to the language of the Legislature, or, as Lord ELDON expresses it, "It is

not the province of the Court to scan the wisdom or policy of the Legislature," *R.* v. *Watson*, 7 East. 214.

A statute *loquitur ad vulgus*, and if this Act stood alone as a by-law requiring the assent of the electors, it could be altered or amended by the Council. But it appears that on the 19th December, 1892, the Lieutenant-Governor, by an Order-in-Council, assented to the repeal of By-law 159 to the extent mentioned in the by-law now in question, and it was urged that this Order-in-Council was sufficient to the purpose of rendering By-law 166 valid, if it should be held to be invalid under section 129.

This Order-in-Council was obtained under section 113 of the General Act, 1892, and is included in certain sections which are grouped under the heading " Contracting Debts." It has been held in the *Thrasher case*, 9 S.C.R. 527, and *Hammersmith Railway Company* v. *Brand*, L.R. 4 H. of L. 171, that these headings are to be looked upon in the light of preambles, and a preamble is the key to the statute, and may be consulted for the purpose of solving ambiguities.

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The clauses under the heading above mentioned are: First—That no liability is to exceed the current revenue, and that all by-laws for contracting debts are not to be valid unless they contain certain specified details. These two clauses are applicable to all municipalities, and are contained in the Vancouver Act in almost identical language. This clause, 112, introduces a restriction in the case of money by-laws of a township or district municipality. Then section 113 gives the recitals which shall be contained in such by-laws, meaning all by-laws referring to the subject matter contained in this group of sections; and sub-section 4 says that no such by-law shall be altered or repealed, except with the consent of the Lieutenant-Governor-in-Council.

This clause is not inconsistent with, or repugnant to, the language contained in section 129 of the Vancouver Act. It can be read with it, and is a means for obviating the

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difficulty which it was argued would arise from literal construction of section 129.

The Order-in-Council was passed subsequent to the final passage of By-law No. 166, and, therefore, it was contended, was of no avail. In my opinion this Order-in-Council is sufficient to give validity to By-law 166, but until that order was passed the by-law was inoperative.

There is nothing in the Act which says that the Lieutenant-Governor-in-Council is to give his assent before any by-laws can be passed. If the assent is given at any time, it is, in my opinion, sufficient. In the present case this order sufficiently identifies the by-laws which it is intended to sanction.

This rule must be discharged with costs; but only one set of costs will be allowed.

Rule nisi discharged with costs.

From this judgment the applicant appealed to the Divisional Court, and the appeal was argued before BEGBIE, C.J., CREASE and WALKEM, JJ., on the 14th and 24th of February, 1893. Judgment was delivered on the 4th of March, 1893.

E. P. Davis, for the appeal.

A. J. McColl, Q.C., and *A. St. G. Hamersley, contra.*

BEGBIE, C.J.: This case comes up before us by appeal from the order of DRAKE, J., upholding a by-law of the Corporation of Vancouver.

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It appears that in the winter of 1891–2 negotiations took place between the Burrard Inlet & Fraser Valley Railway Company and two other associated Railway Companies, viz., the Northern Pacific and the Seattle & Eastern, both of them incorporated in the United States. The result was the execution of a contract between the three Railway Companies, dated 7th March, 1892, at least that is the date apparently of the notarial copy stipulating

for the construction within two years of a line by the first named Company, with terminus at Vancouver, extending to the international boundary and there connecting with the two last-named lines, with certain stipulations as to working arrangements for forty years from the completion of the works. During the summer of 1892 further negotiations took place between the Burrard Inlet Railway Company and the Corporation of Vancouver, by which, in order to facilitate the construction of the railway, the Corporation were to place at the disposal of the Railway Company debentures to the aggregate of $300,000.00, bearing 4 per cent. interest, and repayable at the end of forty years, the Company undertaking to commence their works within six months and to complete them within two years, and to procure from the N.P. Railway a covenant that they would operate their line and maintain it in repair for forty years. The terms of this arrangement were reduced into writing, but apparently not formally executed. However, in pursuance of this arrangement a by-law was passed known as No. 159, both reciting the above agreement of the 7th March, 1892, and also setting forth at length the other draft agreement, the performance of which by the Railway Companies was expressed to be the condition moving the Corporation to make the by-law which authorized the creation of the $300,000.00 worth of debentures to be delivered to the Company or for their use. This By-law, No. 159, further recited that for providing the sinking fund and interest it would be necessary to raise by special rate $15,157.05 annually. It stated the latest assessed value to the rateable property and the existing amount of indebtedness to the Corporation, but did not specify the amount of rate in the dollar necessary to raise the annual sum of $15,157.05 as required by section 113, sub-section 4 of the General Municipal Act, 1892, the charter of 1886 being silent on this latter point.

This by-law received the assent of a certain body of rate-

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payers, but doubts arose whether that was the correct body to give such assent, or whether the approving body ought not to have been taken from another list; and such doubt continuing, notwithstanding the decision of a Judge of the first instance upholding such by-law, the course taken by the Corporation was this: They did not submit By-law 159 to the alternative body of ratepayers for approval, but they prepared two copies of another by-law termed Nos. 166-7 respectively, and which were submitted for assent to the ratepayers on each of the two different lists, and received the assent of both. And it is these by-laws that are now attacked, irrespectively of the competency of the assenting ratepayers, on the ground that they each of them (they are in fact in identical words) repeal or alter the By-law 159, contrary to the provision of the last words of section 129 of the charter, "When such assent is received no such by-law (for raising money, etc.) shall be altered, amended or repealed by the Council except as hereinafter provided."

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In my opinion the only provisions "thereinafter" contained for "altering, amending or repealing such by-laws" are those contained in sections 134–5, and those provisions are quite sufficient to afford scope for the words in section 129, and therefore any attempt to force them is not permissible. But they do not permit or refer to the repeal or alteration of any point of a money by-law except in one future contingent case. If the annual rate fixed by the original by-law be found unnecessarily large, it may, under certain circumstances and after certain steps and consents, be varied for a year as there provided, sections 134–5. In no other part of the charter subsequent to section 129 is any other repeal or alteration whatever of a money by-law hinted at. The words of the opening of section 142, it is true, are very large: "The Council may from time to time pass, alter or repeal by-laws" (for 127 various purposes then immediately enumerated), but that general power evidently means "may pass by-laws, alter or

repeal them as by this charter is respectively appointed," and so for the method and limits of resulting money by-laws we are thrown back upon sections 134–5.

It was attempted to argue that the words "as hereinafter provided" are equivalent to "as may hereafter (that is in any subsequent statute) be authorized." But if that be their meaning they are clearly superfluous, for if a subsequent statute conferred on the Council, or on any body, with or without further ceremony, power to repeal or alter any money by-law, it would have to be obeyed—the power would be exercisable whether referred to in the charter or not. The two sets of words, however, have not the same meaning. "Hereinafter" is clearly to subsequent provisions contained in the charter itself. But the use attempted to be made of this gloss appears rather remarkable. By means of it we were told the last words of section 113, sub-section 4 of the General Act, 1892, are imported into the charter. I should have thought they have entered in *proprio vigore*. But what are those words? "No such (*i.e.* no money) by-law shall be altered or repealed except with the consent of the Lieutenant-Governor-in-Council," and we were told that that meant any such by-law may be altered or repealed with the consent of the Lieutenant-Governor-in-Council.

It is possible that a similar phrase may in some Act of Parliament receive such a construction where it would otherwise be quite insensible, *ut res magis valeat quam pereat*. There is not the least necessity to give them here any other meaning than their plain natural meaning, viz., that of imposing an additional fetter on the Corporation beyond what is provided in section 135 of their charter providing an additional security to creditors against any tampering with any securities once issued. And looking to the history of that Act of 1892 and the suggestions in the report of the Commissioners, it is impossible to doubt that this was in fact in the mind of the Legislature. "The

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construction of a proviso must be such as not to create a fresh right, but to limit the operation of the section to which the proviso is added," *per* BOWEN, L.J., in the *West Ham. case* (1892) 2 Q.B. 680.

By-laws 166–7 are therefore *ultra vires* of the Corporation, and are within the prohibition of section 129 of the Vancouver charter if they either alter or repeal any money by-law, and particularly No. 159. We were told that no alteration was effected or intended; that the last By-laws 166–7 were in substance identical with No. 159. But is that the fact? Surely they display in their substance, nay, in the mere fact of passing them, a manifest intention to effect some alteration. It certainly was not intended that they should be cumulative upon 159. The very recitals shew clearly that there was no intention to levy $600,000.00. And if they were not to be cumulative, then they must have been intended as substitutional, something the promoters wished to have instead of No. 159, intentionally, therefore, altering No. 159, and to that extent repealing it. What other object or intention could the promoters of the new by-law have in view? If they were satisfied with the terms expressed in No. 159, and only wished to have those terms ratified; if they were not satisfied with the decision of the Court of first instance in their favour, and if their doubts only extended to the efficiency of the assenting body, why did they not submit that very By-law No. 159 to the approval of the alternative body of ratepayers? They evidently desired an alteration of the terms; and there was very good reason for that, as will presently be seen. The body of the by-law now impeached is, in several important respects, quite different from the By-law 159. They both agree in the capital amount to be represented by debentures and the purpose to which the capital is to be applied. They differ in almost everything else. The By-law 159 stipulates for a fixed annual amount ($15,157.05) to be levied by special rates; No. 166 stipulates

for a variable annual taxation not to exceed $19,500.00. All the contracts and negotiations recited in No. 159, the due performance of which constituted the express consideration for that by-law, disappear, and a new arrangement entirely is to be adopted. No agreement whatever is to be executed until the Burrard Inlet & Fraser Company have completed their line, nor are any debentures until then to be handed over by the Corporation. In these respects the by-laws give better consideration to the ratepayers for their $300,000.00. But on the other hand, the stipulation in No. 159 as to the forty years working by the contracting Companies (that is during the currency of the debentures) is curtailed to twenty-one years, and the express contract to procure the United States Companies to bind themselves to keep their road in repair entirely disappears. And we were very frankly told that the forty years' maintenance stipulation, a main part of the consideration in No. 159, was found to be entirely *ultra vires*. It was very necessary that a new by-law should be passed, entirely irrespective of the alleged doubts concerning the list of voters.

Whether these alterations render the by-law more favourable to the Corporation or to the Company is entirely beside the present enquiry. It is clear that the By-laws Nos. 166–7 differ radically from No. 159, both in the burden which the ratepayers will have to bear and in the consideration they are to receive ; and the alterations are not such as are contemplated in section 134 of the charter, and therefore cannot be ratified by the Lieutenant-Governor-in-Council. No. 159 is at present an existing, valid by-law, and the other two, Nos. 166–7, altering and in no part repealing it, are therefore *ultra vires* and invalid.

Entirely apart from these considerations, which were the only matters argued, it seems clear that Nos. 166–7 are also bad for non-compliance with divers requirements mentioned in the statute. They do not set out the annual

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rate on the dollar necessary for re-payment of the debenture principal and interest in forty years (1892, section 111, sub-section 3; section 113 and sub-section 4), nor do they state definitely any annual amount whatever proposed to be raised, as required by their charter (section 128, sub-section 2), it is to be $19,500.00, or such less amount as the Council may lawfully reduce it to. Nor is it stated, nor is it possible to foretell when this special rate of $19,500.00 is leviable. It would be absurd to suppose it collectable before the debentures are issued, and the debentures are not issuable until various contingencies are fulfilled, which will probably not be the case for two years or more.

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The appeal will, therefore, be allowed with costs here and below. Before making this order, however, we direct that all the proceedings on this application from the very first be amended by intituling them in the matter of the statute 49 Vic. Cap. 32 (the charter), and 55 Vic. Cap. 33 (the last Municipal General Act).

CREASE, J.: This is an appeal from the judgment of Mr. Justice DRAKE validating By-laws Nos. 166–7, Vancouver City, for the issue of $300,000.00 worth of debentures to the Burrard Inlet & Fraser Valley Railway Company for the purpose of forming a substantially continuous line of railway from the city of Vancouver to the cities of Seattle and Tacoma, in Washington State, and other points in the United States. By-law No. 159, which was passed and assented to by the voters for the city, was contested before Mr. Justice MCCREIGHT, and its validity sustained by that learned Judge in his judgment of the 6th of December, 1892. That judgment is now under appeal.

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Before the last-mentioned decision was made, to avoid litigation on the points disputed in By-law 159, the city and Council of Vancouver, with the assent of a majority of the voters, passed By-laws 166–7 (omitting some of the provisions objected to in By-law 159), and to meet

certain objections then raised, for the same object substantially as that by-law, namely, the connection by railroad of the cities of Vancouver, Seattle and Tacoma. The legality of these two by-laws, which, in substance, form one by-law, voted on by two different sets of voters, was contested by the present plaintiff (appellant) on behalf of himself and other voters, and confirmed by Mr. Justice DRAKE in his judgment of the 24th January, 1893, now in appeal before us.

It should be mentioned that none of the by-laws have yet been acted upon by the Railway Company; also, that before the third passing of By-laws Nos. 166–7 the assent of the Lieutenant-Governor-in-Council was obtained to the repeal of so much of No. 159 as was not consistent with the provisions of Nos. 166–7; thereby the learned Judge considered No. 166, which was not before valid, was validated.

He also considered, and I agree with him, that under sub-sections 85 to 88 of section 142 of Vancouver Incorporation Act, the Corporation assuming it to have power to issue debentures as a bonus in aid of a Railway Company, could lawfully hand them over to such Company. Besides being lawful, it was considered that it would be much to the pecuniary advantage of the Corporation to hand them over to the Company direct rather than risk the raising money on them themselves and paying the bonus in cash.

It is noteworthy throughout that there is no affidavit on the merits, and that the applicant has said nothing to shew that it would or would not be disadvantageous to the city to advance $300,000.00 towards bringing another railroad into the city of Vancouver to connect it, as this one proposes to do, with all the extensive countries to the south and east of it.

But it is equally remarkable that the defendants, if they considered such a connection advantageous, should have proceeded to effect this object by the round-about process

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of three by-laws which, if affirmed now, would certainly have become a fertile source of litigation hereafter.

That there could be no doubt of such a result had the promoters of these by-laws succeeded is, I think, manifest on the face of the by-laws themselves. The considerations were different. The terms were altered. Forty years was turned into twenty-one years. The agreement tripartite was not presented as signed in either by-lay, neither do the agreements coincide. The first contract was not at an end before the making of No. 166. There was on the face of the 166–7 By-laws a direct contravention of the material clause of the Incorporation Act, which prescribed that the rate per dollar should be specified, an omission which brought the by-law within *Sutherland* v. *East Nissouri*, 10 U.C.Q.B. 626. There is a question of the accuracy of the relative amounts to be set aside as sinking fund in each year. The first by-law recites an agreement which leaves something to be settled at a future time. The next by-law, while professing to be the same, recites an agreement which does not leave anything to be settled at a future day, and other points present themselves which could readily be conceived as forming a ground for lengthened proceedings, expense and delay.

The weak point of the whole proceeding is that the By-law 166 purports to repeal, alter and amend a money By-law, 159, previously passed, contrary to the provisions of section 129 of the Vancouver Incorporation Act, 1886. That section says: "Every by-law for raising upon the credit of the city any money not required for its ordinary expenditure, and not payable within the same municipal year, must receive the assent of the electors of the city in a manner provided by this Act." Then it adds the following: "And when such assent is received, no such by-law shall be altered, amended or repealed by the Council except as hereinafter provided."

It is on the meaning of these last words that the main

question of legality or illegality turns; and, to me, taken with the context and read with the Municipal Act, 1892, it appears perfectly clear.

The " hereinafter " is fully satisfied, it appears to me, by section 134 of the Vancouver Incorporation Act, which provides as to when, in any particular year, the rate imposed by the money by-law may be reduced by by-law, and by section 136, sub-section 3, which provides for the suspension of the yearly rate for any given year.

The section of the General Municipal Act, 1892, which has been invoked to assist the defendants (respondents) in this appeal has not, in my opinion, the effect sought to be given to it. That portion of the Act, namely, sub-section 4 of section 113, merely says no such by-law, *i.e.*, for raising money outside of the ordinary municipal revenue, should be altered or repealed except with the consent of the Lieutenant-Governor-in-Council, a most valuable safeguard, which should find a place in every Municipal Act, but which appears to me as not conferring the power to repeal a money by-law, but merely to protect the municipal credit with the outside world.

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By section 142, Vancouver Incorporation Act, general power is given to the Council from time to time to pass, alter and repeal by-laws. But these powers are to be exercised under the special provisions of the Act.

The construction I have given to the Vancouver charter in applying its provisions to By-laws 166–7 is not affected by the General Municipal Act, 1892, except to extend the additional protection to a money by-law which I have described. The application of the charter to these by-laws is complete of itself, and were there any repugnancy or inconsistency between the General and Special Act, although the former is later in date, the Special Act would prevail on the principle *generalia specialibus non derogant*, Endlich-Maxwell on Statutes, section 223, *et seq.*

The Legislature having, at the request of the Corpora-

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tion, already given its attention to the Act for the Incorporation of Vancouver City, it may reasonably be presumed not to have intended to alter the special charter by a general act, unless that intention had been manifested in explicit language—which is absent here—or there were something to shew that such general act was intended by the Legislature to embrace the special provisions of the charter. There is nothing in sections 4 and 5, or other preliminary sections of the General Municipal Act of 1892, to favour such a derogation.

It is stated that no objection would have been raised to By-laws 166–7 if they had been drawn out at first as they now stand. However that may be, it is within the scope of our present inquiry, as I view the various Acts.

As it is, owing to the peculiar manner in which the by-laws have been framed and passed, and the objections which have been raised, these by-laws which purported to be a benefit to the city have merely produced something like a deadlock, from which, judging from appearances, nothing can extricate them but legislation, which is beyond the province of a Court.

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There is, however, evidence before us that no action has been taken to carry the by-law and the agreement into execution, so that there are no vested interests arising from that cause in the way of such a solution.

It appears to me, therefore, from a consideration of all the provisions of the Acts taken together, and as applied to municipal by-laws, that it was the deliberate intention of the Legislature that when once people had embarked their money on the security of a by-law creating a loan for other than ordinary expenditure of the corporation, no change should then be made in it by the mutable *personnel* of a municipal body except as above specified.

And as a further assurance to that effect, section 113, sub-section 4, of the General Municipal Act, 1892—to which I have already referred—adds a further precaution for the

safety of such a sensitive plant as capital, that no such by-law should be altered or repealed except with the consent of the Lieutenant-Governor-in-Council. This is no permissive power to grant a repeal, but a further precaution against hasty action, for the security of investors, and to preserve the public credit of the municipality; and this I consider to be the proper construction to apply to By-laws 166–7. There was no power in the Council to repeal 159, and, for the reasons I have given, I consider 166–7 are invalid and *ultra vires* of the Corporation, and consequently that the judgment under appeal should be reversed, and the appeal allowed, with the costs of this Court and of the Court below.

WALKEM, J.: The City of Vancouver has a special legislation charter, 49 Vic. Cap. 32. Under that charter a money By-law, No. 159, was passed and assented to by the electors, to come into force on the 10th of October, 1892. Its object was to aid the "Burrard Inlet & Fraser River Valley Railway Company" with a subsidy of $300,000.00, provided the Company perfected and secured traffic arrangements for a period of forty years with the Northern Pacific Railway in the adjoining State of Washington.

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Later on, in 1892, two further By-laws, Nos. 166–7, having the like object and authorizing the like subsidy, were passed and assented to. They, however, respectively cut down the term of forty years, mentioned in No. 159, to twenty-one, in order to conform, as counsel explained, to the provision of section 77 of the British Columbia Railway Act, 1890, which was that no agreement as to traffic arrangements made between railway companies should extend beyond twenty-one years.

A motion to quash By-law No. 167 was made before my brother DRAKE on two grounds, and after argument the rule was discharged and the by-law sustained; hence this appeal.

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One of the two grounds was abandoned before us, and the remaining one—a concise, legal point—was that as the by-law purported to alter By-law No. 159 by substituting the term of twenty-one years for that of forty, and by correspondingly changing the time for payment of the subsidy, it was *ultra vires* as being contrary to section 129 of the city's charter, which is as follows: "Every by-law for raising upon the credit of the city any money not required for its ordinary expenditure, and not payable within the same municipal year, shall, before the final passing thereof, receive the assent of the electors of the city in the manner provided in this Act; and when such assent is received, no such by-law shall be altered, amended or repealed by the Council except as hereinafter provided." The language of the first part of this enactment is not well chosen, for anyone familiar with the municipal system knows that a money, or other, by-law is "passed" when it receives its last reading in the Council and is concurred in by the Mayor or other presiding officer; but here, "before the final passing," the assent of the electors is to be obtained. As the section proceeds it says that no such by-law—when so assented to—shall be altered or repealed "by the Council." But, said Mr. *McColl*, it does not say that it may not be altered or repealed by the Council and electors. The answer is that the Council, as a legislative body, is clearly prohibited from initiating or passing any measure of repeal or amendment; and, of course, in the absence of such a measure, there would be nothing for the electors to assent to. The rest is clear—no money by-law shall be altered or repealed "except as hereinafter provided." The words "hereinafter provided" are fully satisfied by section 134, upon which nothing else turns. The alteration, therefore—and it is sufficient to find that there was one without discussing it—of By-law No. 159, as attempted to be affected by the impeached by-law, was *ultra vires;* hence the latter is invalid.

It was, I may state, contended that if this were so every newly-fledged municipality would have larger powers than the city, as it could, under the General "Municipal Act, 1892," amend or repeal any of its money by-laws; and the absurdity of the thing, as well as the rule that a liberal construction should be given to powers conferred upon municipalities, ought to be considered by the Court. But liberality beyond a precise statutory limit is not within the power of a Court to consider. I fail also to find anything at all absurd in the distinctive powers referred to. Even if the absurdity did exist, "If the words of an Act," as observed by Lord ESHER in the case of *Queen* v. *The Judge of the City of London Court* (1892) 1 Q.B. 290, "are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity." No words can be clearer than the prohibitive words of section 129: "No such by-law shall be altered, amended or repealed by the Council," hence the reference which has been made to the General Municipal Act to explain them was wholly superfluous, as they are incapable of two interpretations.

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It follows that the decision upholding By-law No. 167 must be reversed with costs, including the costs of the Court below; and, as I understand it, By-law No. 166 falls with it.

By consent the title of this matter is to be amended by inserting the words "In the matter of the Vancouver Incorporation Act, 1886, and the Municipal Act, 1892," before "In the matter of Bell-Irving and the city of Vancouver," etc.

Appeal allowed with costs.

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B.C. Land Act, sections 5-13-14—Record obtained by misrepresentation—"Unoccupied"—Trespasser making improvements—Whether right to recover.

H., in 1893, applied to the Crown to pre-empt the land in question, and obtained a record thereof in his own name from the Crown upon a misstatement that the same was not improved, etc., and a statutory declaration that the same was "unoccupied and unreserved Crown land within the meaning of the Land Act." C., in 1889, made application to the Crown to purchase the land, and, in the belief that his purchase and title from the Crown were completed, entered into actual occupation, and made improvements on the land to the value of $600.00. H., at the time of his application and record, was aware of the occupation and improvements of C.

Held, Sustaining the decision of the Crown Lands Commissioner, that at the time of the application of H. the lands were not "unoccupied" Crown lands within the meaning of section 5 of the Act, and were not open to pre-emption and record.

That section 14 of the Land Act, as amended by the Land Amendment Act, 1891, Sec. 1, "The occupation in this Act required shall mean a continuous *bona fide* residence of the pre-emptor, or of his family, on the land recorded by him," relates to section 13, which provides for cancellation of the record of a settler "if he shall cease to occupy such land," and does not govern the question of what lands are "unoccupied" for the purposes of section 5, *supra*.

Semble, That as H. was a trespasser and wrong-doer, $180.00 awarded by the Land Commissioner to be paid to him for his improvements while in possession was improperly awarded.

Statement.

APPEAL by Thomas Hereron, under section 103 of the Land Act, C.S.B.C. 1888, Cap. 66, from decisions of Leonard Norris, Assistant Commissioner of Lands and Works, and Forbes George Vernon, Chief Commissioner of Lands and Works. The appeal was argued before DAVIE, C.J.

Chas. Wilson, Q.C., for appellant.

E. P. Davis, Q.C., contra.

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DAVIE, C.J.: This matter comes before me by way of two petitions in appeal brought by Thomas Hereron from (1) the decision of Leonard Norris, Assistant Commissioner of Lands and Works for the Osoyoos division of Yale District, dated 18th November, 1893, and (2) the decision of the Honourable Forbes George Vernon, as Chief Commissioner of Lands and Works, dated 2nd October, 1894.

Under the Land Act the findings of fact of the Commissioner or functionary appealed from are final, and my jurisdiction to review his decision is confined to questions of law only.

The facts of the case are these: Joseph Christian in the month of October, 1884, being then the owner in fee simple of land adjoining the land now in dispute, took steps to purchase the land in question from the Assistant Commissioner, and acting under the *bona fide* impression that he had purchased the property, Christian fenced it in with a continuation of the fence of his fee simple land, and has ever since lived upon and occupied the land so under fence as his home, and still occupies it. He made improvements on the land in dispute to the value of $600.00, and to quote the finding of the Assistant Commissioner: "The evidence shews clearly that at the time of Hereron's application the place (meaning the land in dispute as distinguished from Christian's fee simple) was worth $2,500.00; there were improvements on it to the value of $600.00; Christian had cleared up and been cutting hay on some twelve acres of it believing it to be his, and it was included within the same fence, and formed part of Christian's ranch."

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On the 2nd September, 1893, the appellant applied to the then Assistant Commissioner to pre-empt the land included within Christian's fence other than his fee simple land. He stated to the Commissioner, contrary to the fact, that the land was not improved; that it was covered with fir timber hard to clear, and chiefly valuable to him (Hereron) for a water privilege he would acquire with it. He also

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made the usual statutory declaration used for the pre-emption of unoccupied and unreserved land in form No. 2 to the Land Act, that the land for which he had made application "is unoccupied and unreserved Crown land, within the meaning of the Land Act." Relying on these representations, and acting upon such declaration, Mr. Lumby, the then Assistant Commissioner, issued a record of the land in the appellant's name, who thereupon entered upon the land and sought to dispossess Christian thereof. Christian immediately appealed to the Assistant Commissioner of Lands and Works, Mr. L. Norris, who, after hearing both parties, pronounced the following decision:

"*Re* S.E. ¼ section 14, township 23, Osoyoos District, *Christian* v. *Hereron*. I find in the above case that Christian had no right to the land under the Land Act, either by pre-emption or purchase. He believed he had purchased it, but in this he was mistaken. He has, however, a claim to the land in equity by (1st) occupation, (2nd) improvements. This claim Christian had no opportunity to substantiate, not being aware that an application had been made for a record until after such record had been granted. On the other hand Hereron had no claim to the land in law or equity prior to September 2nd, 1893, when he obtained the record of it. The question then is as to whether Hereron's record is valid and should stand or not. Before Hereron's record was granted he made a statement to the effect that the land was not improved, that it was covered with fir timber, hard to clear, and chiefly valuable to him for a water privilege he would acquire with it. Upon these representations being laid before the late Mr. Lumby, Assistant Commissioner of Lands and Works, and upon Hereron making the usual statutory declaration that the land was unoccupied, a record was granted to him. The evidence, on the other hand, shews clearly that at the time of Hereron's application the place was worth $2,500.00, that there were improvements on it to

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the value of $600.00, that Christian had cleared up and been cutting hay on some twelve acres of it, believing it to be his, and that it was included within the same fence and formed part of Christian's ranch. It appears to me that Christian should have had an opportunity to advance and to substantiate, if he could, the equitable claim thus obtained. But this he was debarred from doing through the misrepresentations of Hereron. Apart from this, however, the declaration Hereron made that the land was unoccupied is false, and that he must have known it to be false when he made it; this in itself is sufficient to invalidate his record, which is accordingly cancelled," Sec. 8, Land Act, C.S.B.C. 1888, Cap. 66.

The Assistant Commissioner having reported the facts to the Chief Commissioner, Mr. Vernon, the latter functionary, it seems, caused certain improvements alleged to have been made by the appellant, since his application to record, to be valued, and the same were valued accordingly at $180.00. On the 2nd October Mr. Vernon ordered "that the record of the pre-emption granted to Mr. Hereron be cancelled and that Mr. Christian's application to record, dated 18th November, 1893 (it seems that Christian when apprised of the defect in his title by Hereron's record had himself applied to pre-empt), be accepted, and that a certificate of record of the lands in question be granted to him upon payment by him to Mr. Hereron of the sum of $180.00 for improvements made by the latter, as appraised by Mr. Coryell, P.L.S."

Judgment.

It is now argued by the appellant: 1. That the land at the time of his record was unoccupied land "within the meaning of the Land Act," and that, therefore, his declaration was technically true; 2. That if untrue, and the record obtained by misrepresentation, or howsoever, there is no power either in the Assistant Commissioner or Chief Commissioner to cancel it, but that the party aggrieved must proceed in the name of the Attorney-General by *scire facias*,

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writ of intrusion, or some such other step to recall the record; 3. That assuming that the Chief Commissioner would have power to cancel a record for false representation, he could only do so after a judicial investigation before himself, and that such investigation was wanting in this case.

Upon the first point I am of opinion that the land was not unoccupied land within the meaning of the Land Act, and that Mr. Hereron's mere swearing, by the card as it were, that the land was unoccupied "within the meaning of the Land Act" will not avail him, in view of its notorious occupation to all practical intents and purposes. It is perfectly true that the Land Act, section 14, as amended by the Land Act Amendment Act, 1891, provides "that the occupation in this Act required shall mean a continuous *bona fide* personal residence of the pre-emptor or family on the land recorded by him," but this by no means implies that all land not so occupied, *i.e.*, "occupied by a settler on the land recorded by him," shall be deemed vacant and unoccupied land, open to pre-emption by any person entitled to pre-empt land. To so hold would be to hold that lands which had been purchased directly from the Crown, and never recorded at all, would be open to record by any stranger—a proposition which requires only to be stated to be ridiculed. It appears to me that the occupation referred to in section 14 is the converse of the "non-occupation" or "cessation of occupation," which by section 13 would justify the Chief Commissioner in cancelling a pre-emption record, and is not intended to be the gauge of the "unoccupation" which entitled a man to pre-empt Crown land. Moreover, if the gauge of the "unoccupation," which would entitle to pre-empt, were the want of occupation by a former pre-emptor, what becomes of section 13, which reposes the power in the Chief Commissioner to cancel records for want of occupation "in a summary way" (which I take it, and bearing in mind the

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principles laid down in *Reg.* v. *Smith*, 3 App. Cas. 614, means in a summary way, after affording opportunity of a hearing to the pre-emptor) if any stranger may come in and frustrate the powers of the Commissioner by himself effectually cancelling the record in obtaining a new one for himself, and this without any shadow of hearing or trial being accorded the original pre-emptor or his family. Again, it must be remembered that Christian's occupation of this land by fencing it in with his own commenced in 1884, before the passage of the amendment of 1891. Under the Act which was in force then, "occupation," according to section 14, meant residence of the pre-emptor on "land" (not "the" land) recorded by the settler. There is nothing in this case to shew that the adjoining land, of which Christian owns the fee simple, "was not originally acquired by him by record." If so, then Christian did *bona fide* reside on "land recorded by him." What land he lived on is immaterial. He lived on land recorded by him, and, according to the principle recognized in *Jones* v. *Williams*, 2 M. & W. 326, the occupation of his fee simple land would be occupation of the adjoining land. I am therefore clearly of opinion that the land in dispute was not at the time of Hereron's record unoccupied land within the meaning of the Land Act.

Judgment.

Then is there power under the Act to the Commissioner or Assistant Commissioner to cancel this record, and have the Land Office proceeded regularly in cancelling it? I am of opinion that both these questions must be answered in the affirmative. The Assistant Commissioner finds that the appellant's declaration was false, and that he knew it to be false. The law then says that having made such false declaration, the applicant shall have no right, either at law or in equity, to the land, consequently he ceased to occupy, or to have any right to occupy, the land immediately the falsehood was ascertained. Then section 13 provides that the Commissioner, upon being satisfied of cessation of

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occupation, may cancel the record. This the Assistant Commissioner has done. But it is said the Commissioner in section 13 means the Chief Commissioner of Lands and Works only, but it is clear that the "Commissioner" under the interpretation clause means either the Chief or the Assistant Commissioner. In my opinion the Assistant Commissioner had legally and effectually cancelled this record, and there was no occasion for the Chief Commissioner to supplement that which he did. But, if it was necessary, I am further of opinion that the Chief Commissioner had nothing further to do but to act upon the report of his assistant, and that *qua cunque via* the record had been properly cancelled. There is only one thing which I see to find fault with in the decision of the Land Office, and that is the order upon Christian to pay Hereron $180.00. Upon no principle of justice that I can recognize is Hereron entitled to this sum or to any other compensation. He was a trespasser and wrong-doer when he made his improvements on Christian's fenced and improved land, and, so far from being recompensed, should rather be made to pay damages for invading his neighbour's property. In the view I take of it the condition to pay $180.00 could not be enforced; that matter is not, however, before me.

Judgment.

Upon the appeal I consider that the Assistant Commissioner's decision, as ratified by the Chief Commissioner, is sound in law, and that both petitions of appeal must be dismissed with costs.

Appeal dismissed with costs.

NORTHERN COUNTIES INVESTMENT TRUST v. ROSS. McFIE (Third Party).

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Practice—Rules 128–133—Third party—Right to bring in fourth—When exercisable—"Defendant."

A third party notice under Rule 128 can issue only at the instance of a defendant, and a person brought in by such notice as liable to indemnify the defendant, and who contests such liability, is not a defendant within the meaning of the rule, and cannot issue a notice bringing in and claiming indemnity over against a fourth party.

Semble, A third party who has obtained an order under Rule 133, admitting him to defend the action as against the plaintiff, is a defendant within the meaning of the rule.

SUMMONS by one Brown to set aside a notice served by McFie upon him under Rule 128, bringing him into the action as a person liable to indemnify McFie, who had been brought in as a third party by the defendant as liable to indemnify him against the plaintiff's claim. Statement.

E. Miller, for Brown.

D. G. Marshall, for the plaintiff.

R. W. Harris, for defendant.

O. L. Spencer, for the third party, McFie.

DAVIE, C.J.: This is an action on a covenant in a mortgage for payment of principal monies and interest. McFie, having purchased the equity of redemption in the mortgaged property, and agreed to indemnify the defendant therefrom, has, at the instance of Ross, the defendant, been served with a third party notice under Rule 128, which provides that where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court, issue a notice to be called a third party notice, to that effect, Judgment.

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stamped with the seal of the Court. A copy of the notice is to be fyled with the Registrar, and served in the same way as a writ of summons. The notice is to state the nature of the claim, and, together therewith, is to be served a copy of the statement of claim, or, if there be no statement of claim, then a copy of the writ of summons. In the case now before the Court, McFie, the third party, admits his liability to indemnify Ross, but asserts that he, too, has disposed of the equity of redemption to Brown, who in turn has agreed to indemnify McFie, and McFie has accordingly obtained an *ex parte* order permitting him also to issue a notice claiming indemnity over against Brown, pursuant to Rule 128. Mr. *Miller*, as counsel for Brown, who has been served with the third party notice, now applies to set the same aside, together with the order permitting its issue, upon the grounds that a third party notice can issue only at the instance of a defendant, and that McFie, although a third party, is not a defendant within the meaning of the rules of the Supreme Court. I am of opinion that the point is well taken. It is perfectly true that in *Fowler* v. *Knoop*, 36 L.T.N.S. 219, the Divisional Court (Cleasby B. and Field J.) gave leave to a third party to bring in a fourth—the same as McFie seeks to do here—and that the same practice was followed in *Witham* v. *Vane*, 49 L.J. Ch. 242; but those decisions were under the discharged rules of 1875, which, as pointed out in Wilson's Judicature Acts, page 189, 7th Ed., in regard to third party practice, differ in some important respects from the present rules, which limit the right to bring in a third party to a single case where the defendant claims to be entitled to contribution or indemnity. Is, then, a third party, who has been simply served with notice under Rule 128, and who does not contest the plaintiff's demand, a defendant? It seems not, although the definition of defendant in section 2 of the Supreme Court Act, 100 of the Imperial Judicature Act, includes "every person served with any writ of summons, or pro-

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cess, or served with notice of, or entitled to attend any proceedings." In the absence of authority I should have been disposed to consider a third party to be a "person served with process," if not with the "writ of summons," for Rule 128 expressly provides that the third party shall be served with "a copy of the statement of claim, or, if there be no statement of claim, then a copy of the writ of summons in the action." And, but for Rules 132–3 and the authorities presently quoted, a third party would seem to be a person "served with a notice of," if not "entitled to attend," the proceedings. The third party, however, does not defend the action or litigate with the plaintiff unless an order be made under Rules 132–3 giving the third party "liberty to defend the action" or to take such other steps as may seem just. In *Eden* v. *Weardale Iron & Coal Company*, 28 Ch. D. 333, it was held that the Court has no power to give a third party leave to fyle a counter claim against the plaintiff, and in dealing with the definition of defendant in section 100, FRY, L.J., says, and BOWEN, L.J., concurs with him: "I do not think that includes a third party. He is certainly not served with any writ of summons or process. The only question is whether he comes under the words 'served with notice of, or entitled to attend any proceedings.' These words seem to me to be intended to apply primarily, if not exclusively, to persons attending or served under Order XVI., Rule 40, by which in certain actions persons interested may be served with notice of the judgment, and may have liberty to attend proceedings." And referring to the notice under Rule 128, he says: "That does not appear to me to be notice of a proceeding within the definition contained in the 100th section." The point whether a person served with notice under Rule 128 becomes a defendant came again before the Court of Appeal twice in the same case, reported 34 Ch. D. 223, 35 Ch. D. 287. After the decision in 28 Ch. D., the third party, the Ecclesiastical Commissioners, obtained an order dated 17th March, 1885,

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that the question of indemnity as between themselves and the defendant should be tried after the trial of the action, and that pursuant to Order XVI., Rule 53 (our Rule 133), the Ecclesiastical Commissioners should be at liberty to appear at the trial and oppose the plaintiff's claim so far as they may be affected thereby, and for that purpose to put in oral and documentary evidence and to cross-examine the plaintiff's witnesses. This order, it was held by the Court, had the effect of making the third party defendants, and the plaintiff having, under Order XXXI., Rule 1, which empowers the Court to grant leave to the plaintiff or defendant to fyle interrogatories for the cross-examination of the opposite parties, obtained an order to interrogate the Commissioners, the Court of Appeal, 34 Ch. D. 225, upheld that order, Lord Justice COTTON saying; "It appears to me that the Commissioners, although originally not parties, have put themselves in the position of parties, and parties who are opposing the plaintiff." And LOPES, L.J., says: "If the Ecclesiastical Commissioners had been brought in as third parties, and no further order had been made, I think the order appealed from would have been wrong. But on the 17th March, 1885, an order was made, the effect of which was practically to place the Ecclesiastical Commissioners in the same position as if they were defendants." The point is more exhaustively discussed in 35 Ch. D., at page 287, upon appeal from an order permitting the Commissioners to interrogate the plaintiffs, and the principle is upheld that by simply bringing the third party in, under Rule 128, you do not constitute him a defendant, as the fight is simply between the third party and the defendant, but that the third party places himself in the position of a defendant immediately he gets an order empowering him not only to fight the defendant as to indemnity, but to litigate with the plaintiff also regarding the original cause of action. LINDLEY, L.J., says (page 296): "Being defendants, not because they are third parties, but

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by reason of the order of the 17th March, 1885, they are entitled to deliver interrogatories." The same principle is recognized in *Byrne* v. *Brown*, 22 Q.B.D. 657, and in *Edison Company* v. *Holland*, L.R. 41 Ch. D. 28. These authorities are binding on me, and I am bound to follow them. See also Wilson's Judicature Act, 7th Ed., p. 190: "But *semble*, under the present rules a fourth party cannot be brought in." *Carshore* v. *N. E. Company*, 33 W.R. 420, per COTTON, L.J.; to the same effect in the Annual Practice, page 425. I do not lose sight of section 24, sub-section 3, of the Judicature Act (section 13, sub-section 3, of our Supreme Court Act), on which Mr. *Spencer* relied; but it will be observed that the power to relieve third parties given by that section is dependent upon rules of Court, and carries the right no further than rules of Court may extend. The point is fully dealt with in *Eden* v. *Weardale Iron Company*, 28 Ch. D. 336, and the decision arrived at nevertheless, that a third party who obtains no order, under Rule 133, is not a defendant.

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I am, therefore, of opinion that the notice to Brown, and order authorizing it, must be set aside, and this application granted with costs.

Application granted.

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RE YORKSHIRE GUARANTEE AND SECURITIES CORPORATION (LIMITED) AND THE ASSESSMENT ACT.

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Constitutional law—Tax on mortgages as personal property—Direct or indirect—Exemption of indebtedness in respect of—C.S.B.C. Cap. 111.

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The Assessment Act (C.S.B.C. 1888, Cap. 111, Sec. 3) imposes a Provincial revenue tax upon all personal property, including, by the interpretation clause, "mortgages."

The appellants were assessed for the amount of mortgages registered by them, seven-eighths of which amount was represented by money borrowed by the Company in England upon its debentures, which was further secured by a deposit of the mortgages held in British Columbia to an amount sufficient to cover the outstanding indebtedness from time to time,

Held (1). That the tax was direct and *intra vires* of the Provincial Legislature.

(2). That the appellants were entitled to an exemption under section 3, sub-section 19 (a) in respect of the amount of their indebtedness for the borrowed money.

Statement.

APPEAL from a judgment of the Court of Revision confirming the assessment of the Company as the owners of mortgages registered in New Westminster to the value of $313,023.00, and in Vancouver to the value of $631,475.00, for the purpose of taxation thereon, at the rate of one-half of one per cent., under the provisions of the Assessment Act, C.S.B.C. Cap. 111, Secs. 3–6, providing for such tax upon mortgages, as personalty.

It appeared from the evidence that, of the mortgages

NOTE—(a) Section 3. All land and personal property and income in the Province of British Columbia shall be liable to taxation subject to the following exemptions, that is to say: * * (19). So much of the personal property of any person as is equal to the just debts owed by him on account of such personal property, except such debts as are secured by mortgage upon his real estate, or are unpaid on account of the purchase money therefor.

assessed, only one-eighth in amount represented investments of the Company's own capital, the other seven-eighths representing investments of money which the Company had borrowed from persons in England, according to a method set forth in the evidence of the Manager of the Company, as follows :

"The mortgages are deposited with bankers in England as security for monies advanced by clients to the Company. The Company has a stock of mortgages, and if a client wishes to effect an investment, a deposit slip informing him that the bank holds mortgages in his interest is given to him, in the same manner as an advance on bills of lading; the Company deals with mortgages as if they are chattels, depositing the mortgages, which are all taken in the name of the Company, as security for the advance from the client, he being an equitable mortgagee, and having also a debenture handed to him, which is a charge on general assets and a specific charge on specific mortgages. The paid-up capital, loans and reserve fund, and profits of the Company, at 30th June, 1895, would be £412,380, the money borrowed being £359,733, and lent on mortgages £387,000, paid-up capital £27,749, 10 per cent. on subscribed capital, reserve £12,000, and amount lent in British Columbia $944,000.00. The tax is an item in the expenses of the Company, and must be recouped by the mortgagor, and if he did not pay it the Company would charge a higher rate of interest. Debentures are sold and money brought to British Columbia and invested on mortgages. Money can be lent in British Columbia without reference to the head office, the mortgages being registered in British Columbia and forwarded to England as completed; the proportion of capital of the Company to loaned money is one-eighth, the mortgages being subject to an indebtedness by the Company of seven-eighths of their amount."

Statement.

The principal ground of appeal relied on was that the imposition of the tax in question was *ultra vires* of the Provincial Legislature as being an indirect and not a direct tax. The appellant Company, also contended that, in the event of that ground being decided against it, it was entitled to have deducted from the amount of the whole assessment the seven-eighths thereof represented by the sums so borrowed by the Company in England.

The appeal was argued on the 11th July, 1895, before the Full Court, CREASE, MCCREIGHT and DRAKE, JJ.

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D. M. Eberts, *A.-G.*, and *A. G. Smith*, for the Crown: We take the preliminary objection that the appeal is out of time. The judgment of the Court of Revision appealed from was delivered on the 28th January, 1895, and the notice of appeal to this Court was given on the 18th March following. The statute giving the appeal, 52 Vic. (B.C), 1889, Cap. 28, provides: "The notice of such appeal to the Full Court, the time for bringing the same on, and the procedure generally, and the powers of the Full Court in respect of such appeal, shall be the same as in the case of an ordinary appeal from any judgment made by a judge of the Supreme Court to the Full Court." The words "any judgment" have the same meaning as the words "any final order in any matter not being an action" in Rule 684 (B.C. Rules, 1890), and the appeal ought to have been brought within twenty-one days, as provided by that rule.

Argument.

E. P. Davis, *Q.C.*, *contra:* The governing words are "ordinary appeal to the Full Court." The ordinary appeal to the Full Court, and that class of appeals in which that Court has exclusive jurisdiction, are appeals from final judgments in actions, in which the time for appealing is one year. Interlocutory appeals are proper subject of the jurisdiction of the Divisional Court, and the Full Court has only a concurrent and rarely exercised jurisdiction. The appellate jurisdiction in relation to final judgments in matters other than actions is not the ordinary, but the extraordinary jurisdiction of the Court.

Per curiam: We think that the proper construction of the statute is that this appeal should have been brought within the time limited for appeals to the Full Court from final judgments in matters other than actions, namely, within twenty-one days. To give the construction contended for by *Mr. Davis* would be contrary to the manifest policy of the Act that questions of taxation should be finally determined within the fiscal year. The Court has,

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by the terms of the statute, the same powers in respect of the appeal as in ordinary cases, including the power under Rule 743 to extend the time for appealing, notwithstanding the lapse of the time appointed; and, in view of the importance of obtaining an early decision upon a question affecting not only the appellants but others in the same position, we think it a proper case in which to exercise the power, and will accordingly now extend the time and hear the appeal.

E. P. Davis, Q.C., for the appeal: If the incidence of the tax is such that in the ordinary course of events it can be shifted on to another by the person upon whom it falls in the first instance, it is an indirect tax, *Reed* v. *Mousseau*, 8 S.C.R. 408; *Attorney-General for Quebec* v. *Reed*, 10 App. Cas. 141; *Dulmage* v. *Douglas*, 4 Man. 495. The tax in question is not a tax upon property in the proper sense of the term, it is a tax upon the hiring of money. One of the tests given is that the citizen can avoid paying an indirect but not a direct tax, *Attorney-General for Quebec* v. *Queen Insurance Company*, 3 App. Cas. 1090. For definition see *Queen* v. *Taylor*, 36 U.C.Q.B. 183; Mills' Political Economy, Ed. 1888. A house tax if imposed on the occupier is direct, but if imposed on the builder is an indirect tax. If this tax were imposed on the mortgagor it would be a direct tax, as he is the person who, in the nature of things, must pay it; but being imposed on the mortgagee, with the necessarily implied expectation that he will reimburse himself from the mortgagor as a part of the costs of the loan, it is an indirect tax. The covenant for payment of taxes in the short forms of Mortgage Act in general use contains a stipulation covering re-payment by the mortgagor of the tax. *Attorney-General for Quebec* v. *Quebec Insurance Company*, 3 App. Cas. 1090, is not so strong a case as the present. In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, the tax was held to be direct for reasons which

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shew the tax to be indirect here, see at page 583 : "It is not a tax on a commodity in which the bank deals which it can get an enhanced price for sufficient to cover the tax," here it is, for the mortgagee can charge a higher rate of interest sufficient to cover it. "If there be any method of recovering by the bank it is indirect and circuitous;" here the means of recovering it are direct and immediate.

As to the right of the Company to deduct seven-eighths of the total assessment as not representing their own personal property, or as representing so much of their "personal property as is equal to the just debts owed by them on account of such personal property," under section 3, sub-section 19 of the statute *supra*, the arguments sufficiently appear from the judgments.

Argument.

D. M. Eberts, *A.-G.*, and *A. G. Smith*, *contra*: The question of whether the tax is direct or indirect is a legal and not an economical one. The fact that the mortgagees may raise their rate of interest, or may stipulate with the mortgagors that the latter shall repay them the amount of the tax, does not alter its incidence as a direct tax upon the property of the mortgagees. The tax is not upon mortgages or mortgage transactions as such, but upon the personal property of the Company, and included in that term, by the interpretation clause of the Act, is mortgage indebtedness to them. Any indebtedness is similarly included no matter how arising. It is not a tax upon the amount of business done or upon the number of transactions, which is commonly recovered by means of a stamp, and which would probably be an indirect tax; and *Attorney-General of Quebec* v. *Reed*, 10 App. Cas. 141; *Reed* v. *Mousseau*, 8 S.C.R. 408; *Dulmage* v. *Douglas*, 4 Man. 495; *Plummer Waggon Company* v. *Wilson*, 3 Man. 68, are distinguishable. The tax cannot be avoided by avoiding the lending of money on mortgage, for it must be paid on the money itself whether lent or not. *Severn's case*, 2 S.C.R. 70, is practically over-ruled. See *Reg.* v. *Holliday*, 21

O.A.R. 42. All the authorities are reviewed in Clement on the Canadian Constitution, Ed. 1892, p. 425, *et. seq.*

E. P. Davis, in reply: The *Severn case* is not over-ruled, but the rule of construction was better defined in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 595, namely, that the Court will have regard to the substantial general tendency of the tax. Does it really fall in practice upon the person who pays it in the first instance? A tax which in the ordinary and common course is necessarily shifted upon another person is an indirect tax. The intention of the Act to be gathered from the necessity or probability of the case is that the tax should ultimately be paid by others than the mortgagees.

CREASE, J.: This is an appeal by the Yorkshire Guarantee Company against the judgment of the Court of Revision and Appeal under the Assessment Act, which confirmed on appeal the assessment of the Company, in the year 1894, for the sum of $313,023.00 on account of registered mortgages in New Westminster City, and for $631,475.00 on account of registered mortgages in Vancouver City, in all $944,498.00 of an assessment under the mortgage tax provisions of the Assessment Act. The tax has been paid for the previous year. This was a test case upon the questions:

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(1) Whether or not the money borrowed by the Company upon the security of the mortgages assessed can be deducted from the value under the provisions of sub-section 19 of section 3 of the Assessment Act.

(2) Whether or not the mortgage tax is an indirect tax, and therefore unconstitutional.

A preliminary objection was raised by the Attorney-General that the appeal being in a matter not in an action, under Supreme Court Rule 684, was out of time, as the judgment was on the 28th January, 1895, but the notice of appeal was not made until the 18th March last. After argument it was decided that the appeal should have been

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brought within the twenty-one days; but owing to the importance of the case, for it indirectly affected the other companies who raised their capital by debentures, the Court considered that sufficient cause was shewn to warrant them in ordering the appeal to proceed at once.

To facilitate the decision and narrow the issues, Mr. *Davis* omitted the consideration of several of the grounds of appeal, for instance: (1) Whether the Yorkshire Guarantee Company was a registered Company within the Province. (2) The registration of mortgages containing land in two districts, at New Westminster and Vancouver, twice over, once in each district. (3) And as to mortgages which have been paid off before assessment. These were matters for mere adjustment with the Deputy Attorney-General. This left only a few grounds to discuss, viz.: (1) The proposed deduction from the assessment of the amount owing in England on account of the mortgage assessed, *i.e.*, the amount borrowed by the Company on the security of the said mortgages. (2) Whether the Provincial Government has jurisdiction to make the assessment. (3) That the mortgage tax itself is an indirect tax, and therefore beyond the taxing powers of the Province. (4) That the sections of the Assessment Act providing for the mortgage tax are *ultra vires*.

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The evidence before the Court shortly summarized was that the greater part of the business of the Company in British Columbia consists in lending money on mortgage of real estate in British Columbia as well as other places. These loans on mortgage (which as used throughout this judgment means mortgage of real estate) are of two kinds. One, of the monies lent by the Company on mortgage in British Columbia directly, *i.e.*, out of their funds, consisting of paid-up capital, reserve funds and profits. These, from the evidence of Mr. Farrel, the manager, amount to one-eighth of the monies lent by the Company on mortgage in British Columbia. The remaining portion of the monies

so lent by the Company on British Columbia mortgages is borrowed from persons in England. They are secured by debentures, which are a general charge on all the assets of the Company of what nature and kind whatsoever, together with a deposit of British Columbia mortgages made in the name of the Company for the benefit of persons so advancing the money on mortgage. And these are exchanged when they are paid off for other mortgages of a similar amount. No form of such mortgage was produced.

The monies so advanced on mortgages in British Columbia and borrowed in England constitute the remaining seven-eighths of the whole monies advanced on mortgage in British Columbia.

These seven-eighths, the Company contend, are not liable to taxation under section 3 of the Assessment Act, C.S.B.C., 1888, Cap. 111.

The point raised by Mr. *Davis* for the Company, is that the Provincial Legislature has no jurisdiction to make the assessment upon the ground that the mortgage tax is an indirect tax, and not therefore *intra vires*. This contention is effectually answered and met by *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

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From a careful analysis of the evidence in the present case, and the application to it of the reasoning employed by Lord HOBHOUSE in the *Lambe case* (page 583), which is well worthy of perusal, there is no doubt that the tax now in question is "demanded directly of the Company, apparently for the reasonable purpose of getting contributions for Provincial purposes from those who are making profits by Provincial business." "It is not a tax on any commodity which the Bank deals in and can sell at an enhanced price to its customers." "It is not a tax on its profits, nor on its several transactions. It is a direct lump sum to be assessed by simple reference to its paid-up capital and places of business."

For these reasons the tax must be held to be direct taxa-

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tion within sub-section 2 of section 92 of the British North America Act.

The Provincial Legislature must have intended and desired that the very corporations from whom the tax is demanded would pay and finally bear it. It is carefully designed for that purpose.

Neither is it indirect as a tax on mortgages. It is palpably a tax on the money, not on the land, and it is therefore direct and *intra vires*.

Now, as to the contention that the seven-eighths before mentioned is not liable to taxation under section 3 of the Assessment Act. That section is not capable of such interpretation. The mode of investment of personal property of the Company, and even its non-investment, cannot possibly, as a matter of principle, affect their obligations to pay the tax.

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They must look for exemption on some different ground. This the learned counsel for the Company has not failed to do, and this is the leading point which is now before the Court for determination.

His contention was that if it should be found they were bound to pay taxes on their personal estate loaned out on mortgage, they were only liable to pay on the one-eighth, which came out of their own proper funds, and not on the seven-eighths which they borrowed from and were liable to pay back to the persons who had advanced it in England. To maintain this proposition, he contends that such is the true meaning of section 3, sub-sections 19–20, of the Assessment Act.

By section 3 all personal property in the Province is liable to taxation, subject to *(inter alia)* the following exemption: "(19) So much of the personal property of any person as is equal to the just debts owed by him on account of such personal property, except such debts as are secured by mortgage upon his real estate, or are unpaid on account

of the purchase therefor," and "(20) And the net personal property of any person under $300.00."

These sub-sections 19–20 on the face of them, when read with that strictness which applies to tax acts like the present, seem to confirm the view of liability set forth by the Company, viz., that only the one-eighth is subject to the tax.

"The principle of all fiscal legislation" is markedly laid down by Lord CAIRNS in *Partington* v. *The Attorney-General*, L.R. 4 H.L. 100, at p. 122, which he thus summarizes: "If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

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Tried by the above tests the case stands thus:

The Company own the one-eighth, but owe seven-eighths to parties in England, no matter where the one-eighth came from. This seven-eighths, according to the reading of sub-section 19, is exempt, as a just debt owed by the Company on account of such personal property. This is what takes place in Ontario under the revised statutes of Ontario, 1877, Cap. 180, p. 1823, and their revised statutes of 1887, Cap. 193, whence our Assessment Act is borrowed in the identical words of these sub-sections 19–20. The late Mr. Justice HARRISON, in his Municipal Manual of Ontario, Ed. 1889, p. 720, a valuable compendium of the Ontario Municipal Law on the subject, commenting on these sections (there found in R.S.O., 1877, Cap. 180, the Assessment Act, Sec. 7, Sub-sec. 21), says, in foot note

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(b), page 720: "If what a man owes on account of his personal estate be equal to or exceed the amount of his personal estate, his personal estate is exempt from taxation. This is because it is unfair to tax a man upon what he really does not own, and cannot be said to really own so long as he owes the price of it." In the following notes he goes on to connect sub-sections 19–20, and explain further: "So much (he quotes) of the personal property of any person as is equal to the just debts owed on account of such property is to be deducted from the value of his personal property. The balance is his net personal property."

Here the seven-eighths borrowed in England under debentures being deducted from the total amount of personal property of the Company lent out on mortgage in British Columbia leaves one-eighth of such total amount, and I find makes that alone the amount for which the Company are liable to be taxed on their personal property in British Columbia.

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The judgment, therefore, of the Court of Revision and appeal must be varied, and the assessments against the Yorkshire Guarantee Company in the books of Vancouver and Westminster cities be altered accordingly.

As the appeal has only partly succeeded, there are no costs.

McCREIGHT, J.: This is an appeal by the above-mentioned Company from the judgment of the Court of Revision and Appeal.

It appears by the evidence of Mr. Farrell, the local Manager, that the business of the Company in British Columbia consists in making advances of money on real estate in British Columbia, as well as other places. That the monies so advanced consist as to seven-eighths of the same of monies borrowed in England from persons who are secured by debentures and a general charge on the assets of the Company, and a deposit of British Columbia mort-

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gages to further secure such advances, and he gave further particulars as to the mode of securing persons in England so advancing monies to the Company, which do not seem to me to be of such importance as regards the question of taxation now under consideration.

It should be added that the remaining one-eighth of the monies lent by the Company on mortgages in British Columbia appear to be their own money, consisting of paid-up capital, reserve fund, etc.

It was contended by Mr. *Davis*, for the Company, that they were not liable to pay taxes on the monies invested by them in British Columbia on mortgage, notwithstanding section 3 of the Assessment Act, C.S.B.C., 1888, Cap. 111, and it was suggested that the tax in question was, in substance, a tax on mortgages and an indirect tax according to cases decided by the Judicial Committee. But it seems to me that there is an obvious fallacy in attempting in effect to read words of that nature into the plain language of section 3 of the Assessment Act.

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That section (3) simply imposes a tax upon personal as well as other property, and it was not suggested, and could not be suggested (see *Bank of Toronto* v. *Lambe*, 12 App. Cas., at pp. 582–3), that this was anything but a direct tax or "a direct lump sum to be assessed by simple reference to the Company's paid-up capital and its places of business;" see page 583 of the above report in the judgment of the Judicial Committee.

One fails to see why the particular manner in which the personal property of the Company is invested can have any bearing on the question of the liability to pay the tax, or that it is a matter of importance whether it is invested at all or only lying idle in a bank as a place of safe custody. Of course we are not concerned as to this point with the exemptions mentioned in section 3 of the Assessment Act.

Mr. *Davis*, however, raised another question, to the effect that if the Company were liable to pay the tax on their

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personal estate invested on mortgage, they were only liable to the extent that such money was strictly their own. In other words, that if they were liable to pay taxes on personal estate so invested, it was only on the one-eighth which Mr. Farrell's evidence shewed belonged to the Company, and not on the remaining seven-eighths which were lent by residents in England.

This contention seems to be fully supported by section 3 sub-sections 19–20, bearing in mind the rules of the construction of tax acts stated in the cases referred to in the argument. See per Lord CAIRNS in *Partington* v. *Attorney-General*, L.R. 4 H. of L., at p. 122, *Cox* v. *Rabbits*, 3 App. Cas. 473; *Pryer* v. *Monmouthshire Canal Company*, 4 App. Cas. 202; and *Oriental Bank* v. *Wright*, 5 App. Cas. 842.

The expression in sub-section 19 dealing with exemptions is "so much of the personal property of any person as is equal to the just debts owed by him on account of such personal property, except such debts as are secured by mortgages upon his real estate or are unpaid on account of the purchase money therefor." This sub-section is the same as that to be found in the Rev. Stat. Ontario, 1877, Cap. 180, Sec. 6, Sub-sec. 16, p. 1823, and see Rev. Stat. Ontario, 1887, Cap. 193, Sec. 7, Sub-sec. 21, and, lastly, in Harrison's Municipal Manual, Ed. 1889, p. 720.

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At page 720, in a foot note to section 7, sub-section 21, it is said: "If what a man owes on account of his personal estate be equal to or exceed the amount of his personal estate, his personal estate is exempt from taxation." This is because it is unfair to tax a man upon that which he really does not own, and cannot be said really to own so long as he owes the price of it.

"The exception is where the debts are secured by mortgage on his real estate, or are unpaid on account of the purchase money therefor."

I cite this passage shewing the construction which has always been placed on words identical with the provisions,

of the statute in question, and this construction is obviously inconsistent with taxation on the money which the Company borrow in England for the purpose of lending in British Columbia. I can find no case on the subject, and think no serious question has been raised as to the meaning of the provision.

Again, the expression in sub-section 20, section 3, of the B.C. Assessment Act, further dealing with the exemptions of the net personal property, says " property of any person under $300.00."

This expression throws light, if it is required, on sub-section 19. No one will contend that the seven-eighths borrowed in England is not to be deducted in estimating the net personal property of the Company.

I have, therefore, come to the conclusion that the Company are liable to be taxed for the personal estate which they own in British Columbia, but not for that which they have borrowed in England for the purpose of investment in British Columbia.

Judgment of McCREIGHT, J.

It was suggested by Mr. *Davis*, I believe, that the expression " mortgages " in the interpretation clause, section 2 of the Assessment Act, C.S.B.C., 1888, Cap. 111, favoured his argument as to the tax in question being indirect and unconstitutional by implying that the mortgages were to be taxed ; but I think it means only that money invested on mortgage was to be taxed, and certainly we are not to construe a provision so as to make it nugatory when the Legislature clearly intended that money lent on mortgages should be taxed.

The judgment is that the judgment of the Court of Revision and the assessment be varied accordingly in the books of the municipalities of Vancouver and New Westminster, and, as both parties have partly succeeded, no costs.

Judgment of DRAKE, J.

DRAKE, J. The appeal in this case is limited to two

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points. 1st. That the Assessment Act, as far as it regards to tax on personal property affecting mortgages, is *ultra vires*, being an indirect tax. 2nd. That if *intra vires*, the assessment on the appellants should be reduced, because the greater part of the funds invested in the Province are subject to debts of others by the nominal lenders, and is therefore within the exception of sub-section 19, section 3, of the Act.

The first point is one of the greatest interest and importance. It is admitted that an assessment on personal property in itself is a direct tax, because the incidence of the tax is on the person who is intended to pay, and who actually pays it.

The definition of personal property in the Act is limited to the class of property therein named, and does not include all personalty as understood in law ; it mentions *inter alia* mortgages. A mortgage is merely an investment of personal property on a particular class of securities consisting of land or chattels. The contention is that where we find that payment of the tax is in fact made by another than the person on whom it is levied, then the tax is indirect.

Judgment of DRAKE, J.

The definition given by Mill, and more or less put forward as a correct definition in the argument in *Bank of Toronto* v. *Lambe*, 12 App. 575, is as follows : A direct tax is demanded from the very persons who it is intended or desired should pay it ; indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Such are the excise and customs, and Walker's Science of Wealth, 333, uses the same language.

The first point that seems open to argument on this definition as applied to the present case is : Was the intention of the Legislature that this tax should be paid by any other than the mortgagee ? It is contended by Mr. *Davis* in his exhaustive argument that, as a matter of fact, the mortgagee does not pay the tax, and he points out that in the

mortgage deeds of the appellant Company they insert a covenant that this tax shall be paid by the mortgagor, and even if there was no such covenant, the lender would charge the tax on the borrower by lending at an increased rate of interest. Granting in the fullest sense these conditions, does the fact that, under these circumstances, the tax falls on the borrower of money make the tax an indirect tax? I hardly concur in this deduction. I suppose it is universally acknowledged that people will endeavour to shift the burden of taxation whenever they can on to other shoulders; the fact that they are able to do so in more ways than one does not convert a direct tax into an indirect tax.

An indirect tax will, in certain circumstances, become a direct tax, as, for instance, an importer of customable goods consuming them himself; the customs duty is always considered as an indirect tax, because it is a charge added to the price of goods which eventually has to be borne by the consumer. In the converse case a direct tax may, in some cases, be paid by others than the person upon whom it is in the first place imposed, but that does not make it an indirect tax. The fact that personal property in the shape of money may be invested in a variety of ways for the purposes of income or commerce does not of itself change the nature of the property, although it changes its denomination. It is still personalty, and if an investment in the shares of a joint stock company or in the purchase of a commercial article is taxable by direct taxation, I do not see any escape from the position that personalty invested in mortgage falls into the same category.

The intention of the Legislature is that the owner of the personalty is to bear the tax; it is imposed on him, and he is the person intended to bear it. It is not imposed on him with a view that someone else (the mortgagor) shall bear it, or that it shall be distributed over a class of persons. The tax is not imposed on the dollars but on the owner of the dollars. Customs duties are imposed on the goods, not on

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the owner of the goods. I cannot see how the appellants in this case can escape from the decision of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575. This tax appears to me to fall within the *indicia* laid down by the Privy Council in that case for discriminating between a direct and an indirect tax. I therefore must decide against the appellants on this point.

And with regard to the second point, the evidence discloses these facts: The appellants are a joint stock company, with 10 per cent. of the subscribed stock only actually paid up. The Company invites the public to lend them money, for which they give a debenture secured on the uncalled capital and all the other assets of the Company. In order to enable the Company to meet the interest on these debentures they lend out their capital and also the money thus borrowed at a higher rate of interest than that agreed to be paid on the debentures; these mortgages when complete are sent to the head office in England, and an equitable charge is given to each debenture-holder on some specific mortgage or mortgages, which is changed from time to time as the mortgages are paid off, but the debenture-holder does not receive the mortgage money when repaid. None of the money of any debenture-holder is lent on any specific mortgage. All the money is placed in one common fund and operated on by the Company as their own capital, and is loaned out not only in British Columbia but elsewhere in other countries.

Judgment of DRAKE, J.

These being the facts, can it be said that they fall within the language of sub-section 19, which is as follows: "So much of the personal property of any person as is equal to the just debts owed by him on account of such personal property, except such debts as are secured by mortgage upon real estate or are unpaid on account of the purchase money thereof."

This section seems to me to limit the exception from taxation to a particular sum which the lender owes in

respect of the particular advance, and is not intended to exempt capital raised as this is by shares and debentures.

No one can say that the money advanced on mortgage is the money of any particular person advanced to a particular mortgagor. If a person obtains a loan, when he owes a large sum of money and owns unencumbered personal property, he can hardly claim an exemption from taxation on the ground that if his creditors press him all his personalty will be used in meeting his general liabilities. If this construction was intended the section would read: "so much of the personal property of any person as is equal to the just debts owed by him," and there stop.

The exemption, in my opinion, is limited to the actual debt incurred in respect of the actual personalty taxed.

The Legislature appears to me to have provided against the very contingency suggested by Mr. *Davis*. For these reasons I think the appeal should be dismissed.

Appeal allowed in part.

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Criminal law—Code, section 283—Abduction—Possession of father—Abandonment of induced in U.S.A., and "taking" in Canada — Jurisdiction—Evidence.

Prisoner was indicted for having, at the city of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one B.R., being under the age of sixteen years, out of the possession and against the will of her father, contrary to section 283 of the Criminal Code.

The evidence shewed that the girl, by persuasion of letters written by the prisoner in Victoria, Canada, addressed to and received by her within the State of Washington, U.S.A., was induced to leave her father's house in that State and meet the prisoner at Victoria. Upon meeting her there he suggested that it was not too late for her to return home, but she declined, and the prisoner thereupon took her to a house near Victoria, where they spent the night together.

Held, per DAVIE, C.J., at the trial, convicting the prisoner, that the Court had jurisdiction, as the offence was wholly committed within Canada.

Upon case stated for the opinion of the Court of Criminal Appeal,

DAVIE, C.J., and CREASE, J., affirmed the judgment.

Held, per MCCREIGHT, WALKEM and DRAKE, JJ., quashing the conviction: That it was essential to the offence that the girl should have been in the possession of her father at the time of the taking, and that, upon the facts, when she met the prisoner at Victoria she had already abandoned that possession.

Per MCCREIGHT and WALKEM, JJ.: That the reception by the girl of the letters was the motive cause of her abandoning her father's possession, and therefore a material factor in the offence, which consequently, in part, took place outside the jurisdiction.

Per WALKEM, J.: That the letters, so far as they held out the inducement, should not have been admitted in evidence at the trial.

CASE stated for the opinion of the Court of Criminal Appeal, pursuant to section 743 of the Criminal Code, by DAVIE, C.J., as follows:

Statement. 1. The prisoner appeared before me on the 24th July, 1895, having elected to take a speedy trial, upon a charge of having, on the 10th July, 1895, at the City of Victoria,

unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Code.

2. Belle Rockwood, an unmarried girl, who was fifteen years old on the 17th October last past, resided with her father and mother at Port Hadlock, in the State of Washington, one of the United States of America. The prisoner became acquainted with her there, and after such acquaintance came to reside at Victoria, British Columbia; and, whilst here, opened up a correspondence with the said Belle Rockwood, whilst she was still living with her parents at Port Hadlock aforesaid, urging her, in his letters, to come over here and join him. Belle Rockwood, in reply, wrote letters consenting to come, and finally the prisoner sent her the necessary means to bring her here. Port Hadlock is distant about seven miles by water communication from Port Townsend; a steamer runs from there to Port Townsend daily, connecting with steamer to Victoria, arriving at the latter place the same day. Statement.

3. By her own inclination, and influenced by the letters the prisoner had written her, the said Belle Rockwood left her home on the 10th July, 1895, with the intention of joining the prisoner at Victoria. She travelled on the steamer City of Kingston from Port Townsend to Victoria, and the prisoner met her on the arrival of the steamer at the warehouse at Victoria.

4. As they walked together from the steamer, the prisoner asked the girl to think seriously of her father, mother and sister; that it was not too late; the steamer returned that evening, and if she wanted to go back she was at perfect liberty to do so. Belle Rockwood's reply was that she would rather stay with the prisoner. The prisoner then took the girl to a restaurant, and afterwards to a house on the Esquimalt Road kept by some people named Hunt, to whom he

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introduced the girl as his wife ; and, as such, the prisoner and the girl occupied the same apartment that night.

5. The prisoner was arrested the following day on the charge of abduction.

6. Upon these facts I was of opinion that no abduction took place before the prisoner and the girl met at Victoria, but that the offence was committed when, after the meeting at Victoria, the prisoner took the girl to the restaurant and afterwards to the Esquimalt Road. I consequently convicted the prisoner and sentenced him to five years' imprisonment in the penitentiary ; but after the sentence, at the request of the prisoner, I agreed to state this case for the Court of Appeal, and in the meantime I respited the execution of the sentence and committed the prisoner to gaol.

Statement.

If the Court shall be of opinion that no offence was committed by the prisoner over which the Courts of this Province had territorial jurisdiction, the conviction must be quashed ; otherwise, it is to be affirmed.

The question was argued before DAVIE, C.J., CREASE, MCCREIGHT, WALKEM and DRAKE, JJ., on the 7th and 9th August, 1895.

Argument.

Frank Higgins, for the prisoner : The gist of the offence is the taking of the girl out of the possession of her father, *Reg.* v. *Bates*, 3 F. & F. 274. It is necessary that the prisoner should have known, or have had reason to believe, that the girl was in such possession at the time of the taking, *Reg.* v. *Hibbert*, 11 Cox C.C. 246. The girl is in the constructive possession of her father only so long as she has the intention of returning home, and the *onus* of proving that she had that intention is on the Crown, *Reg.* v. *Mycock*, 12 Cox C.C. 28. Supposing the girl to have abandoned her father's possession and the prisoner then to take her away, the case is not within the statute, *per* PARKE, B., *Reg.* v. *Mankletow* Dears, C.C.R. 159, p. 164, 22 L.J. (M.C.) 115. The refusal of the girl to go home, although suggested by the prisoner,

shewed that she had then deliberately forsaken her father's possession.

A. G. Smith, for the Crown: The anterior facts are immaterial. The whole question is, did the prisoner abduct the girl in Victoria? It makes no difference that the girl went by her own free will from her father's house to another place where the prisoner took her away, *Reg.* v. *Kipps*, 4 Cox C.C. 167. The taking constitutes the offence. It is a single substantive act, as in larceny, and not divisible. The only question is, where did it take place? Clearly in Victoria, as, if the girl had gone home after meeting the prisoner there, no offence would have been committed in either jurisdiction. At most, the abandonment of the girl of her father's home was conditional upon the prisoner's meeting her at Victoria and taking her away, *Reg.* v. *Mankletow*, *supra*. As to the operation of the letters: enticing away is a different offence to the present, see section 284 of Code. If the indictment had been for "enticing away," the Court would probably not have had jurisdiction, as the enticement operated in Washington.

Argument.

DAVIE, C.J.: This case comes before the Court of Appeal by way of a case stated, in pursuance of section 743 of the Code, upon a conviction under the Speedy Trials Act, whereby Robert Blythe was sentenced to five years' imprisonment in the penitentiary for having, on the 10th July, 1895, at the city of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Code. The trial took place before me, sitting in the County Court Judge's Criminal Court, and, after conviction, thinking there might be some doubt whether the facts constituted an offence over which the Courts of British Columbia had jurisdiction, I offered to state this case, and, at the request of the prisoner, stated

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the same accordingly, respiting meanwhile the execution of the sentence.

The facts, as disclosed by the stated case and the evidence and correspondence returned therewith, shew that Belle Rockwood, who was fifteen years old on the 17th October last, resided with her parents at Port Hadlock, in the State of Washington. The prisoner, a married man, living with his wife and children at or near the same place, became acquainted with her there, and on the 4th March, 1895, when still at Port Hadlock, wrote her that he was obliged to leave at once, being accused of a "most horrible crime," but protesting his innocence. In the letter the prisoner offers to send for the girl if she will come to him. The prisoner then went to Victoria, where he continued correspondence with the young woman by letters of a seductive character, addressed to and received by her at her home, urging her to come to Victoria and join him. In one letter dated 22nd May, the prisoner asks the young woman if she will come over to him about the 1st July, provided he sends money to bring her over. He remarks in his letter that he expects her father and uncle would follow them all round the world and "fix me plenty if you come to me, but it must all be done very quietly, and under other names, you understand;" and in a postscript to another letter, dated 31st May, prisoner says: "I understand I am a free man now. That woman that I was married to has got what she wanted, and will, I hear, marry Mr. Larsen shortly." The girl replied, agreeing to come to the prisoner, saying in one of her letters: "If you wish me to come to you I will do so; glad enough to leave this abominable place."

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The prisoner in his letters makes promises of marriage, but, in one letter received by the girl before starting, he says that he cannot marry her before she is eighteen years old, as a marriage in British Columbia before that age would be unlawful. In his letters he mentions the route

by which she is to come, counsels her to register under an assumed name, and to dress herself in a way to appear older than she is, and promises to meet her on arrival.

By her own inclination, as the young woman remarks in her evidence, and influenced by the letters the prisoner had written her, she left her home on the 10th July, 1895, with the intention of joining the prisoner, who had sent her money to pay her fare to Victoria. She travelled from Port Hadlock to Port Townsend, a distance of seven miles, by steamer, and from there to Victoria, the same day, by the City of Kingston, which runs to and from Victoria daily. The prisoner met her on the arrival of the steamer at Victoria, and, as he walked from the steamer with the girl, he asked her to think seriously of her father, mother and sister; that it was not too late; the steamer returned that evening, and if she wanted to go back she was at perfect liberty to do so. The girl's reply was that she would rather stay with him, and he then took her to a restaurant, and afterwards to a house on Esquimalt road, where he introduced her as his wife, and remained with her that night.

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The discussion of the case before the Court of Appeal has removed any doubt which I entertained as to the propriety of the conviction.

Section 283 of the Code enacts that everyone is guilty of a misdemeanor and liable to five years' imprisonment who unlawfully takes, or causes to be taken, any unmarried girl being under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her. The corresponding clause of this section was 9 Geo. IV., Cap. 31, Sec. 20, under which it has been repeatedly held to afford no defence that the taking was with the girl's consent or even at her express request, for, as remarked by MAULE, J., in *Reg.* v. *Kipps*, 4 Cox C.C. 168, "the law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the

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Legislature that at that age young females are not able to protect themselves or give any binding consent to a matter of this description." Consequently the Canadian Code adds to the provisions of section 283 above quoted: "2. It is immaterial whether the girl is taken with her own consent or at her own suggestion or not."

The present case turns on two points: 1. Was the girl taken out of the possession of her father by the prisoner? 2. If so, where did that taking occur; in British Columbia or in the State of Washington?

That the girl was taken by the prisoner from her father's possession there can, I think, be no question. A manual taking is not required; it is sufficient if, by persuasion, the girl leave the possession, *Reg.* v. *Kipps*, 4 Cox C.C. 167; and there can be no doubt of the persuasion here, whether of the letters or what took place on the meeting at Victoria. But it is urged that the persuasion, which is a constituent portion of the offence, consisted of the letters, which were all received in the foreign jurisdiction, and hence, as a material portion of the offence took place abroad, that the young woman when she arrived in Victoria had already abandoned her father's possession, and that the prisoner was guilty of no offence which our law could reach in taking her from the steamer. In fact, it was not a taking at all. The girl was free, and out of her father's possession; went with the prisoner voluntarily, and, so far from any persuasion being then exercised by the prisoner, he distinctly bade her think of father, mother and home, and return by the steamer if she saw fit.

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I am entirely unable to assent to this reasoning. The taking referred to by the statute is the actual taking. The blandishments and allurements which may have prepared the mind of the girl to willingly submit to or court the taking, although perhaps, as in this case, highly immoral, are not themselves punishable. Until some overt act on the part of the prisoner, there is a *locus penitentiæ*, and he

may recede from his intended crime. So the prisoner here, if instead of taking the girl to the restaurant, and then to her destruction, had insisted that she abandon the evil purpose to which he had been alluring her, and return to her friends; had he even kept away from the place of meeting, he would have committed no criminal offence, whether in Washington or here. The very reply of the girl that she would rather stay with the prisoner, to his highly suggestive intimation that she was at perfect liberty to return home by the same steamer which brought her, shews that there were just the two alternatives in her mind —either to stay with the prisoner or return to her home. So, if the prisoner had not taken the girl from the steamer, she would have returned home, and there the matter would have ended.

In *Reg.* v. *Mycock*, 12 Cox C.C. 28, WILLES, J., says: "The father has constructive possession of the girl so long as she has an intention of returning to him, and, as remarked in the case of *Reg.* v. *Mankletow*, Dears 159, presently referred to, that constructive possession is not severed by a renouncement of possession conditional upon the prisoner meeting her at a particular place and taking her away."

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In *Reg.* v. *Mankletow* the girl, by appointment, met the prisoner at a place two miles distant from her father's home. That case is reported in three places, viz.: Dearsley's C.C., p. 159; 22 L.J.M.C. 115; and 6 Cox C.C., p. 143. It was decided by a bench of six Judges: JERVIS, C.J.; PARKE, B.; ALDERSON, B.; WIGHTMAN, B.; CRESSWELL and COLERIDGE, JJ.; was argued by eminent counsel for the prisoner, and is the only case I can find where similar questions to those arising here are exhaustively discussed. The other cases are trials at Assizes, where hurried *dicta* are given by the presiding Judge as governing the facts in the particular case in hand. Chief Justice JERVIS in *Reg.* v. *Mankletow* says: "So long as the girl continues a member of her

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father's family, and is under his control, she is in his possession"; and PARKE, B., as reported in Dearsley, remarks: "Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But suppose she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of her father's possession."

That seems to me precisely what occurred here. The girl conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away; but, as remarked by Baron PARKE: "That would not be a determination of the father's possession."

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The Law Journal reports JERVIS, C.J., as saying: "The facts of this case show that there was a continuing possession in the father. The girl, by the prisoner's persuasion, left her father's house for the particular purpose of meeting the prisoner; if she had not met him she would have returned home; the possession of the father, therefore, was only conditionally renounced; by the act of taking, the prisoner severed the connection between the girl and her father, and so took her out of his possession."

In Cox, C.C., Chief Justice JERVIS is reported as saying: "The girl left her house by the prisoner's persuasion for the particular purpose of meeting the prisoner at an appointed place, and, until that purpose was accomplished, the control and possession of the father continued; if she had not met the prisoner, she would have returned home, but he interferes and persuades her to go with him, and she does so, and he takes her bundle and puts it with his own in the box. By these acts all care and control on the part of the father is determined, and at that time the prisoner takes her out of the possession of her father." To

the question, then: "When did the taking out of the father's possession occur?" I answer: "At Victoria, when the prisoner met the girl at the boat and took her from there."

The fact of the prisoner, before taking her to the restaurant, reminding her of home and telling her that she was at perfect liberty to return there, was, it seems to me, a most effective way of alluring and persuading the girl to go with him, instead of going home, just as effective as if he had then repeated every word which he had written in his letters.

So that, casting out of consideration for the moment the letters and everything which had occurred previous to the girl's coming here, we have the fact that the prisoner knew that the girl had left her home that same day with the idea of meeting him; with this knowledge he meets her at, and takes her from, the boat, alluring her to accompany him eventually to the house on the Esquimalt road. Begun, continued and ended in British Columbia, I cannot conceive what is wanted to complete his crime. The girl had come to a foreign jurisdiction; but what difference can that make? It is not suggested that the law relating to the custody of children is different, and, until it is shewn to be so, is presumed to be the same, *Mostyn* v. *Fabrigas*, Sm. L.C., 9th Ed., p. 684, and the father's possession would have been enforced here as well as there. It is no more an extraordinary thing for a young woman to take a trip to Port Townsend or Port Hadlock than it would be to Maple Bay or Salt Spring Island. You would take a steamer either way; the distance is about the same, and the time occupied on the trip about as long. You would not think that a young girl taking the latter trip had thereby necessarily abandoned her father's possession, although she had gone there to meet her lover and might possibly elope with him; and why should you so consider, because, instead of going to Salt Spring Island or Maple Bay, she goes to Port

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Townsend or Port Hadlock, or *vice versa ?* The imaginary boundary line can make no difference.

I grant that if the prisoner had known nothing of the girl's parentage, and if she had apparently been a waif and stray, he, as in *Reg.* v. *Primett*, 1 F. & F. 50, or *Reg.* v. *Green and Bates*, 3 F. & F. 274, could not have been considered as taking her out of her father's possession; but that is not the case here. He knew full well when he met her where she had come from on that very day. It is true that in *Reg.* v. *Olifier*, 10 Cox C.C. 404, Baron BRAMWELL, at *nisi prius*, expresses the opinion that "if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has fairly got away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of the Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away." But this is a mere *obiter dictum*, unnecessary, for determination even, of the case then in hand. If the instance put by Baron BRAMWELL is intended to include the case where the man is or becomes aware of the parentage, I cannot reconcile it with the reasoning of WILLES, J., in *Reg.* v. *Mycock*, 12 Cox C.C. 28, and of COCKBURN, C.J., in *Ex parte Barford*, 8 Cox C.C. 405.

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In the former case WILLES, J., remarks that the prisoner had no more right to deprive the father of the girl, of his property as it were, in her, than he would have a right to go into his shop and carry away one of his telescopes or optical instruments. By the same reasoning then, it seems to me, a man, finding a girl under sixteen, and discovering her home and parentage, has no more right to deprive the father of the girl, of his property as it were, in her, by keeping her, than would a man finding one of her father's telescopes or optical instruments in the streets, knowing it to be her father's, to keep it and appropriate it to his own

use. He would be bound to return the telescope, and so, it seems to me, would be to restore the girl.

In *Ex parte Barford:* Howse and Hopkins were not in any way responsible for the girl's leaving her father's house, but they retained possession of her knowing of her parentage; and COCKBURN, C.J., remarks that if they had been indicted under 9 Geo. IV., Cap. 31, Sec. 20, no one could doubt that they would have been liable to be convicted of the offence.

That case also lays down the principle followed in *Re Agar-Ellis*, 10 Ch. D. 49, that a father, if there be no disqualifying cause, has a right to the custody of a female child up to the age of sixteen, although she be unwilling to live under his care and control. Chief Justice COCKBURN gave the judgment of HILL and BLACKBURN, JJ. and himself, and stated that in coming to the conclusion which they did, they had consulted with the Judges of the other Courts, all of whom were unanimous in opinion with the Judges of that Court.

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At most, then, what took place here was a conditional abandonment of the parents' possession. If the prisoner was prepared to meet her and marry her, or whatever it may be, the girl was prepared to abandon her father's possession, not otherwise. Under these conditions, then, her father's possession continued until the purpose of her coming here was accomplished by the prisoner taking her away.

I am therefore of opinion that the prisoner's offence was wholly perpetrated in British Columbia by his there taking the girl, Belle Rockwood, out of her father's possession, and that the conviction should be affirmed.

CREASE, J.: This appeal came before this Court under section 743 of the Criminal Code, upon a case stated by the Chief Justice, before whom the prisoner was tried under the Speedy Trials Act and sentenced to five years in the

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penitentiary, for having on the 10th July, 1895, at the city of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Criminal Code.

The facts of the case are fairly, but somewhat briefly, told in the case stated, as submitted to the Court; but are more fully detailed in the opinion of the Chief Justice, which, as well as those of my brother Judges in our several conferences hereon, I have had the privilege of hearing.

Since then I have carefully examined all the authorities which have been brought forward in elucidation of the legal points with which the question submitted to us abounds, and have come definitely to the conclusion that:

(1.) The taking which constituted the abduction took place in Victoria, and was not complete until the prisoner —a married man—took the girl from the warehouse to the restaurant and to the, to her, fatal house on the Esquimalt Road.

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(2.) That her abandonment of her father up to that time was conditional, and she was, until the taking, constructively in the possession of her father. And for the following reasons :—

As to (1): Because the persuasion which was the motive power (her own consent and inclination by section 283 of the Code count for nothing), which, though it commenced in Washington State, was continued and freshly exerted here; and, with the subsequent taking her out of such possession, constituted one complete offence, all of which occurred in British Columbia.

The prisoner's conversation with her, on coming from the steamer, was, as I read it, transparently made to protect himself—making evidence against a British Columbia law, into which he had evidently to some extent been inquiring, when he fixed for her the marriageable age without consent

at eighteen, and must have done so with his own views and intentions in regard to her in his mind. If she had said, "Well, I'll go back," can any one who read his letters doubt the persuasion he would then have used and the magnetic force of personal influence he would have exerted upon the young girl to carry out his purpose. If he was in earnest in what he said (she certainly thought he was) that would shew that there was still an alternative left to the girl in the contemplation of both, of returning to her father's house and home; in other words, she was still constructively in her father's possession, not yet abandoned, and so she must necessarily have regarded it when she answered "I would rather" (meaning of the two) "stay with you."

All that had taken place between them, up to the actual taking, without the taking, would have been no offence, and she would still have been constructively in the father's possession. It is to him that, if the prisoner refused to, or had not met her, she would naturally and necessarily have returned. The prisoner's words "that it was not (then) too late," if he meant them to have any weight at all, were very significant, as to what extent matters had gone between them, and indicate that it was from that point that he took the young girl to her ruin.

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I look upon the expression upon which the learned counsel for the prisoner laid so much stress, "this abominable place," as the subsequent context of the letter shews, merely as the hasty, petulant utterance of a lovesick girl, whose lover had been obliged hastily to leave the neighbourhood and consequently herself, on being accused of a "most horrible crime," of which she of course thought him innocent. The same remark applies to her other extravagant utterances against individual members of her family, as temporary ebullitions of feeling on his account, not proofs of a settled intention of total abandonment.

Had he not met her, or had he repented, or refused to carry out his engagement, it is but natural to infer that a

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total revulsion of feeling in their favour would have set in, and that "total abandonment" could not have been determined upon by her until the final interview at Victoria settled her fate. Her father by his own conduct shewed that he did not consider his possession and control severed, which, under *Reg.* v. *Kipps*, 4 Cox C.C. 168, the law gives to parents for the protection of females under sixteen, and that is an important element in the case.

It must be remembered, too, throughout that the presumption, until rebutted, is that the same law giving control to parents over their children is, under *Mostyn* v. *Fabrigas*, Sm. Ldg. Ca. 9th Ed. 684, extant in Washington State as in British Columbia.

I entirely concur in the Chief Justice's reasoning, and the construction he puts on the case of *Reg.* v. *Mankletow*, as reported in Dearsly's C.C. p. 159, 22 L.J.M.C. 115, and 6 Cox C.C. p. 143—and the conclusions of the Judges in that case appear to me to apply exactly to the circumstances of this case. "Supposing (Baron PARKE observes) the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But suppose she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of her father's possession." And so here, if the prisoner had not met her, or refused to carry out the pre-conceived purpose, she must have returned home. The letters shew her disinclination (besides being in a foreign place) to enter service; her infatuation for the prisoner precluded the alternative of another lover, and the only, and easy alternative, was to return to a home only a day distant from Victoria.

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It has been suggested that the mere distance come is a proof of abandonment; but that I think has no more to do with it than going a day's journey in any other direction, whether in Washington or across the line.

The father's possession remains still. Her answer to prisoner's suggestion that she had still the opportunity of returning home, just like the solemn protest of one of his letters, that he "could not wrong her"—so vilely falsified by the event—acted on her, as he intended it should, as if he were making a chivalrous and supreme effort of self-denial for her sake, which would have the effect, on a young girl's heart, of the strongest posssible persuasion, and that within British Columbia, which induced her to choose finally to renounce the conditional possession and control of the father, which existed up to that moment, and go with the prisoner to her ruin. The words "I would rather stay with you," express just as clearly as if they had been spoken, the additional words "than accept the other alternative and go home."

Leaving the letters out of the question, we have then the knowledge of the prisoner, in British Columbia, that she had that morning left home to come and meet him. She had only conditionally renounced the possession of her father. If she had not met him, or he had refused to take her, she would have returned home. The prisoner's act in taking her to the restaurant and the Esquimalt house, severed her from her father finally, and constituted the taking her out of the possession, to which, under *Reg.* v. *Mycock*, 12 Cox C.C. 28, and *Ex parte Barford*, 8 Cox C.C. 405, he was bound, with such full knowledge, to have returned her.

Judgment of CREASE, J.

The law respecting the custody of children must be taken to be the same in Washington State, whence she came, as here in British Columbia, until the contrary be proved, and that the father's possession would be enforced here as well as across the boundary line, *Mostyn* v. *Fabrigas*, Sm. L.C. 684. There is no suggestion to the contrary; and the father did come and resume possession of her here, and this does not appear to have been opposed.

We have thus all the elements of the complete offence

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occurring within British Columbia. The knowledge of the prisoner, in the first place, of the father's possession of the girl; of, at the most, the conditional abandonment of that possession by the girl; the persuasion by the prisoner as the motive force, exerted here, and the taking her out of the possession of and against the will of her father. So that the prisoner's crime fulfils all the conditions of section 283 of the Code within British Columbia, and is complete, and the conviction should be confirmed.

McCREIGHT, J. [after stating the facts the learned Judge proceeded]: Having regard to the remarks made by the Judges in *Reg.* v. *Mankletow*, 6 Cox C.C. at p. 146, and see the same case in 22 L.J.M.C. at p. 117; *Reg.* v. *Mycock*, 12 Cox C.C. p. 28, it appears essential to the case being within the Act that the girl should be "in the possession of her father, or other person having the lawful control of her" at the time of the unlawful taking, and, sitting as a juryman (and a Judge sitting in appeal like this has to discharge the functions of a juryman as well as a Judge), it becomes incumbent on a Judge to determine whether the girl was in the possession of her father on her arrival in Victoria, so as to be taken out of that possession by the prisoner in that place; and a Judge must find that such possession of the father continued in Victoria up till the time of taking; and the Judge must be satisfied on this point beyond all reasonable doubt. I must say that, far from being satisfied as to such possession beyond a reasonable doubt, I should find it reasonable to conclude that the girl had abandoned such possession before leaving Port Townsend for a foreign country. From this point of view alone I think the conviction cannot be sustained.

Judgment of McCREIGHT, J.

But there is a further point of view from which I think the conviction cannot stand. In *Regina* v. *Olifier*, 10 Cox C.C. 402, Baron BRAMWELL points out that in that case the persuasion of the prisoner constituted the motive cause of the girl leaving

her home. The letters which passed between the girl and the prisoner, and which, of course, only operated in Washington, leave no doubt in my mind that they were the main and the motive cause of her leaving, and if so, some material factors in this case took place out of the jurisdiction of this Court, and the difficulty is analogous to what used to take place at common law before remedied by statute, where a man received a fatal blow in a foreign country and died in England.

I have only to add that I am quite unable to say, as a juryman, that the evidence in this case warranted the conviction.

WALKEM, J. [after stating the facts]: The conviction in this case could have been supported if the persuasion used by the prisoner to induce the girl to leave her father's roof had taken place within this jurisdiction; that is to say, after the girl had arrived here. In *Reg.* v. *Olifier*, 10 Cox C.C. 402, Baron BRAMWELL thus lays down the law, not as an *obiter dictum* as has been just stated to have been the case by the Chief Justice, but for the guidance of the jury: "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of the Act of Parliament, for the Act does not say that he shall restore her, but only that he shall not take her away. It is, however, equally clear that if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet if he avails himself of that leaving which took place at his persuasion that would be taking her out of her father's possession, because the persuasion would be the motive cause of her leaving." In *Reg.* v. *Booth*, 12 Cox C.C. 232, the question of persuasion was the first one left to the

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jury, not as an incidental question, but as part of the issue—"The real issue for you to try," said the learned Judge, "is simply this: Was she taken out of the possession and keeping of her father without her father's consent? Did the prisoner take her away?" Both of these authorities illustrate the importance attached to persuasion. In both, it is dealt with as a necessary element or factor in cases of abduction, for, according to Baron BRAMWELL, where there is no persuasion there is no infringement of the statute.

In the present instance, persuasion was used by the prisoner in his letters to the girl to induce her to leave home; but the letters were received by her and influenced her at Port Hadlock; hence the act of persuasion took effect beyond this jurisdiction. We have, therefore, no more authority to take cognizance of this stage of the prisoner's alleged offence, than we would have had to entertain jurisdiction over the complete offence, had it been committed in the State of Washington. Consequently, the letters, so far as they held out the inducement mentioned, should not have been admitted at the trial as evidence against the prisoner. The arrangement (call it conditional if you will, to meet Baron PARKE's observation in *Reg.* v. *Mankletow*), which was made through the medium of the same letters, to the effect that the prisoner would meet the girl when she landed here, is open to the same fatal objection, as it was one of the inducements referred to and, therefore, one of the acts which formed part of the offence complained of; for every act—need I say?—which serves in the whole or part to constitute an offence under our criminal law must occur or be committed within the territorial limits over which that law extends, or in other words, within the Dominion, otherwise we have no authority whatever to adjudicate upon it. Again, I am unable to hold with that degree of certainty which the criminal law holds to be indispensable that the girl was constructively in her father's possession after she left his house or at any

Judgment of WALKEM, J.

rate after she had landed here; and if she was not, and even if it were doubtful that she was, the prisoner is entitled to his discharge.

In addition to this, the prisoner so far from persuading the girl after she arrived here to leave her parents, dissuaded her from doing so, as appears by the following notes taken of her cross-examination: "You," (the prisoner) "met me at the warehouse," (meaning the City of Kingston's wharf in Victoria). "I do not remember the exact conversation as we came from the steamer." Prisoner—"Did I not ask you to think seriously of father, mother and sister, it was not too late, the steamer returned that evening, and if you wanted to go back you were at perfect liberty to do so?" "Yes." "Was not your answer "No, Robert, I would rather stay with you?" "Yes." It may be said that the prisoner acted very artfully in putting such questions and giving such advice, and that he expected no other answer than he got; but that matters not, so long as the girl thought that he was in earnest in what he said, and there is no evidence that she did not.

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Coupling the girl's avowed refusal to return home with her statement in her letters to the prisoner that she was glad at the prospect of leaving it, as it was to her an "abominable place," and that the only person she regretted leaving was her aunt; also with the fact that she made deliberate preparations to depart with the intention of marrying the prisoner and then crossed the straits into a foreign jurisdiction, it seems to me only reasonable to conclude that from the moment she left her father's roof she meant to renounce his protection; and that being so, his constructive possession of her would be gone, *Reg.* v. *Mycock*, 12 Cox C.C. 28. It would have been quite a different thing if, for instance, she had come here on a visit to friends with her parents' consent, for, in such a case she would be constructively in her father's possession, as a visit would of itself imply an intention to return; but

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the facts before us are opposed to the inference that she had any such intention, and hence, according to the decision last cited, she was not in her father's possession, at any rate, when the prisoner met her.

Again, as the prisoner, after the meeting, used no persuasion to induce her to abandon her home, his subsequent taking her away, though strongly to be condemned, is not an offence within the meaning of the section of the criminal code under which he has been convicted.

For this and the foregoing reasons, the conviction should be quashed.

Judgment of DRAKE, J.

DRAKE, J.: In my opinion this conviction must be quashed. The offence aimed at in the Code is taking a girl under the age of sixteen out of the possession of and against the will of her father. In order to give this Court jurisdiction the possession of the father must be within the territorial limits of Canada. If the prisoner had gone over to Port Hadlock and personally assisted the girl in the elopement, the offence would be complete in the State of Washington and the laws of the United States would apply and not our Code. Instead of personally assisting, the prisoner arranged the elopement by correspondence, and supplied the necessary funds. In my opinion the result is the same, the persuasion equally took place in a foreign country. The prosecution endeavoured, therefore, to shew that the abduction, that is, the taking the girl out of the possession of her father, was effected when the prisoner met her on the wharf at Victoria. This is not so, for if, instead of the prisoner, some charitably disposed person had met her and taken her in charge it could not be said he abducted her, although her arrival here was against the will of her father. There must be some active step within the jurisdiction, to unlawfully get possession of the girl against the will of her father. But it might be urged the prisoner is guilty because her arrival here was induced by him; but, in order to convict, the

inducement must have been offered here. Of that there is no evidence; in fact, the evidence shews that the prisoner pointed out to her that she could leave if she wished. The girl when she arrived here was *de facto* out of the possession of her father. The statute contemplates a *de facto* possession. If she left her father's house on a visit with his consent, this would be consistent with actual possession if the father was within the jurisdiction. But, if she left without his consent and went to a foreign country, she is the person who has severed the connection between her father and herself. And, although by following her to the place of her retreat he may be able to establish a possession *de jure*, that is not the possession contemplated by the Act.

I consider the conduct of the prisoner scandalous in the extreme, but however bad and unnatural he has shewn himself to be, he has not brought himself within section 283. All the authorities cited deal with cases where the parties were within the jurisdiction from the first inducement to the ultimate removal.

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In *Reg.* v. *Mondelet*, 21 L.C. Jur. 154, the authorities which were cited and fully discussed in the argument were all reviewed, and it was there held that if a girl had left home voluntarily and then met the prisoner it would not be a case within the statute; and for the purposes of this case it must be held that only the acts that took place on Canadian soil can be looked at. In *Reg.* v. *Henkers*, 16 Cox C.C. 258, where a girl employed as a barmaid, with her father's consent, was taken away by the prisoner, it was held he could not be convicted of taking her out of the custody of her father, and in *Reg.* v. *Miller*, 13 Cox C.C. 179, when a girl went to visit her parents from Sunday to Monday, but by arrangement with the prisoner left her parents' house on Sunday and went with him, it was held she was not in her father's possession at the time of the alleged offence, but of her master.

These cases clearly shew that there must be an actual

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possession in the father at the time of the taking, which, as I have pointed out, was a taking on arrival of the boat in Victoria, and I see no evidence of it here.

Prisoner discharged.

DAVIE, C.J.

[In Chambers].

1895.

Sept. 19.

STEWART v. WARNER

STEWART v. WARNER.

Practice—Right to jury—Rules 81, 330.

Rule 330, providing "causes or matters referred to in Rule 81 of these rules shall be tried by a Judge without a jury," is imperative, and as one of the matters referred to in Rule 81 is "the rectification, setting aside or cancellation of deeds or other written instruments," any action claiming such relief must be tried without a jury, though the issues involved might otherwise be proper for trial by a jury.

APPLICATION made by the plaintiff by summons in Chambers for an order that the action be tried by a jury.

Statement. The action was brought by the executrix and sole devisee and legatee under the will of James M. Stewart to have a bill of sale of certain interests in mineral claims made by the said deceased in favour of the defendant cancelled on the ground of fraud and undue influence in obtaining the same.

Chas. Wilson, Q.C., for the application: There are many questions of fact involved, and the question whether there

Argument. was fraud or not is a proper subject for a jury to pass upon.

J. J. Godfrey, contra: There is no discretion in the Court to grant an order for a jury on this application. The case is governed by Supreme Court Rule 330, "causes or matters

referred to in Rule 81 of these rules shall be tried by a Judge without a jury," and by reference to Rule 81 it is to be observed "the rectification, setting aside or cancellation of deeds or other written instruments," is one of these causes or matters. The English Rule (marginal Rule 427) is different and allows a discretion to a Judge to grant a jury or not as he sees fit; this discretion, however, is governed by authority, and in England in a case such as the present one a jury would not be granted, *Ruston* v. *Tobin*, 10 Ch. D. 558.

Chas. Wilson, in reply.

DAVIE, C. J.: There is no discretion under our Rules 81 and 330 to grant a jury, and the application must be dismissed with costs. Judgment.

Summons dismissed.

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BELL-IRVING AND VANCOUVER.

BELL-IRVING AND CITY OF VANCOUVER.

IN THE MATTER OF THE VANCOUVER INCORPORATION ACT, 1886, AND THE MUNICIPAL ACT, 1892, AND BY-LAW 159 OF THE CORPORATION OF THE SAID CITY.

Municipal Law—Vancouver Incorporation Act—Money by-laws—Statutory recitals imperative—Municipal Act, Sec. 113, Sub-sec. 4—Submission to Electors—"On which the voters' lists are based"—Vancouver Incorporation Act, 1886, Sec. 127—Conflict between general Municipal and special Act.

By the (general) Municipal Act, 1892, Sec. 113, Sub-sec. 4, by-laws for contracting debts not required for ordinary expenditure, and not payable within the same municipal year, "shall recite (2) The total amount required by this Act to be raised annually by special rate for paying the new debt and interest, and (4) The annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the new debt."

By Sec. 4 of the same Act, "This Act shall be construed as applying to the cities of New Westminster and Vancouver only so far as it is not repugnant to or inconsistent with their Acts of Incorporation."

By the Vancouver Incorporation Act (private), 1886, Cap. 32, Sec. 128, as amended by Cap. 62 of 1892, Sec. 5, each of such by-laws "(1) shall name a day in the financial year in which the same is passed, when the by-law shall take effect," "and (3) the amount of the debt which such new by-law is intended to create, and, in some brief and general terms, the object for which it is to be created."

Held, by the Divisional Court (BEGBIE, C.J., CREASE and WALKEM, JJ., over-ruling the judgment of MCCREIGHT, J., ante page 219): (1) That the provisions of section 113 of the (general) Municipal Act, *supra*, are not repugnant to or inconsistent with the provisions of section 128 of the Vancouver Incorporation Act, *supra*, and that By-law 159 of Vancouver is invalid for non-compliance with section 113. (2) That section 127 of the Vancouver Incorporation Act, 1886, providing that "the right of voting on by-laws requiring the assent of the electors shall belong to * persons * rated, etc., on the revised assessment roll on which the voters' lists of the city are based," confers the right to vote only upon persons on the revised assessment roll upon which the existing voters' lists are based, and the description is not satisfied by persons upon the last revised assessment roll, upon the basis of which the voters' lists for the current year have not yet been made up.

Judgment. APPEAL from a judgment of MCCREIGHT, J. (reported

ante p. 219) dismissing a *rule nisi* to quash By-Law 159 *supra*.

E. P. Davis and *E. V. Bodwell*, for the appeal.

A. St. G. Hammersley, *contra*.

BEGBIE, C.J.: To deal first with Mr. *Hamersley's* first contention, that By-law 159 has been repealed by the Vancouver Incorporation Amendment Act, 1893, and that therefore there is and can be no question of substance for us to determine but merely a question of costs as between the assailants and defenders of that by-law, and that an appeal cannot be prosecuted merely to obtain a determination as to the incidence of costs, according to *Moir* v. *Huntingdon*, 19 S.C.R. 363, and *Attorney-General* v. *Bonnor*, 54 L.J. Ch. 517. But I can put no such construction upon the statute. It is true that by the operation of the statute it becomes necessary, so far as regards the legality of the $300,000.00 bonus which all these three by-laws, Nos. 159, 166–67 (see ante page 219 and 228), were intended to establish, to consider the effect or original validity of No. 159. But the statute takes and establishes the By-law 166 and sets it forth in a schedule which is declared to be a part of the Act. The two concluding clauses of that schedule are therefore part of the Act. "In case the By-law No. 159 shall be quashed or declared invalid," then certain consequences are to follow. "In case the said By-law 159 shall not be quashed or set aside," the same or such portions thereof as may not be quashed or set aside shall be valid or binding in so far, but in so far only, as the same is not inconsistent with or repugnant to and does not differ from this By-law 166. It appears to me very clear that this is a direct intimation by the Legislature that the proceedings with regard to By-law No. 159 are to continue and to be prosecuted to a finish. In fact, until that point is determined, and it cannot be determined by any other tribunal than this, the Act itself cannot be said to enter upon its full and definite effect, because there are

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two express alternatives declared in the Act itself, according as By-law No. 159 shall be declared valid or invalid; so far is it from being the case that the Act has deprived the Court of jurisdiction, it actually awaits our decision to bring the Act into full force.

As regards the by-law itself, there are two miscarriages so clear that there can be no doubt upon the matter, nor any necessity to enquire for further defects. The matter is at first sight a little complicated owing to the extreme length and complexity and repeated alterations of the charter of this Corporation; they never seem to have very clearly known their own minds except upon one point, that they wished to be an exception to the general law and to have provisions of their own. This may often lead to litigation, for having a distinct legislation the decisions of the Courts on the general Municipal Acts may often have no application, but by keeping the appellant's objection steadily in view, and refusing to be embarrassed with unnecessary details, their importance or futility can be without much difficulty ascertained.

All by-laws for charging the ratepayers beyond the current year, *e.g.* by loans, debentures, bonuses, guarantees, etc., are called money by-laws, and require peculiar provisions and peculiar sanctions, which are alleged to be wanting. One such provision is, that every money by-law must recite the annual special rate per dollar required for paying the interest and new debt and creating an equal yearly sinking fund for extinguishing the loan, see Municipal Act, 1892, Sec. 113, Sub-sec. 4. The respondents contend this is not required by the original charter. The Vancouver Incorporation Act, (1886) Sec. 128, as amended by 55 Vic. (1892) Cap. 62, Sec. 5. By it various matters are required to be stated in the by-law, but not this expressly. By that Act the by-law is to name the day of its coming into force, to specify the amount, that is the total amount, in addition to all other rates necessary for extinguishing the debt

and interest at the proposed times, and to "recite" (1) The amount and object of the new debt thereby created, (2) the total amount per annum required for interest and sinking fund, (3) the last assessed rateable value of the city, and (4) the total existing debt. By the Amendment Act, 1889, Cap. 40, Sec. 13, these provisions were somewhat enlarged, but still there was no enactment that the by-law was to recite the special rate per dollar. That was introduced, so far as the Corporation of Vancouver was concerned, by the general Municipal Act, 1891, Sec. 100, consolidated in 1892, section 113, *supra*, in the words above cited.

It was at first argued that this general Act did not apply. But by section 5 of the Act of 1891—section 4 of Municipal Act, 1892—it is expressly stipulated that it is to apply, but only so far as it is not repugnant to or inconsistent with their private Acts. And we are all of opinion, and it is in fact clear, that merely adding in the by-law an additional statement concerning the loan, viz., the rate per dollar, is neither repugnant to nor inconsistent with the stipulations in the private Acts. In fact, it was immediately afterwards urged that the rate "per dollar" is merely an arithmetical deduction from the matters which are required to be set forth and are in fact set forth in the impeached by-law. The total amount required annually for interest and for the sinking fund is duly set forth, and so is the total value of the rateable property; anybody can calculate the rate per dollar, and it is mere superfluity to recite it separately. It is not for the Court to decide upon the relative or absolute importance of a provision expressly required by a statute. It may in the case of many ratepayers be very important that they should in the clearest manner and in divers ways be exactly informed of the true nature of the burthen they are asked to impose on their property. At any rate the Legislature has provided that they are to be so informed. But it is enough for us to be satisfied that the by-law is clearly bound to recite this calculation, and that it does not recite it.

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Another provision which is alleged to have been entirely misunderstood, and so uncomplied with, is as to the body of voters by whom the by-law is to be sanctioned. The voting was in September, 1892, and it was based on the assessment roll as made out by the assessors in February, 1892. That list was not revised until 1st November, 1892. But the right of voting on such a money by-law is, by section 127 of the original charter, 1886, which has never been altered in this respect, conferred on persons on the revised assessment roll on which the voters' lists of the city are based. If there had been a municipal election in September, the voters would have been, not the persons on the assessment roll of February, but those on the last revised assessment roll, *i.e.*, the list revised in 1891. That was the only "voters' list" in existence in September, 1892. We all agree that here is another fatal defect, and the attempt to extricate from it the authors of the by-law amounted to this, that we were asked to construe section 127 as enacting that the right of voting was to belong to *the voters* without more. The error perhaps arose from confusing the revising of the city assessments with the revising of the lists of city voters. In revising the assessments the only question is as to value. In revising the lists of voters there is no question of less or more value, but of the *status* of the persons assessed, whether they are of full age, or of the required nationality, or married women, etc. It is clearly the latter revision which is required for ascertaining the lists of persons entitled to vote on a money by-law. By-law No. 159 has therefore never received the necessary sanction. There were other errors alleged and argued, but for the purposes of this appeal I have surely said enough. The appeal must be allowed with costs here and in the Court below.

Judgment of BEGBIE, C.J.

CREASE and WALKEM, JJ., concurred.

Appeal allowed with costs.

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Medical Act—C.S.B.C. 1888, Cap. 81, Sec. 41—Liability of unregistered practitioner——"Practicing medicine."

Defendant, with the object of making sales of medicines professed by him to be specifics for certain diseases, held public meetings, invited proposed purchasers to declare their symptoms, and publicly examined them and applied the remedy.

Held, that this was "practicing medicine for gain or hope of reward."

CASE stated by FARQUHAR MACRAE as Police Magistrate in and for the City of Victoria, as follows: The information alleged that W. G. Barnfield, *alias* Sequah, of Victoria, within the space of three months last past, to wit, on the 28th and 29th August, 1895, at the city of Victoria aforesaid, did practice medicine for hire, gain or hope of reward, not being duly registered in accordance with the provisions of the Medical Act and Amending Acts, contrary to the form of statute in such case made and provided.

The defendant pleaded "not guilty," and after hearing the parties and the evidence of the complainant, the defendant offering no evidence, I, on the 30th August, 1895, dismissed the said information. Statement.

It was proved upon the hearing that the complainant, a stonemason, went into the A.O.U.W. Hall, in the city of Victoria, on the evening of the 28th August, 1895, and there saw the defendant extracting teeth from human beings. The defendant afterwards spoke from a platform, chiefly upon rheumatism, and claimed that he could cure rheumatism in ninety cases out of one hundred, and invited anyone affected with the disease to come upon the platform. Mr. Franklin went up and the defendant asked him how long he had been affected with rheumatism. Franklin, in answer to the question, stated ten or twelve years. The

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defendant had a bottle on the table near to him containing something called "Sequah's Cure." The defendant emptied some of the contents of the bottle into a glass and gave it to Mr. Franklin to drink, which Mr. Franklin did. The hall was at the time fairly well filled with people. The defendant invited five people to go upon the platform to see that only Sequah's oil was applied to Mr. Franklin. The complainant along with four others from the audience went upon the platform or stage and together with the defendant's business manager or assistant left the platform or stage and went into a room in rear of same. Mr. Franklin was directed to lie down on a couch. The manager applied "Sequah's Oil" to the affected part. The defendant was present from time to time. The complainant heard the defendant say "the oil was getting a little too dry." This was whilst the manager was rubbing the affected part with oil. The manager pulled up Mr. Franklin's leg and he and the defendant told Franklin to kick out straight with his leg. Franklin did so once or twice. Then the manager asked where the pain was and Franklin told him. The manager again rubbed the affected part. The rubbing being stopped they all returned to the platform in presence of the audience. Franklin seated himself on a chair. After about five minutes the defendant asked Franklin if he felt any better, and then asked him to "get up and walk across the stage." Franklin got up and nearly ran across the stage. The audience laughed, so also did the defendant, the defendant saying "he was pleased with Mr. Franklin's case and the way he got relieved." He further said those were the kind of cases he liked to get. Franklin then left the stage.

Statement.

The defendant stated to the audience that he cured rheumatism with "Sequah's Oil," and stated that after the meeting was over he would give anyone an opportunity to speak to him, and they could get "Sequah's Oil" for $1.00 a bottle, or two bottles for $1.50, or four bottles for $3.00.

The complainant after the close of the meeting went to

the defendant and gave him information as to his symptoms, viz., that he had been in the hospital for two months during last spring, having then undergone an operation for abscess. He stated to the defendant that there was a large swelling under his hip and a discharge from the old wound two or three weeks before this date of consultation with the defendant. The complainant asked the defendant if he (the defendant) could do anything for it. The defendant said by rubbing "Sequah's Oil right on the swelling it would throw out any discharge there was." The defendant told the complainant not to rub on the old wound at all. The complainant told the defendant he would get the oil in the morning, the defendant stating that he could get it at any time between ten and twelve in the morning. The complainant went back on Thursday to defendant's office and got from the defendant two bottles paying therefor the sum of $1.50. One bottle was called "Sequah's Oil," and the other "Sequah's Cure." The defendant had on the preceding night only spoken of the oil. The defendant explained to the complainant that the second bottle, *i.e.*, "Sequah's Cure," was for cleaning the blood and opening the pores. The bottles were produced in Court and made exhibits. The defendant, in answer to the complainant, upon the complainant being about to leave the defendant's office, said he thought the oil would cure his swelling.

Statement.

It was brought out on cross-examination by defendant's counsel, that the defendant asked Mr. Franklin if his ailment was rheumatism, and he said "Yes;" that the defendant did not make any examination of Mr. Franklin or touch Mr. Franklin's leg. Further, that the defendant stated to the audience that anyone suffering from rheumatism would be treated free; that the complainant did not see Franklin pay anything to the defendant; that the defendant did not touch the complainant at all, or did he tell the complainant what disease he was suffering from. In answer to questions put to complainant by me (the Police Magistrate) the com-

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plainant stated that the defendant said nothing to indicate that he was a doctor, nor did he, the defendant, speak of himself or of his skill, but spoke of the virtues of "Sequah's Medicines." The defendant said the medicines would cure kidney complaints, liver complaints, and specified one or two other complaints. The defendant invited anyone who wished to consult with him, and that he would be seen any day between ten and twelve, and it was on account of this invitation that the complainant called at the defendant's office.

Statement.

It was admitted that the defendant was not upon the "British Columbia Medical Register," or entitled to practice the profession of a chemist or druggist in the Province of British Columbia.

I determined that the matter hereinbefore stated was insufficient to support the said information. The question for the opinion of the Court is, whether my said determination was erroneous in point of law.

The case was argued before CREASE, J., on the 25th September, 1895.

Argument.

A. E. McPhillips, for the appeal: The defendant undertook to cure certain diseases and gave advice for a consideration, namely, the furtherance of the sale of his medicines. This is practising medicine within the Act, C.S.B.C. 1888, Cap. 81, Sec. 41, *Apothecaries' Company* v. *Nottingham*, 34 L.T. N.S. 76; *Woodward* v. *Ball*, 6 C. & P. 577; *Reg.* v. *Hall*, 8 Ont. 407; *Reg.* v. *Stewart*, 17 Ont., MCMAHON, J., at page 5.

Frank Higgins, contra: Defendant did not diagnose the complaints or give medical advice, he merely vended the preparation as a specific for certain classes of complaints. This is not practising medicine, *Reg.* v. *Howarth*, 24 Ont. 561; *Reg.* v. *Coulson*, 24 Ont. 246; *Reg.* v. *Hall*, *supra*, is distinguishable. Defendant there admitted practising medicine and charging his patient $3.00 a visit; here the defendant charged nothing but the price of the medicine.

Judgment.

CREASE, J.: I think under the circumstances set forth

in this case stated, submitted for my decision on appeal, after examining the authorities cited: *Encyclopædiac Dictionary*, p. 3,077, "Medicine;" *Apothecaries* v. *Nottingham*, 34 L.T.N.S. 76; *Reg.* v. *Hall*, 8 Ont. 407; *Reg.* v. *Stewart*, 17 Ont. 5; *Reg.* v. *Howarth*, 24 Ont. 561; *Reg.* v. *Coulson*, 24 Ont. 246; *Haworth* v. *Brearley*, 19 Q.B.D. 303; *College of Physicians* v. *Rose*, 6 Mod. 44, Cas. 52; *Re Horton*, 8 Q.B.D. 434; and hearing counsel on both sides, that the defendant Barnfield (*alias* Sequah) is fully entitled to sell his patent medicines as publicly as he likes, so long as they are not shewn to be inimical to the public health, and as freely as Parr's life pills, or any other patent medicine. The mere selling without an inducement to any one is not "practising medicine;" but he is not entitled to call upon people to submit to his personal manipulation or inspection and dispensing of his medicine to them, asking their symptoms, diseases or complaints, or treating them as he did in the cases before us with his medicines. I say nothing about his producing the individuals themselves after treatment to audiences as living "advertisements" of his success in so treating them, as the information stops half-way at the charge of his practising medicine unlawfully. It is but common sense to say he did this for "gain or hope of reward," as the sole object of the whole thing and in every case was to sell as much of his drugs as possible.

Judgment.

The merits and value of the "Sequah" drugs as medicines are not in the case. I find that in the cases before the Court, according to the ordinary and commonly understood meaning of the words of Sec. 41 of the Medical Act, C.S.B.C. Cap. 81, as required to be applied to the construction of statutes the acts of the defendant legally amounted to "practising medicine," and have brought him within the penal provision of the Medical Act.

This Act, it should be observed, was passed in the public interest, after very full debate and examination by the Legislature. It is a *fac-simile* also of the Act passed by the

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Legislature of Ontario for a similar salutary object, and has been rendered necessary for the protection of the public from being practised upon by persons incompetent to treat diseases safely and intelligently, and, like the defendant, unskilled and untrained in the safe application of medical science and remedies to the delicate and highly organized constitution of the human frame. The decision of the magistrate, therefore, in dismissing the information was erroneous, and must be and is hereby reversed. And the defendant having so violated the provisions of the Act must be, and is hereby, fined in the sum of twenty-five dollars, the lowest sum mentioned in that behalf in the statute, together with the costs of the appeal and costs in the Court below.

Judgment.

Appeal allowed with costs.

GARESCHE v. GARESCHE.

Trustees—Removal of when not in harmony with beneficiaries — Receiver — Appointment of.

The Court, in the exercise of its discretion, may remove trustees who unreasonably decline to bring an action for the benefit of the trust

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It appearing that the period of the trust had almost expired, and that nothing remained but to wind up the estate, a receiver was appointed instead of new trustees.

The writ of summons not having asked for a receiver it was directed to be amended. Objection that the proposed receiver was the partner of the husband of one of the beneficiaries over-ruled.

If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, if for no other reason than that those beneficially interested, or those who act for them, are unable to work in harmony with him, and if there is no reason to the contrary from the intention of the framer of the trust to give the trustees a benefit or otherwise, the trustee is generally advised by his csunsel to resign. If without any reasonable ground he refuses to do so, tne Court may remove him.

Judgment.

MOTION by the plaintiffs, of the beneficiaries under a

certain trust deed, to remove the defendants Arthur Garesche, Alexander Roland Milne and Louis Gregory McQuade from their trusteeship thereunder. It appeared that the period of the trust would expire within two months, when the estate would be distributed among the beneficiaries under the deed, and the motion therefore asked for the appointment of a receiver instead of new trustees.

The facts fully appear from the judgment.

Robert Cassidy, for the plaintiffs.

A. P. Luxton, contra.

WALKEM, J.: The plaintiffs and the defendant Arthur Garesche are beneficiaries under a deed of trust executed by their mother, in January, 1883, to Arthur Garesche and A. A. Green as trustees. Green died in 1891, and Arthur Garesche acted as sole trustee from that time until September, 1893, when the defendants Milne and McQuade were appointed his co-trustees.

While acting as sole trustee, Arthur Garesche sold his deceased mother's partnership interest in the banking house of Garesche, Green & Company for $125,000.00, of which $80.000.00 were left on a mortgage of the bank property. He consequently had a cash balance in his hands of $45,000.00. Judgment.

It is alleged that from the time he became sole trustee he employed the defendant Wilson as his agent in business matters of the estate, and that on Wilson's recommendation he bought from him some unimproved and unproductive real estate in Portland for $25,000.00, part of the $45,000.00, and that such purchase is now of considerably less value. Wilson admits that he sold the property, but states that he was not the agent of Garesche or the estate, and that Garesche bought the property solely on his own judgment as a speculation, with the intention of building upon it.

In 1892, Arthur Garesche left for Cuba, intending to return, but he has since resided there. Before leaving he

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gave Wilson a power of attorney to act for him in his trusteeship, and also got him to look after his private interests here. Arthur Garesche, about the same time, transferred, as the plaintiffs allege, about $15,000.00 of the trust funds to Wilson to be dealt with according to the terms of the trust deed, but Wilson states that the amount was only $14,000.00, and that Garesche subsequently drew upon it until it was exhausted. Later in the same year, Wilson collected the $80,000.00 due on the mortgage of the Bank property and placed it to the credit of his private account in the Bank of British Columbia, in order, as he explains, to get the benefit for the estate of an arrangement that he had previously made on his own behalf, that he should be allowed interest on his minimum monthly balance. He further says that the proportion due to the estate was credited to it and accounted for from time to time to Arthur Garesche in his correspondence with him.

Judgment.

Wilson would certainly have acted more prudently, even in his own interest, if he had kept the two accounts separate, as the bank would, doubtless, in view of such a large deposit as $80,000.00, have given the estate the like advantage as it had given him in respect of interest, for a trustee or his agent who mixes his own monies with the trust funds must expect, as has already been partially the case here, to have every debit and credit entry in the common account more or less questioned.

I now come to an investment of the trust funds by Wilson, which, however justifiable on the score of security, appears to me to have been improper in a legal sense, inasmuch as he was personally interested in it. In 1889, namely, about two years before Arthur Garesche became sole trustee, Wilson sold some real estate belonging to him here to W. H. Ellis for $8,500.00, $2,500.00 being paid in cash, and the balance of $6,000.00 secured as I understand by a deposit of the title deeds of the property. After the mortgage fell due, say in 1892, Wilson required Ellis to pay it, and to

enable him to do so he lent him $6,000.00 of the trust funds and took a fresh mortgage from Ellis for that amount on the same property in favour of the estate. This latter mortgage fell due recently and has not been paid. The security may be perfectly good, but that is not the point. The plaintiffs claim that Wilson is liable for that amount. I give no opinion upon it, as it is a matter to be decided at the trial.

Another loan much more objectionable in character, of $2,100.00 of the same funds was made by Wilson to a person known as Tullock, who was his tenant, and proprietor of the hotel in the "Wilson Block" on Yates street. The loan was made to Tullock shortly after he moved in and was secured by a mortgage on his furniture. In the first place, the trust deed prohibited loans being made on chattel mortgages, and in the next place, if the ordinary rule were allowed to prevail in such a case, the mortgage would be subject to Wilson's prior right, if he chose to exercise it, to distrain for overdue rent. The value of such a security would, therefore, always be more or less questionable. In any event, the transaction was indefensible. Tullock left the Province without paying the mortgage, and it is only since the institution of this action that Wilson has personally paid it off to the estate.

The two trustees who reside here have designedly refrained, as I infer from McQuade's evidence, from enquiring into any of Garesche's or Wilson's acts—the case of the chattel mortgage perhaps excepted—on the ground that they occurred prior to their trusteeship. They also object to that enquiry being now made by means of the present action, for they disapprove of it, and have refused to allow themselves to be joined as plaintiffs; although the claim as endorsed on the writ is, at least in my opinion, a proper one, as against Arthur Garesche and Wilson, for judicial investigation.

The principle upon which these proceedings are based

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is, as stated by Lord BLACKBURN, in *Letterstedt* v. *Broers*, 9 App. Cas. 371, "that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate." His further observations in the same judgment seem to be particularly apposite. "As soon," he observes, "as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intention of the framer of the trust to give the trustee a benefit or otherwise, the trustee is always advised by his counsel to resign, and does so. If, without any reasonable ground he refused to do so, it seems that the Court might think it proper to remove him."

Judgment.

The trustees in this case are not entitled as such to any benefit under the trust deed, and the only excuse they offer for not resigning is that they consider it to be in the interests of the beneficiaries that they should wind up the estate. But four out of the five of the beneficiaries who, it will be admitted, are perfectly capable of forming an opinion as to what is best for the estate, think otherwise. Arthur Garesche, the remaining beneficiary, naturally opposes the attempt to remove him, for he would appear to be the principal defendant. However, I am not called upon to remove any of the trustees permanently, for whether that shall be done or not is a matter which can only be decided by the Court hereafter. In that respect it stands on the same footing as the question as to whether Arthur Garesche, who as principal is liable for the acts of his agent Wilson, is primarily liable for the amount of the Ellis mortgage, and whether again he is liable for the $25,000.00 used in the Portland speculation. But I have to refer to these and the other transactions mentioned, and also to the conduct

of the trustees in order to ascertain whether there is a *prima facie* case for an interim receivership. It has been stated by counsel for the defendants that several mortgagors have been required by the two trustees here to pay off their mortgages at the beginning of the coming month. Arthur Garesche will doubtless lay claim, through Wilson or otherwise, if he has not already done so, to what he may consider to be his share of any monies that may be thus collected, and having regard to the fact that his co-trustees, the two gentlemen referred to, disapprove of these proceedings being taken against him, the collection and custody of such monies should, in my opinion, be placed in the hands of a receiver, in order that they may be dealt with by the Court at the trial when, as I have pointed out, certain questions as to Arthur Garesche's personal liability to the estate to the extent of $31,000.00 at least will have to be determined. Errors may also be found in his and Wilson's accounts on further investigation, which the Court may direct to be charged to him, for these accounts it will be recollected have not been investigated by Garesche's co-trustees. That considerable friction exists between the trustees and the plaintiffs cannot be denied. As the trustees object to the present proposed investigation by the Court, an investigation which even Wilson's evidence alone would, in my opinion, amply warrant, it is most improbable that they will do anything to facilitate it. The correspondence, securities and accounts which are in their possession will have to be examined preparatory to the trial, and will, it appears to me, be essential to enable the plaintiffs to place the true state of the case, whatever it may be, before the Court. This itself would not justify the appointment of a receiver, but in view of all that has been stated I have no hesitation in granting the application. Objection having been taken that a receiver has not been asked for in the indorsement of the plaintiff's writ, the writ should be amended so as to meet it, leave being now given for that purpose.

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On behalf of the plaintiffs, the appointment of Mr. Shallcross as receiver has been proposed. He is objected to by the other side on the ground that his partner is the husband of one of the beneficiaries, but that circumstance is not to my mind any good reason for objection to him. I shall appoint him upon his giving such security as may be agreed upon between the parties, or, in the alternative, approved of by myself. The costs of all parties to this application should be borne by the estate.

Trustees removed and Receiver appointed.

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Divorce—Appeal—Jurisdiction of Full Court.

In construing statutes the Legislature must be presumed to contemplate dealing only with subjects within its legislative control, and as Provincial Legislatures have no power to confer divorce jurisdiction upon any Court, the language of the Supreme Court Act, C.S.B.C. (1888), Cap. 25, Sec. 67, providing that "an appeal shall lie to the Full Court from every judgment, decree or order made by a Judge of the Supreme Court, whether final or interlocutory, and whether such judgment, decree or order shall be in respect of a matter specified in the Rules of Court or not," cannot be construed to confer upon the Full Court of British Columbia any appellate jurisdiction in divorce matters.

The Imperial Act 20 & 21 Vic. Cap. 85, Sec. 55, giving an appeal to the Full (Divorce) Court from all decisions of a single Judge thereof, is inapplicable to the Full Court of British Columbia.

Statement.

APPEAL to the Full Court and motion for a new trial by the co-respondent, from a judgment of Mr. Justice DRAKE, in the matter of a petition brought in the Supreme Court

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of British Columbia by the plaintiff for a divorce *a vinculo matrimonii* from his wife, and for damages against the co-respondent. The petition was tried before the learned Judge and a jury. The judgment granted the divorce and allowed damages against the co-respondent.

The grounds of the appeal as set out in the notice were: 1. That the verdict was against the weight of evidence. 2. That the damages were excessive. 3. That there was no legal proof of the identity of the respondent with the person to whom the petitioner claimed to have been married. 4. That the marriage certificate produced in evidence was not sufficient evidence of the marriage. Counsel also desired to argue the questions of the jurisdiction of the Supreme Court in divorce matters, see page 318 *post*.

Argument.

The appeal came on for hearing in the Full Court, *coram*, Sir M. B. BEGBIE, C.J., CREASE and WALKEM, JJ.

S. Perry Mills, for the plaintiff, took the preliminary objection that the application for a new trial ought to have been to the Divisional Court, and that neither the Full Court nor the Divisional Court had jurisdiction in the matter. That the Legislature must be presumed only to have intended to deal with matters within its jurisdiction, *Ellis* v. *Ellis*, 8 Prob. Div. 188, over-ruling *Latham* v. *Latham*, 2 Sw. & Tr. 298; *Stanhope* v. *Stanhope* 11 P.D. 103.

W. J. Taylor, contra.

Judgment of BEGBIE, C.J.

BEGBIE, C.J.: This is a case of a petition for a divorce *a vinculo*, brought by the respondent against his wife and a co-respondent, the appellant Macartney. The petition was heard before Mr. Justice DRAKE with a jury. The respondent did not appear. The co-respondent appeared and denied the adultery. He also objected that the Supreme Court of British Columbia had no jurisdiction, and that at any rate Mr. Justice DRAKE, sitting alone, had no jurisdiction to hear and determine upon applications for divorce *a vinculo*. That, even if a single Judge had jurisdiction,

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the fact of the marriage was not proved as required by Statute 20 & 21 Vic. Cap. 85, there being no evidence whatever produced of the law of Ontario, where the marriage was alleged to have been had, nor of the manner and form in which the ceremony was performed, nor any expert witness to prove that a marriage so celebrated would be a valid marriage in Ontario, nor any evidence whatever of the identity of the respondent with the woman alleged to have been married in Ontario, which was absolutely necessary, otherwise a man might marry in a foreign country, leave his wife there, and form in this Province a connection with a dissolute woman, and then, on proof of her misconduct here, obtain a sentence of divorce from his innocent wife.

Mr. Justice DRAKE over-ruled these objections, considering that the case of *M.*, falsely called *S.* v. *S.*, 1 B.C. Pt. I. 25, had settled the question of jurisdiction and was binding on him ; and he found in accord with the jury that the respondent and co-respondent had committed adultery with each other, and he pronounced a decree *nisi* for a divorce *a vinculo*, and awarded $1,250.00 damages against the co-respondent.

Judgment of BEGBIE, C.J.

From this judgment and decree the co-respondent has appealed to the present Full Court, alleging the above grounds, but in the forefront alleging that Mr. Justice DRAKE, sitting alone with a jury, had no jurisdiction to pronounce such a decree. But Mr. *Taylor*, for the co-respondent, had barely opened his case when Mr. *Mills* for the petitioner objected, that though an appeal would probably lie to the Privy Council in England, yet that, at all events and in any case this Court has no appellate jurisdiction in a cause of dissolution of marriage. And we are of that opinion. We have neither the power nor the inclination to discuss the decision in *Sharpe* v. *Sharpe*, or to impugn it in any way. But nothing said or suggested in that case goes to shew that the Court, as then constituted, considered any appellate jurisdiction was conferred on any

sittings of this Court, however solemn or numerously composed. In fact, in that case, the question of appeal was never brought up, and it is now raised for the first time. Now, an appellate jurisdiction can only be given by a competent Legislature. The Colonial Legislature, previous to Confederation in 1871, while the colony was still autonomous, had admittedly made no express provision on the subject; neither has the Dominion Parliament since 1871. The Provincial Legislature, indeed, has declared that an appeal shall be to the Full Court here from all decisions of a single Judge. But since Confederation all matters concerning divorce are expressly reserved to the Dominion Parliament; and the Provincial Legislature in purporting to give appellate jurisdiction must be presumed to have contemplated such matters only as were within its own power, and not such matters as were expressly removed from its regulation. And even if the power of appeal, or any other jurisdiction in divorce matters, had been since Confederation expressly conferred on us by the Provincial Legislature, the gift would manifestly be illegal. The appellant is therefore driven to find this appellate jurisdiction in the provisions of the Imperial Act, 1857, 20 & 21 Vic. Cap. 85, a course which is not clearly consistent with his first objection, that this Court has no jurisdiction at all. However, he says, and truly, that by section 55 of the Imperial Act an appeal is given on all decisions of a single Judge (the Judge Ordinary) to the Full Court. But, in the first place, the decisions which may under that Act be rendered by a single Judge, and therefore which may be appealed under section 55, do not include decisions on petitions for divorce *a vinculo*, which by section 9 are expressly excepted from being dealt with by one Judge alone. And in the next place, the "Full Court" mentioned in section 55 evidently means the quorum of the whole Court mentioned in section 10, and it seems almost a play upon words to say that it shall mean a "Full Court" in British Columbia, an expression used for the first

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time in a Provincial statute after Confederation, and when it could not with any show of legality have any reference to divorce sittings at all.

Then Mr. *Taylor*, for the appellant, endeavoured to argue (again not very consistently with his main objection to the jurisdiction) that inasmuch as this was the appeal of the co-respondent alone, and because his whole interest in the case was limited to the damages, and inasmuch as the petitioner might have proceeded for damages alone under section 33 of the Imperial Act, which matter might have been heard by the Judge Ordinary alone (in which case an appeal would have lain to the Full Court under section 55); therefore we may now consider this matter as having been properly heard by a sole Judge, and so appealable to us. Whatever might have been the case if the petitioner had proceeded under that section 33, it is sufficient to say that he has not done so, but is suing for a divorce *a vinculo*. Besides, we think this contention is fully answered by the considerations already mentioned.

Judgment of BEGBIE, C.J.

We therefore think that we can make no order on this appeal except that the defendant pay to the petitioner his costs of being brought before us.

CREASE and WALKEM, JJ., concurred.

Order accordingly.

BRITISH COLUMBIA LAND AND INVESTMENT COMPANY v. THAIN.

DRAKE, J.

[In Chambers].

1895.

Oct. 15.

B. C. L. & I. Co. v. THAIN

Practice—Judgment under Order XIV.—Special endorsement—Claim for interest till judgment at certain rate necessitating computation.

Plaintiffs' claim, as endorsed on the writ of summons, was for a sum certain for principal and interest due upon a covenant in a mortgage, and interest thereon until judgment.

Held, not a special endorsement entitling the plaintiff to judgment under Order XIV.

To a special endorsement for interest it is necessary :—

1. That it is claimed to be due by contract or statute.
2. That a definite sum is claimed, as defendant cannot be called upon to take the risks of calculation.

Secus, in the case of interest claimed on a promissory note.

SUMMONS for judgment Order XIV. The particulars of the endorsement are shewn by the headnote and judgment. Statement.

G. H. Barnard, for the plaintiff : Interest may be claimed from date of writ to judgment, Ann. Prac. 1894, p. 226, under heading "with or without interest."

L. P. Duff, for the defendant. This statement in the Ann. Prac. 1894, and as cut down in Ann. Prac. 1895, is in direct conflict with the authorities. *Ryley* v. *Master* (1892), 1 Q.B. 674. The writ is not specially endorsed, *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674 ; *Gold Ores Reduction Co.* v. *Parr* (1892), 2 Q.B. 14 ; *Lawrence* v. *Wilcocks* (1892), 1 Q.B. 696. Argument.

DRAKE, J.: Mr. *Barnard* applies for judgment under Order XIV. The writ is endorsed for principal and interest due on a covenant in a mortgage dated 12th June, 1891, and claims a sum certain for such principal and interest as due at the date of the writ. The plaintiff further claims interest at the rate of ten per cent. per annum on the principal sum from date of writ until judgment. Judgment.

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Mr. *Duff*, for defendant, contends that this latter endorsement cannot be made on a writ which is claimed as a specially endorsed writ, and cites *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674; *Gold Ores Reduction Co.* v. *Parr* (1892), 2 Q.B. 14.

Both these cases decide that interest cannot be claimed on a specially endorsed writ unless it is shewn on the endorsement that the interest is due under a statute or by contract. The first case was the judgment of five Judges, delivered by Lord COLERIDGE, C.J., who says two things are necessary in a special endorsement: 1st, that the interest claimed is due by contract; 2nd, that a definite sum has to be claimed, for it is important that a man who is proceeded against should know exactly how much he has to pay, and not be called upon to take the risks of calculation. Here the first requirement is sufficiently shewn, the second is not.

Judgment.

The case of the *Sheba Gold Mining Co.* was subsequently approved by the Court of Appeal in *Wilks* v. *Wood* (1892), 1 Q.B. 684, and is a binding authority on me.

I may point out that a clear distinction is drawn between these cases and one arising under the Bills of Exchange Code, when the statute gives interest up to judgment as damages, and in such a case an endorsement similar to the present one has been held not improper on a specially endorsed writ, see *London & Universal Bank* v. *Clancarty* (1892), 1 Q.B. 689.

I therefore dismiss this summons with costs to defendant.

Summons dismissed.

REG. v. SYMINGTON.

BOLE, CO. J.

1895.

Oct. 23.

REGINA v. SYMINGTON

Game Protection Act, B.C., 1895, Secs. 15-16—Killing deer out of season—Exemption to resident farmer killing deer depasturing his fields—Whether resident agent of absent farmer within the exemption—Statutes—Construction of.

Defendant was convicted under section 15 of the Game Protection Act, 1895(B.C.), for having shot certain deer within the period prohibited by the Act. It appeared from the evidence that the defendant resided upon and managed a certain farm as the agent of the owner who was then absent, and that the deer in question came upon and was depasturing a cultivated field, part of the farm, when the defendant shot and killed it.

Held, that the defendant in committing the act was within the exemption created by section 16 of the Act providing: "16. Nothing in this Act shall be construed as prohibiting any resident farmer from killing, at any time, deer that he finds depasturing within his cultivated fields."

Observations on the equitable construction of statutes.

APPEAL by the defendant from a conviction under section 15 of the Game Protection Act, 1895, for having shot certain deer within the period prohibited by the Act. Statement.

Alexander Henderson, for the appeal.

A. G. Smith, D. A.-G., contra.

BOLE, Co. J.: The appeal herein is brought from a summary conviction whereby the appellant was convicted of having, on 1st August last, shot two deer and was fined $25.00 with costs. The evidence left no doubt, indeed the appellant did not deny that he shot these deer during the close season, but alleges that he was then acting as Mr. Goddard's agent, and sought to justify his action as within the exemption provided for in section 16 of the Game Protection Act, 1895, which provides that the Act shall not apply to a resident farmer killing deer found depasturing his fields at any time. It appears that when the deer were shot they were eating the growing oats in Mr. Goddard's field. Mr. Symington is a resident farmer Judgment.

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at Langley, and following the principles laid down in *Naef* v. *Mutter*, 31 L.J.C.P. 357, and *In re Bowie*, 50 L.J. Ch. 384, for the purpose of ascertaining the meaning of the word "resident," I can have little hesitation in coming to the conclusion that Mr. George Goddard, who owns and lives within a mile of the cultivated field where the deer were killed, is also a resident farmer within the meaning of the Act. If the field had been Mr. Symington's own property, the case would be at an end, but as the field is Mr. George Goddard's, the question naturally arises was Mr. Symington justified in doing what he did, as Goddard's agent. The learned counsel for the appellant strongly insisted that the statute could not be taken to have intended to exclude the operation of the oft acted upon maxim, *qui facit per alium facit per se*, while the learned Deputy Attorney-General strenuously contended that the maxim did not apply to the case at all, and in the alternative, that Symington was at most a mere licensee, and not an agent, and further did not obtain any

Judgment.

authority from Mr. Richard Goddard, who had a part interest in the crops of the field in question, where the killing took place. However, it does not become necessary to deal with that point, as there is evidence of ratification on the part of Mr. Richard Goddard, and were it otherwise it might well be argued that every resident farmer who had a beneficial interest in the field came within section 16 ; but that need not be now dealt with, the question being narrowed down to this : Can a resident farmer authorize a servant or agent to kill deer found depasturing his cultivated field during the close season ? In order the better to arrive at the true meaning of section 16, let us consider what its object and intention was. I think the answer must be, protection for the farmer. Without this proviso, the statute might prejudicially affect him to the extent of making him liable to a serious penalty if he endeavoured to protect his growing crops from the destructive ravages of wild animals. Now, how can this object be best effected ? Certainly not

by forbidding the farmer to employ persons to protect his crops, and by confining the privilege of killing to himself personally. Endlich-Maxwell on Statutes, Ed. 1888, p. 138, says: "A statute which requires something to be done by a person would be complied with in general if the thing were done by another for him and by his authority, for it would be presumed that there was no intention to prevent the application of the general principle of law, *qui facit per alium facit per se*, unless there was something in the language or in the object of the statute which shewed that a personal Act was intended," *R.* v. *Carew*, 20 L.J.M.C. 44; *R.* v. *Kent*, 8 Q.B. 315. Is there anything in the words themselves or the subject matter of the clause to indicate such an intention? The words themselves, in my opinion certainly do not, and to adopt such a construction in the absence of clear and express words would be to violate the rule laid down by Lord CAIRNS, in *Hill* v. *East & West India Docks Co.*, 9 App. Cas. 456 (approved in *Railton* v. *Wood*, 15 App. Cas. 363), where that great and learned Judge said: "Where there are two constructions, the one of which will, as it seems to me, do great and unnecessary injustice, and the other of which will avoid that injustice and keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions." To hold that the power of protection given farmers by section 16 can only be personally exercised, would, to my mind, be to do violence to the plain intention of the Legislature, and practically destroy the utility of section 16.

Judgment.

I must, therefore, in accordance with these views, allow the appeal and set aside the conviction, with costs.

Appeal allowed with costs.

CREASE, J.

1895.

NOV. 11.

REGINA v. PREVOST.

REGINA v. PREVOST.

Criminal Law—Speedy trial—Code Secs. 765-9—Right of prisoner to re-elect as to mode of trial.

REGINA v. PREVOST

A prisoner who has been brought up for election as to the mode of his trial under the speedy trial sections of the Criminal Code, and has elected to be tried by a jury, may afterwards re-elect to be tried speedily before a Judge.

MOTION on behalf of the prisoner, committed for trial on a charge of stealing Government monies, and then in custody upon a warrant of a Judge, before whom he had elected to be tried by a jury at the next sittings of Oyer and Terminer and General Gaol Delivery, committing him to the custody of the Keeper of the Provincial Gaol at Victoria until such sittings, then to be delivered for such trial, for leave to abandon such election and to re-elect to be tried speedily by a Judge without a jury.

Statement.

Charles Wilson, Q.C., for the prisoner.

A. N. Richards, Q.C., for the Crown: The prisoner has no *status* to make this motion. The gaoler has no right to bring him here for this purpose. His warrant is to keep him in custody in the Provincial Gaol till the Assizes and then deliver him for trial. Code Sec. 769, Sub-sec. 2 having provided for re-election in certain specific cases, of which this is not one, excludes the idea of a right to re-elect by any inference. If there is the right to disavow the first election why not a second, and so on. It cannot be said that such a course is to be in the discretion of the Judge. We do not desire to press the prisoner in any way, but question the legality of the proposition.

Argument.

Judgment.

CREASE, J.: I have considered the arguments and cases adduced before me by Mr. *Richards, Q.C.*, and Mr. *Wilson, Q.C.*, and the objects and provisions of the Speedy Trials

Act, especially those relating to the power of the prisoner to elect and re-elect.

While I feel myself constrained to accede to Mr. *Richards'* construction of section 769, that the re-election there relates only to the trials of summary cases and juvenile offenders before the ordinary magistrate, I have on the other hand satisfied myself that the practice of re-election by those accused of offences of the higher class—as already practiced in several cases which have come before this Court, and several Judges thereof—is a correct one, and well within the scope and necessary intendment of the Speedy Trials Act.

The *ratio existendi*, the very life of the Act, is speedy trial. One object of it is to put an end, at the express wish of the prisoner, the person most affected by it, to the pain of prolonged suspense in learning his fate. The whole Act is full of this intention.

By section 765 "every person committed to gaol for trial on the charge of being guilty of any of the higher class of crime" I have alluded to, "may be tried in any Province, etc., and out of the regular term of sittings of the Court, whether the Court before which (but for such consent) the said person would be triable for the offence charged, or the Grand Jury thereof, is or is not then in session; and if such person is convicted he may be sentenced by the Judge." There is the general power. It pervades the whole Act. That gives the prisoner a new right.

Judgment.

What follows is procedure. By section 766, "Every Sheriff within 24 hours after such prisoner is committed for trial must notify the Judge in writing that such person is so confined, etc., and whereupon with as little delay as possible such Judge shall cause the prisoner to be brought before him," and this with the sole view to a speedy trial, always subject to the consent of the prisoner.

The prisoner's consent is made the keystone of the Judge's jurisdiction. The right of every man to be tried

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by a jury of his peers is not taken away, but at his express wish is surrendered, or at least suspended. Because, when the prisoner comes and says "I wish to be tried under the Speedy Trials Act by a Judge and not with a jury," the law in its turn consents and says "Well, you shall have a speedy trial." And if he wishes to be tried by a jury, in the words of the Act section 767, sub-section 2 and section 768, he has to "demand" it—so, there "election" is equivalent to "demand."

There are many public advantages in adopting this Act, and Judges, whether they like the additional responsibility it throws on them or not, have to do it, for the Act, *e.g.* section 769, sub-section 2, says "he shall." It saves the jurors much valuable time and loss of business. It saves the Government great expense in paying witnesses and jurors, preparing the case, which, as the country is rapidly growing, would soon reach an amount that would be excessive. It makes the punishment of the crime all the more effective for following so closely on the offence. For some reason or other it is an Act which, however little Judges may relish the concentration of so much responsibility on themselves instead of sharing it with jurors, is equally acceptable to the prisoner, the Government, and the counsel for and against. The cases in Ontario do not appear (except in one case which after use here and in favour of re-election has slipped out of sight) to have considered this branch of the subject; and indeed, however valuable for reference these decisions may be, this would not be binding here where a different state of circumstances exist. But my own view, and that of the other Judges here, is to consider that a prisoner has now a new right of which the Speedy Trials Act, which gives it, does not deprive him.

Judgment.

It is a liberal statute for a very general good, and *in favorem libertatis*, however strictly, is not to be construed narrowly; but so that *res magis valeat quam pereat* and abuse of it can be easily punished with costs.

At first the prisoner has no option as to the time of electing, whether prepared or not; for he is compelled within twenty-four hours after committal to elect: "Which will you be tried by, a Judge or jury?" He thinks awhile (this I can easily understand happening) and says, "All my witnesses are not here; I am daily expecting them here, but am not sure; but am sure they will be here before the Assizes. So if I must come to a decision at once, I must; and so elect to be tried by a jury," in other words, at the next Assizes, perhaps weeks or months later on. Next day the witnesses arrive and cannot all wait long. He changes his mind; he applies to re-elect and to be tried at once. Section 765 gives him this general right and dictates the special form. He makes a new application. The Judge does not require a new form of arraignment as that is already provided by section 767.

Every part of this Act has been most carefully thought out by its framers. Who is injured by the re-election? Not the Government, not the prisoner, not the public. All are benefitted. He is under the jurisdiction of the Court, which has seizin of his case. If it should turn out that he pleads guilty, he could do no more than use the very same words before the speedy trial Judge which he would use before the Court of Assize, for in such case no jury would be empanelled; it would be before the Judge alone there, the same as if re-electing under the Speedy Trials Act.

Judgment.

What is there to prevent his doing it, or to bar the privilege the Act gives him? There is nothing in the Act to prevent it, and hitherto the practice here has allowed it and has been beneficial all round, and I am of opinion that such practice, however onerous to the Judges, is lawful and right and I decide accordingly; and that the prisoner now before the Court has a right to re-elect.

Order accordingly.

IN THE VICE-ADMIRALTY COURT.

DAVIE, L.J.A.

1895.

Nov. 14.

THE MARVIN

THE E. B. MARVIN.

Behring Sea Award Act, 1894 [*57 & 58 Vic. (Imp.)*] *Article VI., Schedule—Prohibition against use of fire-arms—Circumstances of suspicion—Rebuttal—Costs.*

The ship, on 27th July, 1895, was given a clearance for Behring Sea on a sealing expedition by the American customs officer at Copper Island after making a manifest of things on board of her.

She was boarded in the Behring Sea on 2nd September by the U.S.S. Rush, and searched for indications of an infraction of the Act, particularly regarding the prohibition against the use of fire-arms in the taking of seals, under Article VI. of the schedule. In one seal skin, out of 336 then on board, a hole was discovered which might have been caused by a bullet or buck shot. There was a discrepancy both in number and kind between the ammunition stated in the manifest and that found upon the seizure, and there were fewer loaded shells.

The captain of the ship was called as a witness and denied infraction of the Act.

Held, on the evidence, since it was not clear that the hole in the seal skin was caused by a shot, or, if it was, that the shot was from the ship; and since the discrepancy in regard to the ammunition was accounted for as being apparently attributable to error in the manifest, that the action should be dismissed, but, as there were circumstances of suspicion warranting the seizure, without costs.

ACTION for condemnation of the ship for an infraction of Article VI. of the schedule to the Behring Sea Award Act,
Statement. 1894 [57 & 58 Vic. (Imp.)] The facts sufficiently appear from the head note and the judgment.

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

H. D. Helmcken, Q.C., for the defendant ship.

DAVIE, L.J.A.: This was an action for condemnation of
Judgment. the British vessel E. B. Marvin, her equipment and everything on board of her and the proceeds thereof, instituted

by Arthur Yerbery Moggridge, commander of H.M.S. Royal Arthur, on behalf of Her Majesty, on the ground that at the time of the seizure presently mentioned the said vessel was in Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in Behring Sea from 9th August, 1895, to 2nd September, 1895, continuously, and did during the said time use fire-arms and explosives for the purpose of killing fur seals, contrary to the Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.)]

The facts of the case as proved before me shew that the vessel, William Douglas Byers, master, left the port of Victoria on 11th January, 1895, for the North Pacific on a fur sealing voyage, fully manned and equipped with the necessary outfit for seal fishing, including a supply of fire-arms and explosives. The schedule provisions of the Behring Sea Award Act, 1894, which, by Article VI. of the first schedule, makes it unlawful thereafter to use fire-arms and explosives in fur seal fishing, came into force on the 23rd April, 1895, after the Marvin had left Victoria and whilst she was prosecuting her voyage. On 18th June, 1895, Captain Byers received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his fire-arms sealed up, and on 27th July reported with his vessel to Captain Carmine, the American custom-house officer at Copper Island, who informed him that he had no authority to seal up his arms and ammunition, but after making a manifest of the things on board gave Captain Byers a clearance permitting his vessel to proceed to Behring Sea for the purpose of hunting fur seals. The manifest with which Captain Byers went to sea from Copper Island included 1,152 loaded brass shells, 903 empty brass shells, and 138 empty paper shells. Having proceeded on her voyage the vessel was overhauled and searched, but allowed to go free, on 21st August, by the U.S.S. Grant, and by the Perry on 26th August, and on 2nd September, after the hunters had left the vessel for the

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DAVIE, L.J.A. 1895. Nov. 14. THE MARVIN

day's sealing, the U.S.S. Rush hove in sight and boarded her. The cargo then on board of 336 seal skins was diligently examined by the officers of the Rush, and, with the exception of one skin, shewed no appearance of anything but spearing. In one skin, however, a hole was discovered which might have been caused by a bullet or buck shot, and the officers of the Rush believed that it was so caused, and a count of the ammunition on board shewed a considerable difference from the manifest, the actual count made by the officers of the Rush shewing 1,081 brass shell cartridges loaded, 734 brass shells empty, 44 paper shells loaded and 170 paper shells empty. Under these circumstances the Marvin was placed under seizure.

The hunters came home in the afternoon of the same day with a further catch of some forty seals, all taken apparently in a perfectly legitimate manner, as the hunters had neither fire-arms nor ammunition in their boats.

Judgment.

The Marvin was taken to Ounalaska and there handed over to Lieut. Garforth of H.M.S. Pheasant, who again counted the ammunition. His count differed somewhat from that of the Rush, and besides those cartridges and shells formerly counted by the officers of the U.S. vessel, two cardboad boxes of empty brass shells were produced by Captain Byers from the Marvin's lockers, making together with those already counted, a total of loaded cartridges and shells amounting to 2,194, or within one of the number appearing on the manifest, but differing in kind, Lieutenant Garforth's count shewing 1,104 brass shells loaded as against 1,152 on the manifest; 742 brass shells empty as against 903 on the manifest; 305 paper shells as against 138 on the manifest; and 43 paper shells loaded, while there were no paper shells loaded on the manifest.

Captain Byers tells us that when the officers of the Rush made their count he knew that there were more shells somewhere, and asked the officers to wait until the hunters

came back, as they would probably know where the missing shells were, and that when the hunters came back they did inform him of the shells which were afterwards produced from the lockers. He further tells us that the count made at Copper Island, and appearing on the manifest, was made by the hunters, whose word was taken for the number entered on the manifest. He accounts for the discrepancy between paper and brass shells by the ones being then mistaken for the others.

I am of the opinion that Captain Byers' explanation is a reasonable one. Upon inspection of the cartridge I observe that the butt of the brass and paper cartridge is identical, both being of brass, and I can very well believe that in counting them in the boxes this mistake might easily have occurred. I attach no importance to the hole in the skin. Mr. Lubbe, a fur dealer, who was called as a witness, whilst expressing his belief that a hole pointed out by him was a buck shot hole, pointed out a different hole and one which had not been perceived by the officers of the Rush. I am by no means persuaded that either hole was caused by a shot, although of course either might have been ; but then again, even if caused by a shot, it by no means follows that the shot was from the Marvin. On the contrary, it is quite possible that if the hole was a shot wound, such shot might have been fired by a stranger some time before, for Mr. Lubbe tells us that the wound would not heal over for two or three weeks, and he also tells us that it is no uncommon thing to find nests of old shot in skins of seals killed by spearing or in other ways. Captain Byers, who gave his evidence in a straightforward and unequivocal way, assures us that no shooting whatever took place, and the fact that the hunters came back after the seizure without arms or ammunition, and the further fact that no indication whatever of shot was found in any of the other skins; and the tally, within one, of the total count on the manifest, strongly corroborate him.

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THE MARVIN

I think that the discrepancy at first in the number and in kind between the ammunition found and that described in the manifest created sufficient suspicion to warrant the arrest; but this suspicion, I think, has been satisfactorily cleared up by Captain Byers.

The suit will, therefore, be dismissed without costs.

Action dismissed without costs.

WALKEM, J.

1895.

Jan. 7.

DIVISIONAL COURT.

Nov. 15.

BEAVEN v. FELL

BEAVEN ET AL. v. FELL AND WORLOCK.

Practice—Rule 703—Examination for discovery—Scope of—Want of parties no objection to the application.

Held, by the Divisional Court (Crease, McCreight and Drake, JJ.), over-ruling WALKEM, J., that it is not a valid objection to an application for an order to examine a party under Rule 703, and for discovery upon oath of documents in his custody, that other parties, who might be affected by the discovery, ought to be parties to the action.

Parties are entitled, upon an examination for discovery, to examine as fully as they could do in Court.

Statement.

APPEAL from an order of WALKEM, J., dismissing an application by the plaintiff for an order that the defendant Thornton Fell should attend before the Registrar and be orally examined upon oath touching his knowledge of the matters in question, and also for an order that said defendant and the defendant Worlock should make discovery upon oath of all documents in their custody or power, etc.

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The action was brought by the plaintiffs, as assignees, for the benefit of creditors of the insolvent firm of Green, Worlock & Co., to set aside a conveyance of certain lands by Theophila Turner Green, a member of that firm, to the defendants, as being made in fraud of the creditors of the said firm.

E. V. Bodwell, for the application.
Gordon Hunter, contra.

WALKEM, J.: This appeal has been referred to me by the Divisional Court, for written reasons for the refusal on my part to make an order for the oral examination of Mr. Fell and a discovery of documents by the defendants other than Mrs. Green (*a*).

It was urged on the plaintiffs' behalf that the matter of granting or refusing the order was discretionary with me, but that discretion must be understood to be a judicial discretion.

According to the pleadings, and especially in view of the statement of defence, it would appear that the infant children of the late Mr. Green and his widow are beneficially interested in the lands mentioned in the conveyance or deed of trust made by Mrs. Green in favour of the defendants, which deed is now impeached by the plaintiffs as being in fraud of the creditors of the late Mr. Green.

Judgment of WALKEM, J.

I considered, therefore, that I would not be justified in making the order asked for, as the infants were not parties to the action and therefore not represented by a guardian *ad litem*, and as moreover the defendants Mr. Fell and Mr. Worlock would seem to be merely bare trustees, see *per* BOYD, Chancellor, in *Keen* v. *Codd*, 14 Ont. P.R. 182; *Kearsley* v. *Philips*, 10 Q.B.D. 36; and Bray on Discovery, Ed. 1885, p. 343. *Order refused.*

From this judgment the plaintiffs appealed to the Divis-

NOTE.—(*a*) See *Beaven* v. *Fell*, 3 B.C. 362.

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ional Court, and the appeal was argued before CREASE and DRAKE, JJ., on 14th November, 1895.

E. V. Bodwell, for the appeal.

Gordon Hunter, contra.

DRAKE, J.: This is an appeal from Mr. Justice WALKEM's refusal to grant an order for discovery of documents by the defendants other than Theophila Turner Green, and for the oral examination of the defendant Fell.

It is contended that as the defendants Fell and Worlock are merely dry trustees no order for discovery or examination should be made without the *cestuis que trustent* being made parties to the action.

The English authorities must be read by the light of our own rules, and Rule 703 permits the examination of any party to an action whether plaintiff or defendant. If the action were wrongly conceived this privilege is not taken away. And even if all the parties who might properly be before the Court have not been joined, it is no ground for refusing such examination.

Judgment of DRAKE, J.

Cestuis que trustent whose rights might be affected by the testimony given on such examination cannot be prejudiced whether they are actual parties or not.

The very object of our rules is to enable the parties to an action, before the expense of a trial has been incurred, to ascertain whether or not the action is well founded, and whether or not the defence would displace the plaintiff's claim, and in this view of it the parties are entitled to examine as fully as they could do in Court, and to compel the plaintiffs to add others as parties defendant before any examination could take place might result in the plaintiffs having to pay costs of the parties thus added, if it should turn out that their presence was not necessary. With respect to the order for discovery of deeds and documents, we think the plaintiffs are entitled to know what papers are or have been in the trustees' possession; whether or not

they should be produced is quite another thing, and the case of *Ford* v. *Dolphin*, 1 Drew. 222, refers to production and not to the affidavit, which the Court can always order to be made.

For these reasons, we think the appeal should be allowed with costs.

Appeal allowed with costs.

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REGINA v. JIM SING.

REGINA
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JIM SING

Municipal law—Power to pass by-law fixing license fees—By-law delegating power to Council—Ultra vires—License "to be fixed"—Uncertainty.

The Vancouver Incorporation Act, 1886, Sec. 142, Sub-sec. 71, as amended by the Vancouver Incorporation Amendment Act, 1889, Sec. 33, empowered the Council to pass by-laws: (a) "For licensing, regulating and governing hawkers, etc., of any goods for sale, etc., and for fixing the sum to be paid for a license for exercising such calling within the city, and the time the license shall be in force." "(b) Provided always, that no such license shall be required for hawking or peddling any goods, etc., the growth, produce or manufacture of this Province."

By-law 202, of the City of Vancouver, purporting to have been passed under the powers conferred by sub-section 71 (a) *supra*, provided: "No sale of vegetables, etc., shall be made in the city by any dealer, huckster, etc., unless at a permanent place of business for the sale of the said articles, before the hour of nine o'clock in the forenoon of each day of the week, excepting Saturdays, and then not before four o'clock in the afternoon, except at the market place; and no such dealer, huckster, etc., shall sell or offer for sale any of the before-mentioned goods at any place other than the market or from a recognized store, without first having paid the market fees payable by him or her, the amount of which fees and where payable may from time to time be fixed and regulated by resolution of the Council."

The defendant was convicted of offering vegetables, which appeared to have been grown in the Province, for sale between the hours of seven and eight o'clock, a.m.

Held, per DRAKE, J., on appeal, quashing the conviction:

(1) That the power to fix the license fee by by-law did not authorize a by-law relegating it to the Council to fix the fees by resolution.

(2) That the imposition of a fee, in effect a license fee, "to be fixed," etc., was bad for uncertainty.

(3) That the partial prohibition and regulation by the by-law as to sales by hawkers in effect involved the imposition of a license tax upon them in the exercise of the calling, and that the case of the defendant as hawker of vegetables grown in the Province was within the exception provided by sub-section (b).

(4) A by-law may be good in part and bad in part, but the part that is good must be clearly distinguished from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete by-law capable of being enforced.

Statement. APPEAL by the defendant from a conviction for having

offered vegetables for sale between the hours of seven and eight o'clock, a.m., contrary to By-law 202 of the City of Vancouver.

The appeal was argued before DRAKE, J., on 30th October, 1895.

A. H. Macneil, for the appeal.

A. St. G. Hamersley, contra.

DRAKE, J.: The appellant was convicted by Mr. JORDAN, Police Magistrate of the City of Vancouver, of offering for sale on 28th August, 1895, between the hours of seven and eight o'clock, a.m., vegetables grown by the appellant in a garden in the Province. The place where the vegetables were offered for sale was from one-fourth to one-half mile from the market in Vancouver.

The alleged offence is created by By-law No. 202, which is the last amendment of By-laws 154, 184 and 186. The by-law reads as follows: Judgment.

BY-LAW No. 202—A by-law to amend By-law No. 186: "Whereas it is expedient to amend By-law No, 186; Be it therefore enacted by the Mayor and Council, in open meeting assembled, as follows: 1. Clauses 2, 3, 4, 5 are hereby repealed and the following clauses substituted therefor, as follows: 'No sale or offer for sale of vegetables, fruit, farm or garden produce, fish, poultry, eggs, butter, cheese, or meat in quantities less than half a carcass, shall be made in the city by any dealer, huckster or other person unless at a permanent place of business (being premises recognized as a store) for the sale of the said articles before the hour of nine o'clock in the forenoon of each day of the week, excepting Saturdays, and then not before four o'clock in the afternoon, except at the market place, and no such dealer, huckster or other person shall sell or offer for sale any of the before-mentioned goods at any place other than the market or from a recognized store, without first having paid the market fees payable by him or her, the amount of which fees and where payable may from time to time be fixed and regulated by resolution of the Council, and no person shall forestall, regrate or monopolize any of the articles mentioned within the city.'"

The Vancouver Incorporation Act, 1886, Sec. 144, Sub-sec. 71a, as amended, authorizes the Council to make

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by-laws for licensing, regulating and governing hawkers or petty chapmen or other persons carrying on petty trades, or who go from place to place or to other men's houses on foot or with any animal or otherwise carrying goods, wares or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the city and the time the license shall be in force, provided always, that no such license shall be required for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this Province, etc., etc.

It is to be remarked that the by-law makes no exception in favour of Provincial produce, but makes all hawkers liable to pay market fees of an unascertained amount. The amount and place where the fees are to be paid is to be fixed by resolution of the Council.

The appellant in this case was charged with offering for sale vegetables before nine a.m., and not with offering for sale without having first paid a market fee, and the con-

Judgment.

tention is that although the latter part of the by-law may be *ultra vires*, yet so much of the by-law as limits the time before which vegetables cannot be offered for sale is a matter of regulation merely and is within the scope of sub-section 71a.

A by-law may be good in part and bad in part, but the part that is good must be clearly distinguished from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete by-law capable of being enforced. So much of the by-law as imposes market fees of an unknown amount is in my opinion bad. The Act authorizes the Corporation by by-law to fix the sum to be paid for a license, it does not authorize the Council by resolution to fix these fees and alter them at pleasure—a tax (as this is) must be certain and definite and all Acts imposing taxation are construed strictly and in the interest of the class upon whom the burthen is imposed.

The by-law compels hawkers to sell at the market before nine o'clock, or rather says if they don't sell at the market they cannot sell anywhere else; selling at the market involves paying a market fee, and a market fee is in fact a license fee to exercise their calling and falls within the proviso exempting growers of vegetables within the Province from paying a license. This then fixes a place where before certain hours the articles alone can be sold.

The Corporation has power expressly given to it to fix the place of slaughter-houses and where fresh meat is to be sold, but there is no such power given to compel any other trades or occupations to sell at any specified place.

This by-law inferentially fixes the market as the only place where vegetables can be sold before nine o'clock, a.m., and if it is good to restrict sales before nine a.m. it will be equally good as regards sales before nine p.m. and therefore establishes a place where, exclusively, vegetables can be sold, which power is not given by the Incorporation Act, see *Kelly* v. *Corporation of Toronto*, 23 U.C.Q.B. 425; see also *Fennell* v. *Corporation of Guelph*, 24 U.C.Q.B. 238.

Judgment.

I therefore consider the by-law, as far as it affects the sellers of home-grown vegetables is bad, and the conviction of the appellant in this case must be set aside with costs.

Appeal allowed and conviction set aside with costs.

IN THE VICE-ADMIRALTY COURT.

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Seal Fishery (North Pacific) Act, 1893 [56 & 57 Vic. (Imp.) Cap. 23], Sec. 1, Sub-secs. 2, 3—Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.), Cap. 2] Sec. 1—Ship in prohibited zone—Onus of proof—Evidence required to satisfy—Fine instead of forfeiture.

The ship having been arrested within the prohibited zone with seals, and implements for taking them, on board. Upon the trial of an action for her condemnation for infraction of the Act, the captain was not called as a witness by the defence, and the only excuse for not calling him was that he had gone fishing. The account and explanation of the conduct of the ship given in evidence by the mate and some of the crew was inconsistent with reasonable inferences against the ship pointed to by entries in the log.

Held, following The Minnie, 3 B.C. 161, 4 Exch. (Can.) 151, that under the Act the clearest evidence of *bona fides* is required to exonerate the master of a ship found in prohibited waters with skins and implements for taking them on board, from the imputation of an infringement of the provisions of the Act.

That, on the evidence, the *onus* was not discharged, and the Court was not satisfied that the ship had not attempted to take seals in prohibited waters, and that she must be condemned.

Held also, that as no seals appeared to have been actually caught or killed in prohibited waters, it was a proper case for the exercise of the discretion to release the ship on payment of a fine in lieu of forfeiture.

Statement.

ACTION for condemnation of the ship for an infraction of the Seal Fishery (North Pacific) Act, 1893 [56 & 57 Vic. (Imp.) Cap. 23]. The facts fully appear from the judgment.

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

H. D. Helmcken, Q.C., for the ship.

Judgment.

DAVIE, L.J.A. : The British vessel Shelby, Christian Claussen, master, was seized by an officer of the United States cutter Corwin on the 11th May, 1895, in latitude 52

degrees 52 minutes 10 seconds north, and longitude 134 degrees 10 minutes 58 seconds west, being a point within the prohibited waters of the Pacific Ocean as defined in the Behring Sea Award Act, 1894 (Imp.), for an alleged contravention of the Act, such contravention being the employment of the vessel in pursuing seals within the prescribed waters during the period prohibited by law.

By force of the scheduled provisions of the Behring Sea Award Act, 1894, which, under section 1, are to have the same effect as if enacted by the Act, the pursuit of seals within the aforesaid limit is prohibited, and by sub-section 2 of section 1, if there is any contravention of the Act, any person committing, procuring, aiding or abetting such contravention is guilty of a misdemeanor, and the ship employed in such contravention, and her equipment, and everything on board thereof, are liable to forfeiture to Her Majesty, provided that the Court without prejudice to any other power may release the ship, equipment or thing, on payment of a fine not exceeding £500.

Judgment.

At the time of her seizure the Shelby was fully manned and equipped for killing, capturing and pursuing seals, and had on board implements and sealskins.

By section 1 sub-section 6 of Seal Fishery (North Pacific) Act, 1893, which Act was in force at the time of the seizure, if, during prohibited and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or sealskins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the Act. The Acts of 1893–4 being *in pari materia* are to be read as one Act, *McWilliam* v. *Adams*, 1 Macq. H.L. Cas. 176.

The Shelby, therefore, having been found within prohibited waters with seals and implements for taking them on board, is to be deemed to have been employed in contravention of the Act unless the contrary be shewn.

Has it then been shewn that the ship was not used or

DAVIE, L.J.A. employed in contravention of the Act? The most important witness to prove this, if such were the case, would clearly have been Captain Claussen, the master, but he was not called, nor has the failure to call him been satisfactorily accounted for. The only reason offered for his absence is that he was away on a fishing expedition. His evidence might have been taken *de bene esse*, but no effort to procure his evidence seems to have been made. The mate, August Reppon, was called as a witness, and stated that the Shelby stopped sealing on 30th April, when the ship's log shews the vessel to have been in latitude 58 degrees 30 minutes north and longitude 139 degrees 30 minutes west, and that she then set sail for Victoria. On 11th May, after ten or eleven days' sailing, she was found by the Corwin in latitude 52 degrees 52 minutes and 10 seconds north, and longitude 134 degrees 10 minutes and 58 seconds west, a distance approximately of four hundred miles from the point of starting, or less than an average of forty miles a day. The proper course for the ship to have steered for Victoria was E.S.E. magnetic, but it appears that frequently when the course of the wind as indicated by the log would have permitted that course to be made good the vessel was not headed in that direction. For instance, on 2nd May she was headed on a southerly course; on May 3rd on a south by west course, and on 5th May on an east by north course, whereas the wind on each of these days was favourable to an east south-east course. Captain Moggridge states, from an examination of the log, that the schooner ought to have made a considerably greater distance on her course during these days, and in view of the fact, as stated in evidence, that the Shelby had a favourable current of nearly a knot an hour, it is clear that she ought to have made a much greater distance. The Corwin, in coming from the south to the point where she picked up the Shelby, experienced strong head winds, which were favourable winds for the Shelby, and the prevailing winds at that time

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of the year, as shewn by the Coast Pilot, are westerly, also favourable to the east-south-east course to be made by the Shelby.

The Corwin seized the Shelby for contravention of the Act, placed a crew on board her and ordered her to Sitka, a distance of 260 miles, which she reached under sail in a little over two days. At Sitka the Shelby was ordered to Victoria, a distance of about 800 miles, as shewn by the chart, which place she made, likewise under sail, in fourteen days.

The mate, when asked to explain why he went out of his course, particularly on the 2nd, 3rd and 5th May, ascribes the fact to defects in the compass, which he says varies three or four points, but this statement is shewn by his own evidence to be an equivocation and the variations to have had no effect whatever on the course actually made or intended to be made, for whilst it is true that the compass varies, and varies considerably, such variation is regular, known precisely, and duly allowed for. Having committed himself on his examination at the hearing to the variation of the compass reason, which he was compelled to admit on cross-examination was no reason at all, he was by permission of the Court re-called a day or two after the evidence had closed, and he then ascribed the deviations from the course to the state of the wind.

Judgment.

I find myself entirely unable to place any dependence on the evidence of the mate, Reppon, and this leaves the deviations from the regular course between 1st to 11th May, and the fact that 400 miles only was made in ten days, altogether unaccounted for. It is true that Denny Florida, hunter, August Schone, the cook, and Victor Emanuel Laerquest, one of the seamen, all testify, and I have no doubt with truth, that no seals were taken during these days. Their evidence leaves the question of deviations from the course untouched and, in the absence of evidence explaining it, the only reasonable conclusion is that the

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deviations were occasioned by the attempt to pursue seals. At all events it has not been proved to my satisfaction that the vessel was not employed in the pursuit of seals during these dates. In *Reg.* v. *The Minnie*, 4 Exch. (Can.) 151, 3 B.C. 161, it was held by CREASE, J., that the presence of the ship within prohibited waters required the clearest evidence of *bona fides* to exonerate the master of any intention to infringe the provisions of the Act, and that as his explanation of the circumstances in that case was unsatisfactory the ship must be condemned. This ruling is, I think, in thorough accord with sub-section 6 of section 1, and I am bound to follow it. It applies exactly to this case. Here the captain has offered no explanation at all, and the explanation of the circumstances, suspicious in themselves, given by the mate, is unsatisfactory. The vessel therefore must be condemned.

Judgment.

I am inclined to think that this is a case, as no actual taking of seals is shewn, but negatived upon the evidence, in which a fine might meet the justice of the case, instead of forfeiture. I have power under sub-section 2 of section 1 of the Behring Sea Award Act of 1894 to substitute a fine for forfeiture. I will hear counsel upon this point. The costs of suit must follow the condemnation.

Ship condemned and fine imposed in lieu of forfeiture.

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Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.)] Art. V., Schedule—Neglecting to keep log as provided—Whether ship liable to forfeiture as "employed" in such contravention—Construction of words "as soon as possible."

The action was for the condemnation of the ship for a contravention of Article V. of the schedule to the Behring Sea Award Act (Imp.), 1894, in that her master did not enter accurately in the official log book the date and place of each fur seal fishing operation, and the number and sex of the seals captured upon each day, in accordance with the rules for entries in the official log, *i.e.* "as soon as possible after the occurrence," etc., as required by section 281 of the Merchant Shipping Act, 1854 (Imp.), which is made applicable to every vessel engaged in the fur seal fishing by sub-section 3 of section 1 of the Award Act, *supra*.

Held, (1) that the contravention charged was not one in which the ship could be said to be "employed" within the meaning of section 1, sub-section 2 of the Award Act. (2) That the penalty provided for infringement of section 281 of the Merchant Shipping Act, relating to the particular subject of keeping a log, alone applies to the offence, and is incompatible with the forfeiture provided by sub-section 2 of the Award Act for contraventions thereof in which the ship is employed.

The words "as soon as possible" mean within a reasonable time, and, upon the evidence, it did not appear that there had been unreasonable delay.

Action dismissed, with reference as to assess damages caused by the arrest.

ACTION for condemnation of the ship for a contravention of Article V. of the schedule of the Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.)], and section 281 of the Merchant Shipping Act, 1854 (Imp.). Statement.

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

E. V. Bodwell and *G. H. Barnard*, for the defendant ship.

DAVIE, L.J.A.: The charge against the Beatrice is that whilst engaged in seal fishing the master did not enter in Judgment.

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her official log book the date and place of each fur sealing operation, and also the number and sex of the seals captured each day, as required by the Behring Sea Award Act, 1894 (Imp.) No other offence is charged against the ship, and for the offence above mentioned the present action is brought for the forfeiture of the vessel, her equipment and everything on board.

It appears that the Beatrice was seal fishing from the 2nd to the 20th August, on which latter date she was seized by the U.S.S. Rush. It seems that the entries had been duly made in the official log book up to and including the 14th August, but none since, although fur seals had been captured on each subsequent day.

Article V. of the scheduled provisions of the Behring Sea Award Act, 1894, enacts that the masters of vessels engaged in fur sealing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day. Sub-section 3 of section 1 enacts that the provisions of the Merchant Shipping Act, 1854 (Imp.), with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing, and section 281 of the Merchant Shipping Act, 1854, provides that every entry in an official log shall be made as soon as possible after the occurrence to which it relates, and, if not made on the same day as the occurrence to which it relates, shall be made and dated so as to shew the date of the occurrence, and of the entry respecting it, and that in no case shall any entry therein in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge be made more than twenty-four hours after her arrival.

Judgment.

Under section 1 sub-section 2 of the Behring Sea Award Act, 1894, "If there is any contravention of the Act (and the scheduled provisions are made part of the Act) the ship employed in such contravention, and her equipment and

everything on board thereof shall be liable to be forfeited to Her Majesty as if an offence had been committed under section 103 of the Merchant Shipping Act, 1894."

Assuming then a contravention of the Act owing to the neglect of the master to keep up his log, can the ship be said to be "employed" in such contravention, as it is only when "employed" in the contravention that she is subject to forfeiture.

If the contravention had been the taking of seals at a prohibited time or place or in a proscribed way, the vessel might fittingly be said to be "employed" in the contravention; but the keeping of the log is another matter; that is the master's duty. I cannot see how the vessel can be said to be employed in keeping the official log, or in omitting to keep it.

But, beyond this, following the general provisions of sub-section 2, which among other things impose the forfeiture of a vessel employed in contravention of the Act, is sub-section 3, which says that the provisions of the Merchant Shipping Act, 1854, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing. The penal provisions of the Merchant Shipping Act, Section 284, only subject the master to a particular penalty for not keeping the official log book, such penalty being a fine of £5 or £30, according to the offence. No penalty or forfeiture whatever attaches to the ship. The particular provision of the Merchant Shipping Act, inflicting a fine only upon the master, seems to be incompatible with the general provisions of sub-section 2 of the Award Act of 1894, imposing a forfeiture, and such being the case, and following the well recognized rule of construction laid down in *Churchill* v. *Crease*, 5 Bing. 180; *Pilkington* v. *Cooke*, 16 M. & W. 615, and *Taylor* v. *Oldham*, 4 Ch. D. 395, Sub-sec. 2, imposing forfeiture of the vessel, must be read as expressly excepting a contravention by omission to keep a log. Hence, the vessel is not liable to be

Judgment.

DAVIE, L.J.A. proceeded against, although the master might be punished by a fine.

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Nov. 18. But I am by no means persuaded that the captain was punishable for or guilty of any culpable omission in respect of the official log. As before pointed out by section 281 of the Merchant Shipping Act, every entry in an official log is to be made as soon as possible after the occurrence to which it relates.

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"As soon as possible" means "within a reasonable time," *Atwood* v. *Emery*, 1 C.B.N.S. 110 ; *Cammel* v. *Beaver Ins. Co.*, 39 U.C.Q.B. 8 ; *Mann* v. *Western Assurance Co.*, 19 U.C.Q.B. 326 ; and what is a reasonable time must depend upon the facts governing the case in which the question arises.

Here it was proved in evidence that the captain kept a book of account with his hunters, who were paid according to the seals taken, and this book was kept in the cabin, constantly open and in use, and contained a daily entry of the particulars of the catch. Besides this the captain kept his ship's log, in which were entered daily particulars of the voyage other than the capture of seals, whilst the official log book was kept locked up. The crew, besides the hunters, consisted only of the captain, mate and cook. The hunters would leave the ship in their boats at 5 a.m., and generally remain out until evening, and the crew of three left on board would have their time well occupied, particularly in rough or foggy weather, in navigating the vessel and keeping the boats in sight or hearing.

Judgment.

At night when the boats came in the captain would take, on deck, particulars of the capture, and then go below and enter them in the account book. When time and convenience afforded relaxation from other duties, the captain would make entries in his official log, which had in this case been duly posted up to and including the 14th August.

The ship's log shews that between the 15th and 20th August there was considerable fog and dirty weather. I

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am unable to say, under these circumstances, that the captain permitted an unreasonable time to elapse in making entries in the official log.

On these grounds I am of opinion that the action for condemnation wholly fails, and as in my judgment the charge upon which the vessel was arrested was of something for which arrest could not legally be made, no question of reasonable ground for the arrest arises, and, as the ship was arrested when in the pursuit of a legal and profitable employment, she is entitled to recover damages therefor.

Judgment.

I therefore dismiss the action for condemnation with costs; and I direct a reference as to the damages to which the ship is entitled for her illegal arrest and detention.

Action dismissed with costs, with reference to assess damages caused by seizure.

HUDSON'S BAY COMPANY v. HAZLETT.

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Practice—Ex parte order—Whether appealable without motion to rescind—Rule 577.

The Divisional Court will not entertain an appeal from an *ex parte* order made by a Judge. The proper practice is in the first instance to move before the Judge making such an order to rescind same.

APPEAL from an *ex parte* order of Mr. Justice DRAKE, directing the defendant to give security for costs of an appeal by him from a judgment of DAVIE, C.J. The appeal was argued before DAVIE, C.J. and CREASE, J.

Statement.

J. A. Aikman, for the plaintiff: We take the preliminary

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objection that an appeal does not lie to this Court from an *ex parte* order, and that the defendant should have moved in the first instance before Mr. Justice DRAKE to rescind the order, *Black* v. *Dawson* (1895), 1 Q.B. 848.

Archer Martin, contra: The same objection was taken in argument in *Varrelmann* v. *Phœnix*, 3 B.C. 143, and was over-ruled.

Judgment.

DAVIE, C.J.: We think that the practice should be settled in accordance with the rule laid down in *Black* v. *Dawson* cited, and we will refer the order back to Mr. Justice DRAKE for argument before him as upon a motion to re-consider his order under Rule 577. As the decision in *Varrelmann* v. *Phœnix* might have given some justification for the appeal, there will be no costs.

CREASE, J., concurred.

Order accordingly.

CANADA SETTLERS' LOAN CO. v. STEINBURGER.

DRAKE, J.

[In Chambers].

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CANADA SETTLERS LOAN CO. v. STEINBURGER

Practice—Writ of Summons—Copy served not shewing original to be under seal of Court.

The seal of the Court affixed to a writ of summons is not a part of the writ itself, but merely authenticates it.

The copy of the writ of summons served on the defendant did not indicate that the original was sealed.

Upon motion to set aside the service thereof:

Held, dismissing the motion, that the writ was properly served.

SUMMONS by defendant to set aside the service on him of the writ of summons.

H. E. A. Robertson, for the motion: The copy of the writ served on the defendant should shew that the original was served, *First National Bank* v. *Raynes*, 3 B.C. 87. If it does not it is not a true copy. Argument.

W. J. Taylor, contra.

DRAKE, J.: Steinburger applies to set aside writ on the grounds that the copy writ served on defendant does not purport to be under the seal of the Court, and that it is not a true copy of the writ in this action.

The sole objection is that the copy served does not shew that the original was sealed.

I can find no authority for saying that the copy should have an indication that the original was sealed. The seal only authenticates the original writ; it is no part of the writ itself, see Rule 22. Judgment.

If a person served has any doubt when served he can demand to see the original, or under Rule 28 he can demand of the solicitor whose name is on the copy of the writ if the writ was issued by his authority, or in addition to these safeguards he can search the Registrar's office.

The summons will be dismissed with costs.

Summons dismissed.

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EDISON GENERAL ELECTRIC CO. V. EDMONDS *ET AL.*

B.C. Railway Act, 1890, Sec. 38—Whether Westminster & Vancouver Tramway a "Railway"—Res judicata—Divisional Court—Whether concluded by prior judgment of same Court upon another interlocutory appeal—S.C. Rule 234.

The plaintiff Company, as judgment creditor of the Westminster & Vancouver Tramway Company, brought the action against the defendants, as shareholders therein, to compel them to contribute and pay to the plaintiff Company, out of the amounts respectively unpaid up by them upon their shares in the Company, a sum sufficient to satisfy the judgment.

The statement of defence raised an objection in point of law to the whole claim, that the Tramway Company was not within the Act, as not being a "Railway" Company.

Upon argument thereon, DRAKE, J., decided the point of law in favour of the defendants.

Upon appeal by the plaintiff Company, the Divisional Court (Crease and Walkem, JJ., McCreight, J., dissenting) affirmed the judgment of DRAKE, J.

Upon motion then made to him by the plaintiff company under Supreme Court Rule 234, DRAKE, J., made an order dismissing the action as being substantially disposed of by the decision of the point of law.

Upon appeal by the plaintiff company from that order, upon the grounds: (1) that the point of law was wrongly decided, and (2) that its decision did not dispose of the action; the Divisional Court, (Davie, C.J., McCreight and Walkem, JJ.), over-ruling an objection that the Court was concluded on the point of law by the decision of the prior Divisional Court: *Held*, that an action in the Supreme Court can only be finally determined in the last resort in this Province by a decision of the highest Court of final resort therein, namely the Full Court, from which an appeal lies, as of right, to the Supreme Court of Canada, and that both this and the former judgment of the Divisional Court are interlocutory and inconclusive.

2. That the action should be remitted to be set down for trial so as to admit of an appeal to the Full Court from the judgment thereon with an expression of opinion.

3. That the tramway was a "railway" within the Act and plaintiff should have succeeded on the point of law.

Quære (*per* Davie, C.J., and McCreight, J.): Whether the action as brought lay for want of privity between the parties; and whether a winding up of the Company, and call upon the defendants as contributories, was not the only remedy of the plaintiff company.

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THE cause of action and point of law raised are sufficiently set out in the head-note and judgments.

L. G. McPhillips. Q.C., for the plaintiff company.
E. P. Davis, Q.C., for the defendants.

DRAKE, J.: The plaintiffs are judgment creditors of the Westminster and Vancouver Tramway Company and have brought an action against the defendants as individual shareholders, for the purpose of obtaining payment of the judgment out of the uncalled balance of the shares held by the defendants.

The counsel for both the plaintiffs and defendants agree that the only point for the decision of the Court is whether section 38 of the B.C. Railway Act, 1890, applied to the Westminster and Vancouver Tramway Company, in other words, whether the tramway company is a railway within the meaning of the Act. There is no technical meaning to the term railway, a tramway and street railway are both railways in the sense of a road constructed with parallel lines of rails on which cars or trains operate. They may both be moved by the same motive power, but there the analogy ends.

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A tramway company carries passengers from any point on their route to any other point; a railway carries passengers from station to station and is a common carrier of both goods and passengers. A tramway company is not a common carrier of goods, but only of passengers.

On examination, the B.C. Railway Act, Secs. 4 to 44, which are made applicable to all railways, unless varied or excepted by the special Act, the distinction between the two classes of undertaking becomes more obvious. Hardly

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any of those sections are appropriate for a tramway, which ordinarily runs along a highway, and when within a city is called a street railway—it is in fact only an amendment of the means of locomotion given by a highway or street.

In construing an Act of Parliament, the ordinary meaning must be given to the language used therein, and when an Act speaks of a tramway or street railway it means something different from a railway, unless there is anything in the context which would lead to the conclusion that the terms were to be treated as interchangeable.

The plaintiffs refer to the Acts under which the Tramway Company was incorporated as shewing that the Legislature meant a railway pure and simple and not a tramway or street railway. The Westminster Street Railway was incorporated by Stat. B.C. 53 Vic. 1890, Cap. 65, Sec. 10 (private), and the objects as defined by section 10, are restricted to making a line along the streets of New Westminster, and the Westminster and Vancouver Tramway Company was incorporated by Stat. B.C. 53 Vic. 1890, Cap. 67 (private), to construct and operate a single or double track tramway along such of the roads between Vancouver and New Westminster as the Chief Commissioner of Lands and Works should specify.

The two companies were amalgamated by Stat. B.C. 54 Vic. 1891 Cap. 71 (private), with some additional powers. The plaintiffs contend that under section 1, where the Act says that the word railway shall include tramway or street railway, that this definition is a clear indication that something more was intended than a mere tramway ; the phrase used may not be appropriate, but a careful examination of the subsequent clauses of the Act, I think, clearly shew that in the use of the word "railway," both the tramway of the one Company and the street railway of the other Company, were swept into one generic term, and not that a railway company in its ordinary meaning was intended by the use of the word. The plaintiffs say also

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that by reference to the British Columbia Railway Act Amendment Act, 1893, Sec. 9, a clear indication is given that tramways and street railways are included in the Railway Act; but that Act merely protects mortgagees and debenture holders, and lays down rules for their guidance, and it is true for the purposes of that Act, and that Act only, that tramway companies and street railways shall be governed by clauses 6, 7, 8 and 9.

It is a rule in the construction of statutes, that the Legislature is presumed not to intend to make any alteration in the law beyond what it explicitly declares. In the Act in question the words in section 9 are, "the reference in this Act." "This Act" does not mean the principal Act, for with one exception this Act is an addition to the principal Act, and not a variation or alteration of it. If the Legislature had intended to apply the General Railway Act to tramways and street railways, they would have used apt words for the purpose; they have not done so and I cannot import into the Act a meaning inconsistent with the plain words used.

Judgment of DRAKE, J.

There is little to be gained from authority, for both in Ontario and England there is a general tramway law under which all undertakings of this nature are incorporated, but in the *Brentford & Isleworth Tramway Company*, 26 Ch. D. 527, Chancellor BACON held that a tramway was not a railway and as such was liable to the operation of the Winding-up Act, which in words excludes railways. For the reasons above I am of opinion that the Railway Act does not apply to undertakings in the nature of tramways or street railways, and judgment on the point raised will be entered for the defendant with costs.

Judgment for defendants.

Statement.

From this judgment the plaintiff Company brought an appeal to the Divisional Court, which was argued before

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CREASE, McCREIGHT and WALKEM, JJ. Judgment was rendered on the 7th August, 1895.

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

E. P. Davis, Q.C., for the respondents.

CREASE, J.: This was an action by the plaintiffs as execution creditors under a judgment of 29th December, 1893, against the New Westminster and Vancouver Tramway Company, for the sum of $19,059.02 now due under an unsatisfied execution, and it is brought against the defendants as shareholders in the said Tramway Company in respect of the amount unpaid on the stock of the said company, held by each of the defendants in a sum sufficient to satisfy the said debt of $19,059.02, on which an execution under the said judgment had been returned unsatisfied. The case was argued before DRAKE, J., and judgment given on 29th January, 1895, for the defendants. It is against this judgment and order that the plaintiffs now appeal.

Judgment of CREASE, J.

The one short question of the case is, does the Railway Act with all its compulsory provisions apply to the Tramway Company?

If it does, section 38 of the British Columbia Railway Act, 1890, applies. That section says: "Every shareholder shall be individually liable to the creditors of the said Company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities of the Company, and until the whole amount of his stock has been paid up." Then follows a condition making the liability contingent on the return of an unsatisfied *fi. fa.* (which has happened in this case) and a provision that "the amount due on the execution shall be the amount recoverable with costs against such shareholder."

If section 38 does not apply, then the Tramway Company is liable to be wound up as an ordinary joint stock company and the assets collected and disposed of accordingly.

The British Columbia Act, under which the first tramway,

or as it is there called, street railway, was created, was Stat. B.C. 1890, Cap. 65 the Westminster Street Railway Act, 1890.

The Company thereby created and incorporated was empowered to construct, etc., and operate a single or double track street railway with all necessary switches, etc., for the passage of cars, etc., adapted to the same upon and along the streets of New Westminster, and along such road or roads adjacent to the said city as the Chief Commissioner of Lands and Works should specify, and to carry, etc., passengers and freight upon the said railway by the force or power of animals, or by electricity, or by such other motive power as the Company might deem expedient, and to supply electricity for lighting, and to maintain and construct all necessary works, buildings, appliances and conveniences connected therewith.

By section 13 the Company might purchase, lease, acquire and transfer any real or personal estate for carrying on the operation of the Company. Then came a power (section 17) afterwards acted on, for the Company to enter into agreements with any persons or corporations then having or thereafter to acquire the power to construct or work street railways in New Westminster, or in the adjacent districts, for leasing or purchasing their rolling stock, or for making running arrangements or amalgamating with any such persons. Section 18 contained a limitation of the extent of the street railway to a point five miles from the then limits of the municipality, which I believe were the same then as they now are in 1895. This street railway was placed in several respects under the control of the City Council.

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The next tramway was incorporated under Stat. B.C, 1890, Cap. 67, called the Westminster & Vancouver Tramway Company's Act, 1890, the preamble declaring it was for "the purpose of constructing a single or double tramway between New Westminster and Vancouver, and for obtaining power to carry the objects of the Company into effect." The Company thereby created was by section 10 empowered to

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construct and operate a single or double track tramway with all necessary switches, etc., and necessary appliances upon and along such road or roads between the limits of the said cities as the Chief Commissioner of Lands and Works should specify, etc., and to take and carry passengers upon the same by the power or force of animals or such other motive power as the Company might deem expedient, and to maintain and construct all necessary works, etc., and conveniences connected therewith.

By section 12 the Company could purchase, hold or acquire and transfer any real and personal estate necessary for carrying on the operation of the Company. By section 14 they had power to use and occupy any and such streets or parts of any streets, roads and highways in or between the said cities, with the permission of the Chief Commissioner of Lands and Works, constituting in all respects a mere tramway Act. This was followed by Stat. B.C. 1891, Cap. 71, an amalgamating Act. This, upon the petition of the Companies, amalgamated the two Companies into one Company and Corporation and granted certain powers and privileges which were required by the amalgamation. By this each of the two Companies is to have the powers of the other Company thereby amalgamated, taking over some additional powers to those which they already possessed.

Mr. *McPhillips*, for the plaintiffs, in an elaborate argument of much force and research, referring to section 4 of the B.C. Railway Act of 1890, contended that such Act applied prospectively, when not otherwise expressed, to every railway created under a special Act and therefore applied to the defendants, and that not being otherwise expressed in the Act of 1891, therefore the Railway Act applied. But that would imply that the defendants' Company is a railway in the full ordinary sense of the word, which is the very point now to be determined, and appears to me contrary to the interpretation clause of Cap. 71, 1891, Sec. 1, which declares that the word "railway" shall include "tramway

or street railway," and gives point to the definition by adding the words "the Companies hereby amalgamated shall mean the Westminster & Vancouver Tramway Company and the Westminster Street Railway Company," and in section 4 authorizes the amalgamated Company to complete the lines of railway already constructed or in process of construction which were not ordinary railway lines, but simply the street railway and tramway thereby amalgamated.

It is impossible to construe an Act satisfactorily without at the same time keeping in mind the subject and circumstances to which its provisions are intended to apply, which are necessarily in the mind of the Legislature at the time of the passing of these Acts.

If it had been intended by the Act of 1891 to turn the tramway and street railway into a regular railway, which it is sought now to construe it, so as to make the Railway Act apply to it, nothing would have been easier, and they well know how to do it, by at once making it subject *mutatis mutandis* to the Railway Act, and that appears to me to be the weak point of the plaintiffs' otherwise forcible argument. It excludes altogether from its reasoning all the facts and actual position and working and every day necessities of the Company at the present time, and selects certain isolated portions of the Acts relating to it and collateral powers which it has received from the Legislature, common to other tramways in British Columbia, and at the same time to be found in the Railway Act as applied to ordinary railways created by special Act, and then looking at the question in the abstract and arguing backwards conclude that therefore all the onerous provisions of the Railway Act, fencing, cow-catchers, embankments, crossings, grades, railway beds, curves, road-beds, bridges, engines, carriages, returns, financing and other burdens are to be applied to this Tramway Company (for if one applies as of right all do) and thus bear it down with a weight particularly inapplic-

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able from the first to the present undertaking, and known by the Legislature to be so.

The learned counsel for the defendants cited many authorities to support his contention: the Tramways' Act, 1870, [33 & 34 Vic. (Imp.) Cap. 78], Sec. 3; *Bishop* v. *North*, 12 L.J. Exch. 362, dwelling on the policy of the law as affecting the construction of the Act, and the Ontario Street Railway Act, 1883. He also referred to Wood on Railways, pp. 1–2–3, and Wharton's Lexicon, to shew that the tramways were for conveyance of traffic along a road, and that at first tramways could not take land; and argued that here, as not more than one-third or one-half of the line runs on roads, and as power was given to the Company to purchase and hold land for the purposes of the Company, it must be presumed they would use the power. He referred to *Regina* v. *Newport Dock Company*, 31 L.J.M.C. 266, a case in which it was held that a railway constructed by a dock company who were owners of a canal used as a railway they must be assessed as a railway.

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Great Northern Railway Company v. *Tahourdin*, 13 Q.B.D. 320, was cited as a case where the protection afforded by the Railway Companies' Act, 1867 [30 & 31 Vic. (Imp.) Cap. 127], Secs. 3–4, against seizure of railway plant in execution was extended to two dock companies which established a railway communication between them, under statutory charter, the defendants being creditors who had seized the railway plant in execution, and where it was held that the Dock Company was a "Company" within that Act, although the railway was merely auxiliary to the dock, and that the railway plant belonging to it was protected from seizure by section 4; arguing, therefore, that this Tramway Company, the subject of the present appeal, was clothed with railway powers which brought it within the purview of the British Columbia Railway Act and subjected it to all its compulsory provisions, and among others of section 38 of that Act.

In support of this same view the learned counsel cited a

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case of much interest, *In re East & West India Dock Company*, 38 Ch. D. 576. There, a company, formed to make a dock and afterwards authorized by a Railway Company's Act to make a line through its own property, although it was another private Act of another company which did this, was held to be a Railway Company and a receiver and manager was appointed to the whole Company. There the question for decision turned upon the 3rd section of the Act which defined the companies to which the Act applies, in these words: "In this Act the term 'Company' means a Railway Company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining or working a railway, either alone or in conjunction with any other purpose." This purpose may be an auxiliary and subsidiary and not the principal purpose for which the Company is constituted. That "constituted" is equivalent to "established," and any Act whether original or subsequent by which the Company is constituted for the purpose of constructing, maintaining or operating a railway is within the meaning of the section.

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If a company were originally incorporated by Act of Parliament for the purpose of constructing and maintaining a canal, and by a subsequent Act was authorized to turn the canal into a railway, it would be a company constituted for the latter purpose within the meaning of the enactment. And as the purpose for which a company is incorporated and empowered to construct a railway is ascertained by reference to the power, on which Sir George JESSEL, in *Wilkinson* v. *Hull, etc., Railway & Dock Company*, 20 Ch. D. 323, says, "every work which the Company is empowered to do is a purpose" it is the power of Parliament which confers any powers it likes on any company it likes—dock and railway or railway and dock—it is the same. But this case, although a valuable declaration of law where railways (as is ordinarily understood by

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the plain meaning of the term) are created as in the case cited under the authority of Parliament with compulsory powers, does not appear to me to govern the case now before us on appeal. It is not constituted or operated as a railway, but moved by electricity. It has grades impossible to a railway, and curves which no railway could safely face. It is easily and instantly stopped without risk or danger. It carries a different rail, has different culverts and bridges. A break at the power house throws all the road idle until it can be repaired, and although it could be made to carry steam by a total change in its construction and yet remain a tramway—witness the recent tramway Acts which have passed through the local House—yet it is more easily and cheaply managed as a tramway, and in that shape is of much greater benefit to the public than if weighed down by the onerous requirements which inevitably accompany a railway proper, and would practically crush it.

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It is needless to say that such a legal point as that now raised is not to be settled by any argument *ab inconvenienti*, but by the plain law of the case. But still, in examining the law it is necessary to consider the plain effect of it on the subject to which the Legislature clearly intended it to be applied, as affording a legitimate clue to what was in the minds and intention of the Legislature in the preparation of any Acts on the subject.

It is a principle of construction in construing statutes (as in *Taylor* v. *Oldham*, 4 Ch. D. 405), and indeed a duty, to interpret them as we find them literally unless prevented by the subject or the context. It is equally a duty when the subject or the context or subject matter make it imperative to do so, to give that construction which most closely carries out the intention of the Legislature, nothing more and nothing less.

A great deal of difficulty has arisen in construing the various Acts in the present case, from not bearing in mind the difference in the objects and mode of working and

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conditions of existence between tramways or street railways and ordinary railways. The same word is used in different senses. The present tramway or street railway, for at least three-fourths of its length, goes through and among the streets of one town and ends in the streets of another town. In the limits of either municipality it passes along the highway—the intermediate part of the way has been the subject admittedly of voluntary gift and not been the subject of expropriation under the clauses of any Act. It is also on several important points under municipal control as to rate of speed, fares, etc., with powers to make certain civic improvements not usual in ordinary railway Acts. The Westminster Street Railway Act, 1890 (Cap. 65), is complete of itself and was made separate from the British Columbia Railway Act, 1890.

The two companies were, as I have shewn, incorporated by Stat. B.C. 1890 (private), Cap. 67, as the Westminster & Vancouver Tramway Company, to construct and operate a single or double track along such of the roads between Vancouver and New Westminster as the Chief Commissioner of Lands and Works should specify. For the purpose of carrying out the objects of these Companies the Westminster Street Railway and the Westminster & Vancouver Tramway Company were amalgamated by Stat. B.C. 1891 (private), Cap. 71, under the title of the " Westminster and Vancouver Tramway Company."

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It has been a special object of the plaintiffs throughout the discussion to avoid taking into account the state and circumstances of the several tramway or street railway companies with which the local Parliament has had to deal, and which they must have had in their view when legislating on the subject, or the two city Companies now combined into one Tramway Company could not have had its present existence. No one using it could for one moment consider it a railway, other than in the sense in which a tramway is a railroad whereon passengers alone are com-

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monly carried from point to point in carriages or trams impelled along parallel lines of rails, in the present instance by electricity, a motive power at present peculiar to tramways—never used as yet I believe on railways proper—although as a matter of right tramways and railways have the power to use whatever motive power they may find most useful. And there the parallel ends.

Much stress was laid by the plaintiffs on the interpretation clause of this Act, which declared that unless the context required a different interpretation the word "railway" in that Act should include "tramway or street railway," as constituting the Company on their own petition a railway, as they contend, in all senses of the word. The word "railway" first comes up in connection with that line in this Act, and the explanation seems to me clear from the remainder of the sentence—where the words "the Companies hereby amalgamated" are declared to mean the Westminster & Vancouver Tramway Company and the Westminster Street Railway Company.

As it was very inconvenient to repeat the names of these two Companies where separate reference to them was required, the two names were merged into the name of the railway, which answered very well as representing either tramway or street railway, just as the context of the Act might require. And point is given to this construction at the end of the interpretation clause. Section 1 of the Westminster & Vancouver Tramway Company Amalgamation Act, 1891, where it is further explained that the words "Company hereby amalgamated" shall mean such one of the last named Companies as the context may require. And this construction and use of the word "railway" in the Act of 1891, as applied either to the tramway or street railway, is borne out by an inspection of the various clauses of the Act, *vide* sections 4, 5, 6 and 8; section 9 which was cited by the plaintiffs as an inferential proof that the stock not paid up was subject to assessments, and that section 38

of the British Columbia Railway Act, 1890, would also apply inferentially, does not seem to me to warrant that conclusion.

The Legislature, while legislating and knowing very well how to effect its object by appropriate wording, would never have left such a point as that to the construction of a collateral inference, especially as the share capital was not to be called up all at once, but to be raised for the purposes of the Company as work progressed by calls or assessments on the call paying shares, as in other companies. The whole land has already been obtained, partly by the permission of the Chief Commissioner of Lands and Works and the Municipalities, and partly by the consent of parties without payment. The portion not granted by the Chief Commissioner of Lands and Works was obtained by purchase, not expropriation.

Section 10, which in its references to the said works and the said street tramway or tramways shews what was in the mind of the Legislature in enacting that clause, and it is a legitimate construction according to the plain meaning of the words that section 10 gave legal sanction to the authority which, judging from the wording of the creating Acts of 1890, the Chief Commissioner of Lands and Works had assumed when he finally laid out the present line between the two cities, and in that and sections 11 and 12 conferred on the amalgamated Companies powers which suited it as a tramway company without converting it into a railway in the ordinary sense of the word, weighting it down with the compulsory provisions and sections of the Railway Act of 1890.

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The Dominion Legislature recognizes a distinction between a tramway and a railway proper. In a case in the Exchequer Reports (Can.) Vol. IV. p. 262, recently called to my attention, *Toronto Street Railway Company* v. *The Queen*, the distinction between a tramway or street railway like the present and the ordinary railway under the compulsory sections of the

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Railway Acts is very clearly drawn and appears to me conclusive.

The plaintiff indeed inferred from the Railway Amendment Act of 1893 (Can.) Sec. 1, that before that Act a tramway was dealt with as a railway, and there has been no such statutory exception here. But to me it appears capable of quite a different construction, for it shews the Dominion Legislature recognizes a marked difference between a tramway and a railway, when in section 1 it makes provision against a railway being intersected by a tramway. It shews also that the Railway Committee of Canada do not recognize a tramway as a railway. The British Columbia General Municipal Act of 1892 treats a tramway as distinct from a railway ; so that there also the British Columbia Legislature recognizes the difference between a tramway and a railway.

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On consideration, therefore, I am of opinion that the Acts creating this amalgamated tramway and street railway have regarded it throughout as a tramway company, and that entirely distinct from a railway pure and simple created such by a special railway Act. And this although certain provisions useful for the tramway are imported from the railroad Acts for convenience sake into the management of the tramways ; but as might have been expected, at least in the view I take of the case, this has been misapprehended by the plaintiffs, from the use of the same wording in the clauses imported into the tramway Acts as that contained in the public railway Act, from which, for convenience, they are taken.

For instance, the British Columbia Railway Act Amendment Act, 1893, has for its object undoubtedly to protect mortgagees and debenture holders whether of British or foreign corporations, for all which it makes suitable regulations. At the same time, to shew that it does so for the purpose of that Act and no further, it enacts that street railways and tramways shall be guided by clauses 6, 7, 8 & 9.

I use the words "no further than that Act," because the words in section 9, "the reference in this Act," confine the application to that Act, which is merely an addition to the principal Act, which, as counsel for the defendants pointed out, is not a variation of the principal Act save in the substitution of one single clause, the application of which is obvious. It is a presumption of law that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakeable implication; or, in other words, beyond the immediate scope and object of the statute, *per* TREVOR, J., in *Arthur* v. *Bokenham*, 11 Mod. 150. In all general matters beyond, the law remains undisturbed.

It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without pressing its intention with irresistible clearness, *U. S.* v. *Fisher*, 2 Cranch (U.S.R.) 390. And to give any such effect to general words, simply because in their widest, and perhaps natural, sense they have that meaning, would be to give them a meaning in which they were not really used, Endlich-Maxwell on Statutes, Ed. 1888, p. 96; and that I consider is the case here.

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Had the Legislature intended that the Tramway Acts should have been governed by the Railway Act, they would have "expressed their intention with irresistible clearness." They have not done so, and I am bound by the intention which they have expressed, as gathered from their legislation on the subject.

Had the Acts affecting the tramways created them ordinary railways, there would have been no necessity for importing into them specific clauses drawn from the British Columbia Railway Act. It would have applied at once.

For these reasons I am of opinion that the Railway Act does not apply to tramways or street railways, and consider

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that the judgment of the Court below should be sustained with costs.

WALKEM, J., concurred.

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McCREIGHT, J.: In this case the learned Trial Judge apparently rested his judgment that the defendants as shareholders in the Company constituted by the Westminster & Vancouver Tramway Company Amalgamation Act, Stat. B.C. 1891 (private), Cap. 71, as well as previous Acts, could not be made liable to the plaintiff Company under section 38 of the British Columbia Railway Act, 1890, on the ground of a distinction between a railway company and a tramway company; and he seems to have considered that that Act, whilst applying to railroads, has no application, at least as regards section 38, to a tramway company. But the real question, as it seems to me, is, what is the liability in respect of the payment of debts which the Legislature intended to cast upon the Company under the Act of 1891, *i. e.* the Westminster & Vancouver Tramway Company Amalgamation Act, *supra*, and whether it must not be inferred from the two Acts of 1890 and 1891 that the Legislature intended that section 38 at all events of the British Columbia Railway Act, 1890, should apply to the said Company?

Judgment of McCREIGHT, J.

It may be convenient to deal first with the Westminster & Vancouver Tramway Company Amalgamation Act, 1891. After section 6, which describes the amount of the stock of the amalgamated Companies, its division and tenure by the shareholders, we proceed to section 9, which I transcribe as, whilst short, it seems to me to throw much light on the question of the application of section 38 of the British Columbia Railway Act, 1890:

"The Directors of the Company may make and issue as paid-up stock, shares in the Company, whether subscribed for or not, and may agree for the sale of such stock, or any part thereof, at such price as they may think fit, and may

select or hand over paid-up stock or bonds in the payment of the right of way, plant, rolling stock, or materials of any kind, and also for the services of contractors, engineers, or other persons employed by the directors, and such paid-up stock shall not be subject to assessments."

This section, and especially the last part of it, seems to me to shew by necessary implication that shares in the Company are, as one would ordinarily expect, intended by the Legislature to be generally subject to assessments, and I know of no provision by which this can be carried out, at least as far as creditors are concerned, except section 38 of the British Columbia Railway Act, 1890.

Again, the interpretation clause, section 1, of the Westminster & Vancouver Tramway Company Amalgamation Act, 1891, which says the word "railway" shall include "tramway" or "street railway," and the remainder of the section indicates that no material distinction was intended between railway and tramway—see also sections 4 and 10, applying the powers of expropriation given by the British Columbia Railway Act, 1890; and here I must quote the language of COTTON, L.J., *In re East & West India Dock Company*, 38 Ch. D. 576, at pp. 591 and 592, where he says: "In my opinion if there is a company which depends for its constitution on Acts of Parliament, then if it has statutory powers of constructing or working a railway, it is a company constituted by Act of Parliament for the purpose of constructing or working a railway." The judgment of FRY, L.J., at pp. 593 and 594 seems also to be instructive as shewing that the powers of the Company are of importance, as shewing whether it is a railway company or not. Now, under section 10, without even reference to the Act of 1890, except as therein alluded to, the Company might have made a railroad from New Westminster to Vancouver, taking all the land required on the most convenient line and have worked such railway in a way not differing from the corresponding line of railway between New Westminster

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and Vancouver which passes by the Junction. The remaining sections of this Act of 1891 seem to me also to avoid any kind of distinction between railroad and tramway.

There was of course no evidence before Mr. Justice DRAKE, and he seems to have assumed that the Legislature intended that the tramway should be constructed between New Westminster and Vancouver along the highway between the two cities and that it was in fact so constructed, but authentic maps in the Land Office, I believe, shew that twenty or twenty-five per cent. of the line only runs along highways, and section 10 of the Act of 1891 evidently negatives any such intention as to the construction of the line on the part of the Legislature.

Again, on turning to the British Columbia Railway Act, 1890, it is apparent that it makes no distinction between railways and tramways. Perusal of the powers given, see especially section 9, sub-sections 6 and 7, the former of which contemplates the railway being worked by steam, electricity, etc., etc. The plans and surveys—sections 10 and 11 as to lands and their valuation, section 20 as to arbitration, section 21 as to mines, section 30 as to fences, section 31 as to tolls, sections 32–37 as to the internal management of the Company—are all in their nature equally applicable to railroads and tramways, and neither the one Company or the other could carry on their business or discharge their duties without some such legislation. Most of the remainder of the Act reads to the same effect. No doubt, a railroad worked by locomotives and a tramway worked by electricity will require some different legislation in minor details, owing to the different nature of the agent employed in the working of the line; but why the creditors of the former should be able to invoke section 38 to enforce payment of their debts and the creditors of the latter be left without the same redress (for I gather the Winding-Up Act of Canada would apply in neither case, certainly not in the present case of a railroad or tramway company constituted by Act

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of the Provincial Legislature), why this should be, and so much to the detriment of creditors, it would be very difficult to give any tolerable reason. I refer to Maxwell on Statutes, p. 179, Ed. 1875, title "Presumption against intending injustice or absurdity," and see *The Duke of Buccleuch*, 15 Prob. Div. 96; *Queen* v. *Judge of City of London Court* (1892) 1 Q.B. 301; *The Alma*, 5 Exch. D. 230, and *Yates* v. *The Queen*, 14 Q.B.D. 657–60–62–65; *Ex parte Graves*, 19 Ch. D. 5. In short, I believe the British Columbia Railway Act, 1890, was intended to apply to a line of this description, and the same was intended by the Amalgamation Act of 1891.

I do not think any amendment of the statement of claim is required, as the whole case mainly appears on the two Acts of 1890 and 1891, respectively, nor would it probably have been suggested but for the apparent mistake of the Trial Judge in thinking the line was to run and did run in its whole course along streets or highways.

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I think the decision must be reversed, and as usual, with costs.

Appeal dismissed with costs.

After the above judgment, the defendants applied to DRAKE, J., under Supreme Court Rule 234, for an order dismissing the action, upon the ground that it was substantially disposed of by the decision of the point of law.

The same counsel appeared. DRAKE, J., made an order dismissing the action accordingly.

Statement.

The plaintiff Company brought an appeal to the Divisional Court upon the grounds: (1) that the point of law was wrongly decided, and (2) that its decision did not dispose of the action; which appeal was heard before DAVIE, C.J., McCREIGHT and WALKEM, JJ., on 24th January, 1896.

E. P. Davis, Q.C., and *L. P. Duff*, for the defendants, objected that the question of law decided by DRAKE, J., and the former

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Divisional Court, was not open for discussion, but that this Court was concluded by the judgment of that Court, and that the only question open to the plaintiff Company upon this appeal was whether the decision of the point of law substantially disposed of the action, involving the question of whether the plaintiff could maintain the action outside of the operation of section 38 of the Railway Act, *e. g.* by the private Acts of the Company, sections 3 of Caps. 65 & 67 of 1890.

The Court without then deciding that point desired the argument over the whole question to proceed.

L. G. McPhillips, Q.C., and *A. E. McPhillips*, for the appeal: Section 38 of the General Railway Act, B.C. 1890, (*a*) applies to the Tramway Company by virtue of section 4; (*b*) by sub-section 2 of section 5, "the Company" shall mean the company or party authorized by the special Act to construct the railway; and by sub-section 11, "the Railway" shall mean any railway which the Company has authority to construct or operate. By the private charter of the Company, 1891, Cap. 71, Sec. 1, amalgamating the New Westminster & Vancouver Tramway Company with the New Westminster Street Railway Company, "In the

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NOTE (*a*) "38. Every shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities of the Company, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the Company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder."

NOTE (*b*) "4. Where not otherwise expressed, this and the following sections to section 44 inclusive, shall apply to every railway which is subject to the legislative authority of the Legislature of this Province, and is authorized to be constructed by any special Act passed during this present Session, or after this Act takes effect; and shall also apply to every railway company which shall, within six months after the

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interpretation of this Act, unless the context shall require a different interpretation, the word railway shall include tramway or street railway." By section 4 *ibid*, "the Company shall be and is hereby authorized to maintain and complete the lines of *railway* already constructed," see sections 11, 12, 13, 14. "The Company is authorized to contract, etc., with any other railway company." The word railway is the wider term and includes a tramway, and such being its known signification the Legislature if it had intended to exclude tramway companies could have done so, *Toronto Street Railway Co.* v. *The Queen*, 4 Ex. (Can.) 262, at p. 268. By section 15, both the Westminster Street Railway and the Vancouver & New Westminster Tramway are referred to as the said railways.

The General Railway Act applies notwithstanding the special provisions in the special Act, *Ont. & Sault Ste. Marie Ry.* v. *C.P.R.*, 14 Ont. 432. As to the construction of the word railway, *Re East & West India Dock Co.*, 38 Ch. D. 576, at p. 585, COTTON, L.J., at p. 590; *Great Northern Railway Co.* v. *Tahourdin*, 13 Q.B.D. 320 ; *Reg.* v. *New Port Dock Co.* 31 L.J.M.C. 266 ; *Ex parte Zebley*, 30 N.B. 130, PALMER, J., at p. 134.

Argument.

Under section 3 (*c*) of Caps. 65 & 67 of 1890 (private

passage of this Act, elect to become subject to this section by serving a written notice of such election, under its seal, upon the Provincial Secretary, whose duty it shall be, at the expense of the Company, to publish notice of such election in the British Columbia Gazette for at least four consecutive issues immediately subsequent to such election ; and this Act shall be incorporated with every such special Act ; and all the clauses and provisions of this Act, unless they are expressly varied or excepted by such special Act, shall apply to the undertaking and shall, as well as the clauses and provisions of every other Act incorporated with such special Act, form part of such special Act and be construed together therewith as forming one Act."

NOTE (*c*) "3. No shareholder in the said Company shall be in any manner liable or charged with the payment of any debt or demand due by the said Company beyond the amount of his, her, its, or their subscribed share or shares in the capital stock of the said Company."

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charter of the Company), the shareholders are by inference declared liable to contribute apart from the section 38, *supra*.

E. P. Davis, Q.C., and *L. P. Duff, contra*

Cur. adv. vult.

February 3, 1896.

DAVIE, C.J.: The appellants (plaintiffs) are judgment creditors of the Westminster & Vancouver Tramway Company, and the question in this action is whether, as individual shareholders in the Company, the defendants are liable upon the Company's failure of assets to contribute to the extent of their unpaid up stock towards the debts of the Company. It is argued that such liability attaches both under section 38 of the British Columbia Railway Act, 1890, and also by virtue of section 3 of chapter 65 and chapter 67 Stat. B.C., 53 Vic. (1890) private, under section 38 British Columbia Railway Act, 1890, because the tramway of the defendant Company is in fact a railway, or at least that the Company had power to construct a railway, and that therefore section 38, enacting that every shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the Company applies, and under these sections, 3, on the ground that the negative words used in such sections create an obligation to contribute. The point of law arising upon section 38 was, so far as related to the defendants Ewen and Elliott, by order of Judge, dated 15th January, 1895, set down to be argued on 22nd January, 1895, and was argued accordingly before Mr. Justice DRAKE, pursuant to Supreme Court Rule 233, which provides that any party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the Judge who tries the case, at or after the trial, provided that by

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consent of the parties or by the order of the Court or a Judge, the same may be set down for hearing and disposed of at any time before the trial.

The Judge, on 2nd February, pronounced the following judgment: "It is hereby ordered and adjudged that the British Columbia Railway Act, 1890, does not apply to a tramway or street railway, and that the issue of the law raised in the pleadings and set out in the record herein (as to whether or not section 38 of the British Columbia Railway Act, 1890, applies to the said Westminster & Vancouver Tramway Company) be and the same is hereby found in favour of the defendants. And it is further ordered and adjudged that the costs of and incidental to the trial of the said issue of law be paid by the plaintiffs to the defendants appearing on the said trial."

An appeal was taken from Mr. Justice DRAKE's decision to the Divisional Court (*coram* Crease, McCreight and Walkem, JJ.), which by a majority judgment affirmed Mr. Justice DRAKE's judgment, and on the same ground, viz: that the Railway Act had no application to tramways. Mr. Justice MCCREIGHT dissented, holding the contrary view.

Notice of motion was then given by the defendants and heard before Mr. Justice DRAKE, to dismiss the action on the ground that the decision of the point of law substantially disposed of the whole cause of action, and the learned Judge adopting this view gave judgment on 20th December, 1895, dismissing the action with costs.

From the last mentioned judgment the present appeal has been brought, and is sought to be sustained, not only by sections 3 of chapters 65 & 67, Stat. B.C. 1890 (private), but on the ground already debated on the previous motion that the Railway Act applies to tramways.

Mr. *Davis*, for respondents, urged that such ground was not open to appellants on account of the previous judgment which remains unappealed from; in other words, that the point is *res judicata*, although Mr. *Davis* objected to the use

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of such expression. To ascertain the effect of a decision of the Divisional Court it is necessary to refer to the constitution of that tribunal, which we find, by sections 59–60, *et seq.* C.S.B.C. (1888) Cap. 31, is confined to interlocutory matters, including the granting of new trials and certain other specified subjects. The Full Court, being the last Court of Appeal to which final judgments are to be taken, and the Divisional Court, respectively, have concurrent jurisdiction in interlocutory matters, section 60 enacting that the Divisional Court shall, in the exercise of its jurisdiction concurrently with the Full Court, have all the powers and authorities held and exercised by the Full Court in interlocutory matters, and its judgment shall be deemed a judgment of the Full Court, and shall be executed and carried out as such, and no appeal shall lie from the judgment of such Court to the Full Court.

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By the Supreme and Exchequer Court Act, section 24 (*a*), an appeal lies to the Supreme Court of Canada from all final judgments of the highest Court of final resort in any Province, and no appeal shall lie to the Supreme Court but from the highest Court of last resort having jurisdiction in the Province. It would appear, therefore, and bearing in mind the judgment in *Morris* v. *London & Canadian Co.*, 19 S.C.R. 434, that no appeal lies to the Supreme Court of Canada from the Divisional Courts of the Provinces, for there cannot be two highest Courts of last resort in the Province, *Danjou* v. *Marquis*, 3 S.C.R. 251; but whether an appeal lies from the Divisional Court or not, it is clear that no appeal will lie from a merely interlocutory judgment, and that an order or judgment under Rules 233 and 234 is interlocutory merely is decided by *Salaman* v. *Warner* (1891) 1 Q.B. 734. Hence it follows that neither the first judgment of the Divisional Court deciding the point under the Railway Act, nor from this decision, both being interlocutory only, can there be any appeal taken to the Supreme Court of Canada, and that to sustain Mr. *Davis'* objection we must

hold that by the decision of an interlocutory point, forced upon the unsuccessful party, from which there is no appeal the rights of the parties are absolutely and finally determined. I do not forget the right of appeal which may exist to Her Majesty's Privy Council, but that appeal is ordinarily from final judgments, and only from the highest Court of last resort and, at least in interlocutory matters, exists as a matter of grace and under special circumstances only, whereas the object of the Supreme and Exchequer Courts Act is to give an appeal as of right to that tribunal in all cases (within the prescribed limits) after they have been finally determined by the highest Court of last resort in the Province. It never, I think, was intended either by our own Supreme Court Act or the rules, or by the Supreme and Exchequer Court Act, that by virtue of an interlocutory tribunal pronouncing what in effect is a final judgment, that there the litigant's rights should be concluded. There can, I think, be but one final determination upon the merits of an action, and when you arrive at that stage, and not until then, the right of appeal as from a final judgment arises; and upon the final appeal, in determining the merits of the case, the Court is not to be barred by any interlocutory decision not brought by appeal to the Full Court. To this effect, I take it, is Rule 683, which says that no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Full Court from giving such decision upon the merits as may be just.

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The words "from which there has been no appeal" mean, I think, an appeal to the Full Court; in other words, that the Full Court in giving final judgment upon the merits, and so opening the door upon the whole case to a higher tribunal, is not to be prejudiced by the decision of any lower Court, the decision of which could not be carried further. This view is also strengthened by the fact that at the time when Rule 683 was originally introduced as

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governing the practice in British Columbia, there was but one Court of appeal in this Province, the Full Court, from either final or interlocutory judgments; under the former practice what is now Rule 683 was Rule 411, and the Court of appeal then referred to clearly meant only the Full Court, and by Rule 1068 the existing practice is to remain in force, except in so far as other provision is made; the language of both rules being identical, it follows, I think, that the Court of Appeal intended must be the same. I am aware of the case of *White* v. *Witt*, 5 Ch. D. 589, but I do not think that case stands in the way of the decision I have arrived at in this. That was a case where, in an interpleader suit, an inquiry was directed as to the validity of a settlement, and the chief clerk having certified that it was invalid as against an execution creditor, his order was varied by the Court. The Court of Appeal held that the appeal from the order varying the certificate must be brought within twenty-one days limited for appeals from interlocutory judgments, and was not, simply because the time for appeal from the final order on it had expired, open afterwards. In England, the same as formerly in British Columbia, there is but one Court of Appeal, whether from final or interlocutory orders, and from that Court you may go to the House of Lords. In *White* v. *Witt*, the appellant had the final Court open to him the moment the decision varying the certificate was pronounced. It therefore became but a question of time, and JAMES, L.J., says he is not to have further time merely because a formal order which must necessarily follow the interlocutory one has to be drawn up. But here, under our practice, the case is different. The appellant had no final Court open to him at the time, and until he had his final judgment could go no further. Hence, whilst to apply Rule 683 in England would merely be to give an enlarged time for appealing, here the appeal cannot proceed at all unless obstacles by reason of interlocutory judgments be removed. As in *Laird* v. *Briggs*, 16 Ch. D. 663, the refusal

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of leave to amend was considered to be simply a part of the trial, so the decision of the point of law here is practically merely an incident of the trial, and as in that case so in this, the whole case will be open on appeal.

The interlocutory findings affirmed by the Divisional Court, therefore, are not binding on the Full Court, and it would, it seems to me, be monstrous that they should be in a case where the Divisional Court was itself divided in opinion, and in which we all think, including the two Judges who sat in the Divisional Court on the previous occasion, there is room for doubt as to the soundness of the decision.

But, assuming that I am wrong in the views just expressed, Rule 234 gives power to the Judge to dismiss the action only when the point of law disposes of the whole action. Supposing then the Railway Act not to apply, there still remains to be decided the point arising under sections 3, which has not yet been raised on the pleading or submitted for decision in any way. If, however, the Court is of opinion that the point of law already raised disposes of the whole action, the Court is still not then bound to dismiss, and even had my opinion been that the point did dispose of the whole action and was well taken, I should, in view of the large amount of money here involved, and the serious point of law which caused the difference of opinion in the Divisional Court, hesitate to give a judgment which could be taken no further. The rule authorizes the Judge, in lieu of dismissal, to make such other order as may be just. We are bound to make the order which the Court should have made, and, so as to guard against any possible miscarriage, in case the view should be taken upon ultimate appeal, that the former judgment of DRAKE, J., affirmed by the Divisional Court, renders the matter *res judicata*, and that an appeal might have been taken from such order, I think the justice of the case will best be met by an order, not only setting aside the judgment of dismissal but enlarging the plaintiffs' time for

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appealing against the first judgment of the Divisional Court until the expiration of sixty days from the final judgment in this action.

The costs of this appeal will be the plaintiffs' costs in the cause.

It may not be out of place to direct attention to the question whether this action can be maintained at all. What privity of contract is there as between the plaintiffs and defendants? The plaintiffs have the judgment for their debt against the Company; what they want now is execution, which formerly they would have obtained as against shareholders by a *scire facias*, but for which apparently winding-up proceedings are substituted. If the maxim *transit in rem judicatam* applies, can they now ask additional judgments against the shareholders?

Judgment of McCREIGHT, J.

McCREIGHT, J.: For the reasons which I gave in a dissenting judgment, and to which I now refer, I think still that the defendants Ewen and Elliott and others and the New Westminster & Vancouver Tramway Company fall within the provisions of section 38 of the British Columbia Railway Act, 1890, and that as at present three out of the four Judges of the Supreme Court seem to entertain the same opinion, that the best course is to refer the case back to DRAKE, J., that it should be so dealt with and be determined ultimately if necessary by higher Courts of Appeal. The statute as to Divisional Courts was not intended to determine finally the right as to large sums of money, as in this case, but only to deal with applications which were substantially of an interlocutory nature having regard to the long intervals at which the Full Court sat.

My only difficulty has been that we may now perhaps be considered as reversing a former decision of the Divisional Court, and that contention may be brought forward and claimed as introducing perhaps inconvenient precedent for future occasions, but I think the two special circumstances

to which I have alluded, namely the divided opinion of the four Judges and the large sum of money at stake, will narrow greatly any inconvenience of that kind. Moreover, we all know that the value of a decision may be affected by the circumstance that it is not subject to appeal, and further we give no decision to the effect that the former Divisional Court was wrong, but only refer the matter back to DRAKE, J., so that the case may be put in train to go, if thought necessary, before appellate Courts which may perhaps ultimately decide that the first decision of the Divisional Court was correct. I think the best course, therefore, is to refer this case back to DRAKE, J., with an intimation of our opinion, upon which no doubt he will so act that the higher Courts may deal with it.

I have doubts as to what order should be made as to the costs of the appeal. I think both sides are to blame for the expense which has been incurred. Instead of an action being brought against Edmonds, Ewen and Elliott, by the Edison Company, between which parties there is no privity of contract (for the only privity is between the Edison Company and the Tramway Company as a corporation) the proceedings should have been by a winding-up order against the Tramway Company as an incorporated company, and against which company accordingly the plaintiffs have in my opinion mistaken their course of proceeding; and the defendants have also erred in not pointing out the mistake at an early date, and so perhaps there should be no costs of this appeal. Perhaps the most convenient course may be to discontinue proceedings which cannot result in a satisfactory conclusion and to take winding-up proceedings instead of the action.

See what was done in *Oakes* v. *Turquand et al*, L.R. 2 H.L. 325, at p. 357, where difficult questions were argued and determined on the point as to Mr. Peek's liability to be a contributory, and see Lord CRANWORTH'S judgment as to the creditor's remedy being solely against the company,

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except of course in the winding-up. But the Chief Justice and WALKEM, J., think the appellants should have their costs of this appeal in any event. And perhaps this may be so, as the Judges have perhaps failed as much as any one in the above respect, and the point of course has not been argued. It is to be observed that after judgment against the Tramway Company the maxim *transit in rem judicatam* applies. See *per* Lord ESHER in *Emden* v. *Carte*, 19 Ch. D. 311, as to the duty of a Judge to take points in a case even though not taken by counsel.

WALKEM, J., concurred with the judgment of DAVIE, C.J., except as to the suggestion that the action did not lie, as to which he expressed no opinion.

Judgment dismissing action set aside and action referred back to Drake, J.

REGINA v. PETERSKY.

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Municipal law—By-law prohibiting sale of personal property on Sunday—Whether unreasonable.

The Vancouver Incorporation Act, 1886 (private), as amended by Stat. B.C. 1886, Cap. 68, Sec. 18, gave the Municipal Council of the city power to pass by-laws: "For the prevention of sales . . of any . . personal property whatsoever, except . . milk, drugs or medicine . . on Sundays." The city passed a by-law prohibiting the sale on Sundays in the city of any personal property, with the exceptions mentioned in the statute.

Upon appeal by defendant from a conviction under the by-law for selling fruit on a Sunday:

Held, 1. That the Provincial Legislature having power to deal with the subject it was no objection that the provision was inconsistent with the Lord's Day Act, 29 Car. II. Cap. 7.

. A by-law cannot be successfully attacked upon the ground of unreasonableness where its provisions are in the terms of the enabling statute, for the objection is then to the unreasonableness of the statute.

APPEAL from a conviction by way of case stated. The case fully appears from the judgment. Statement.

L. G. McPhillips, Q.C., for the appeal: The by-law is bad for unreasonableness, *Heap* v. *The Rural Sanitary Authorities of Burnley Union*, 12 Q.B.D. 617, and its validity may be questioned on motion to quash a conviction thereunder, *Regina* v. *Cuthbert*, 45 U.C.Q.B. 19. The fact that the enabling statute is general in its terms merely affords a wide range for the exercise of the discretion of the Municipal Council in adopting such part of the general power as may be reasonable when applied to the circumstances dealt with, and does not derogate from the rule that the exercise by by-law of general statutory powers must be reasonable. The question of unreasonableness only comes in where it is *e concessus* that the by-law is within the scope of the general statutory power, otherwise there Argument.

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would be no discretion and it would be a mere question of *ultra vires*. The general power is to prohibit sales of *any* kind of personal property (with three exceptions) on Sundays. It must be understood with an implied qualification against imposing the prohibition against the sale of things absolutely necessary, in reason, to be sold on that day, *e.g.*, food and drink to travellers in hotels, etc. The word "any" implies discrimination. The meaning is not that *all* kinds, outside of the named exceptions, may be prohibited without reason or discrimination. The by-law, as prohibiting the sale of *all* the articles open to be dealt with, is unreasonable. The applicant is not forced to argue that the unreasonableness is in the statute. It is no answer that if the by-law prohibited only the sale of "fruit," which is here in question, it would have been a reasonable exercise of the statutory power. A by-law being entire, if it be unreasonable in any particular, it shall be void for the whole, *Saunders* v. *S.E. Ry. Co.*, 5 Q.B.D. 456, at p. 463; see also *Baker* v. *Paris*, 10 U.C.Q.B. 625; *Re Barclay and Municipal Council of Darlington*, 11 U.C.Q.B. 470, at p. 476, 12 U.C.Q.B. 86. The statute conflicts with the Lord's Day Act, 29 Car. II. Cap. 7.

Argument.

A. St. G. Hamersley, contra.

DRAKE, J.: This is an appeal by the defendant against a conviction by two Justices of the Peace for selling fruit in the city of Vancouver on 23rd June contrary to By-Law No. 223, which is a by-law against Sunday trading. By the Vancouver Incorporation Amendment Act, 1895, Sec. 18, the Corporation may pass by-laws: "For the prevention of sales, or exposing for sale, or offering for sale, or the purchase of any goods, chattels, or other personal property whatsoever, excepting the sale of milk, drugs or medicines on Sundays," etc., etc. On 6th May, 1895, the Corporation passed a by-law in the words of the Act, excepting that the word "the"

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before "purchase" is omitted. As the charge here is for selling and not for purchasing, it is not necessary to consider whether the purchaser is guilty of an evasion in buying, which might be argued under the words of the Act, but not under the by-law. The chief contention of the appellant is that the by-law is unreasonable, and no exceptions are made for the sale of necessaries in the shape of food, etc. The same argument applies with equal force to the statute. The Lord's Day Act, Stat. 29, Car. II. Cap. 7, which is in force so far as not repealed, makes certain exceptions, which the Vancouver Incorporation Amendment Act, 1895, ignores. In so far as the latter Act restricts the operation of the statute of Charles it is a repeal of it by amplification. It is not contended that the statute with which I am dealing is not within the powers of the Legislature. If so, can a by-law which is passed within the actual limit of the powers given to the Municipality be held as unreasonable? The powers of the Court with regard to by-laws are to keep within reasonable limits the exercise of all powers given to corporate bodies when general powers are given, and in such cases to see the by-laws are not in excess of their power or repugnant to the statute, Maxwell, 3rd Ed. 417. Here the powers are literally followed. If the Legislature has not sufficiently provided for cases of necessity, it is for the Legislature to rectify the omission and not the Court. The case of *Heap* v. *Burnley Union*, 12 Q.B.D. 617 is distinguishable. There the Board had powers to pass by-laws to prevent nuisances. They passed a by-law that pigs were not to be kept within a certain distance of a dwelling house. As it did not follow that pigs might not be kept so as to be a nuisance, I cannot read with the Act and by-law any other limitations than those which have been imposed by statute, and I, therefore, dismiss the appeal with costs.

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Appeal dismissed with costs.

SPIERS v. THE QUEEN AND CORBOULD.

McCREIGHT, J.
1894.
Jan. 26.

Petition of right—Interlocutory order not appealable to the Full Court—Judgment registered after delivery of writs of fi. fa. to the sheriff—Counter-claim.

FULL COURT.
1896.
Jan. 17.

Held, by the Full Court, DAVIE, C.J., CREASE and DRAKE, JJ., affirming McCREIGHT, J.: A purchaser at sheriff's sale under a writ of *fi. fa.* has no *status* to question a subsequent judgment of the Court setting aside the judgment except by intervening as indicated in *Jacques* v. *Harrison*, 12 Q.B.D. 136-165.

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The registration of a judgment in the Land Registry Office before the delivery of *fi. fa.* lands thereunder to the sheriff is a condition precedent to the efficacy of the writ in the sheriff's hands and sale thereunder under Sections 31 & 32 of the Execution Act, C.S.B.S. (1888) Cap. 42.

Per DRAKE, J.: The purchaser at the sheriff's sale being the solicitor for the plaintiffs in the action was not within the protection against irregularities given by section 43 of the Execution Act, *supra*, to purchasers at sheriff's sales under executions.

Per DAVIE, C.J.: There cannot be a counter-claim to a petition of right.

APPEAL to the Full Court from the judgment of McCREIGHT, J., dismissing a petition of right. Suppliant was the purchaser of lands from the Crown of which the Crown grant had not yet issued when judgment was obtained against him by default of appearance in an action by Marvin & Tilton, of whom Corbould was the solicitor on the record. *Fi. fa.* lands was issued and delivered to the sheriff before the judgment was registered in the Land Registry Office. Corbould purchased the lands at the sheriff's sale, and subsequently a Crown grant thereof issued to him. Suppliant, on affidavits denying the service of the writ in the action, made application to set aside the default judgment, which was refused by McCREIGHT, J., but granted by the Full Court on appeal. The petition was that the Crown refund balance of the purchase money paid to the Crown by Corbould and annul the Crown grant to him

Statement.

and issue one to suppliant. Corbould set up that he was a *bona fide* purchaser under the judgment for value without notice, etc., and counter-claimed that the order setting aside the judgment was obtained by false and fraudulent affidavits and suppression of facts, which imposed upon the Full Court.

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McCREIGHT, J. : I think in this case the plaintiff succeeds in his claim and the defendant Corbould fails in his defence and counter-claim. The important part of the defence is paragraph 2, which reads thus : " With respect to paragraph 4, the defendant admits that the writ of summons and all subsequent proceedings in *Marvin & Tilton* v. *Spiers & Beaton* were set aside by the Full Court, but says that the said Court was imposed upon by the false and fraudulent affidavit of the petitioner James Spiers, fyled in support of the application to set aside the said proceedings ;" and again the counter-claim of Corbould says that " the judgment of the Supreme Court referred to in paragraph 4 of petition was obtained by fraud and perjury, and the said defendant claims that the said judgment may be rescinded and the judgment in *Marvin & Tilton* v. *Spiers & Beaton* be restored."

Judgment of McCREIGHT, J.

A summons was taken out before me in October, 1891, to set aside the judgment obtained by *Marvin & Tilton* v. *Spiers* and others by default ; Corbould, the solicitor to Marvin & Tilton, had purchased at a sheriff's sale under a *fi. fa.* against lands, previous to such summons, the land in question.

On the hearing of this summons I refused to make an order to set aside the judgment, and on appeal the Full Court reversed my decision on the ground of irregularities and perhaps of nullity in the proceedings. I am far from suggesting that this judgment of the Full Court was not perfectly correct, even if it would be proper for me to criticise it.

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It must be borne in mind that in this case the plaintiffs Marvin & Tilton obtained a judgment merely by default. Had the proceedings gone on to trial and Spiers obtained a final decision in his favour, and we will suppose by fraud and perjury, a very different question might have arisen, at all events as between them and Spiers. This point has been a good deal discussed in the English case, see *Flower* v. *Lloyd*, 6 Ch. D. 297 (C.A.), and 10 Ch. D. 327 (C.A.); *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 295 (C.A.); judgment of BRETT, L.J., at p. 307, and concluding with *Boswell* v. *Coaks*, 6 R. 167, in the House of Lords, in which cases, not without a struggle, it has been determined that as between the parties to the judgment the plea of *res judicata* is not conclusive in cases of fraud properly alleged and, if necessary, proved. Marvin & Tilton, it must be observed, cannot be seriously wronged by the judgment of the Full Court, supposing, for the sake of argument, it to be erroneous. There was nothing whatever to prevent them litigating with Spiers the question of his indebtedness to them in the usual manner, and they could not and would not have invoked as against Spiers (it would have been wholly unnecessary not to say illegal to do so) the doctrine of the above cases. The law is always very ready to set aside judgments by default and have cases tried on their merits; and Marvin & Tilton seem to have given up their claim against Spiers as one that perhaps could not be proved.

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All this, however, only leads up to the main question, which is, has Corbould any right to treat as a nullity or question the judgment which the Full Court decided and gave as between Marvin & Tilton and Spiers; secondly, can he now claim to have it rescinded? I think he as by counter-claim cannot do so, whatever he might at one time possibly have done.

The question of third parties setting aside a judgment by default which they considered injurious to their interests, was much discussed in *Jacques* v. *Harrison*, 12 Q.B.D. 136

and 165 (C.A.), where it seems that Mr. Justice FIELD dismissed a summons by the third party to set aside the judgment on the ground that he, the third party, not having served both the plaintiff and the defendant with the summons, was a mere stranger as yet to the action. This ruling was distinctly approved on appeal by the Lords Justices, and seems to me to amount distinctly to this, that a third party like Corbould cannot by plea or counter-claim dispute the validity of the judgment, *i.e.* of the Full Court between Marvin & Tilton and Spiers & Beaton, as he has attempted to do by plea and counter-claim on this record. I may add Lord FIELD'S authority on such a point is very high, see HUDDLESTON, Baron, in *Farden* v. *Richter*, 23 Q.B.D. at p. 128; but this case if not identical with the present is its converse, and whilst shewing what Corbould cannot now do, indicates what he might have done by taking out a summons before me as Judge of first instance, for the purpose of insisting on the judgment by default not being set aside as he had made a purchase under it and so was interested in its continuance, and especially by continuing such contention in the Full Court. No such proceeding (the necessity of which is fully discussed in *Jacques* v. *Harrison*) was taken by Corbould; the summons of course to be served on both Marvin & Tilton and Spiers; and I merely point this out that it may not be thought that the law provided no means whereby he might have insisted on the validity of his purchase and the continuance of the judgment for that purpose, supposing there to have been no irregularities. From the perusal of the judgment of the Full Court where the irregularities, perhaps nullities, are referred to, I doubt whether such contention would have been useful, and I merely mention the point with a view to shew that every right may be enforced if substantial and the requisite procedure is duly adopted.

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There seems to be a fallacy in the plea and counter-claim to which it may be proper to refer. It is often said that

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fraud violates everything, and this as a general maxim is no doubt true, subject to the many exceptions and qualifications which apply to all such maxims; *e.g.*, a contract obtained "by fraud is not void till affirmed, but valid till dis-affirmed;" "it is voidable but not void," see the argument of Mr., afterwards Lord Justice MELLISH, in *Oakes* v. *Turquand*, L.R. 2 H.L. 338, and the approval of the Law Lords, at pp. 346–75. A judgment obtained by fraud cannot be more than voidable, except perhaps in a case like that of the *Duchess of Kingston*, 2 Sm. L.C. 9th Ed. p. 812, which Lord SELBORNE, in *Boswell* v. *Coaks*, *supra*, describes as *Fabula non judicum*. I gather that Marvin & Tilton have elected to treat the judgment in favour of Spiers as valid, or perhaps the Full Court have decided that they having allowed to pass the proper opportunity of disputing its validity had lost all right to interfere, and by this of course I am bound, and as Corbould did not invoke the procedure pointed out in *Jacques* v. *Harrison*, before referred to, he is bound likewise.

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Again, I doubt as a fact whether the Full Court were imposed upon by fraud and perjury as to service of the writ, supposing even that they evidently thought and perjury, etc., existed, there were other good grounds for setting aside the judgment, as Rules 23 and 72 had been disregarded; then again the judgment should have been registered before the delivery of the writ to the sheriff, under the Execution Act, C.S.B.C. 1888, Cap. 42, Sec. 31. This section refers to the Land Registry Act, C.S.B.C. (1888) Cap. 67, of which see section 26; and certainly it does seem that such registration is a condition precedent, and I think the Full Court so considered it, evidently Sir John ROBINSON, C.J., so thought in *Thirkell* v. *Patterson*, 18 U.C.Q.B., where he says at page 80, "It is indeed only from the time of registration that the judgment binds the land."

I must hold that the plaintiff Spiers succeeds against Corbould on the claim, and Corbould fails on the counter-

claim against him. Costs to follow the event, but I am ready to hear discussion on this point.

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From this judgment the defendant Corbould appealed to the Full Court, and the appeal was argued before DAVIE, C.J., CREASE and McCREIGHT, JJ., on 11th July, 1895.

A. J. McColl, Q.C., for the appellants.

Aulay Morrison and *A. C. Brydone-Jack*, for the respondents.

Cur. adv. vult.

January 17th, 1896.

DAVIE, C.J.: The suppliant was the purchaser of certain Crown lands, and had paid a portion of the purchase money but had received no grant. On 2nd May, 1889, judgment by default of appearance was recovered in this Court against the suppliant and one Beaton, by Marvin & Tilton, for $100.10 exclusive of costs, and on 20th October, 1889, upon a writ of *fieri facias* against lands, which was delivered to the sheriff before the judgment had been registered in the office of the Registrar-General of Titles; the suppliant's interest in the land before referred to was sold by the sheriff to Corbould, who was the solicitor on the record for the judgment creditor, and a Crown grant of the land was afterwards issued to Corbould. In July, 1891, application was made to Mr. Justice McCREIGHT, by summons on behalf of the suppliant, to set aside the writ of summons, judgment, and all subsequent proceedings, on the grounds of non-service of the writ of summons and the non-registration of the judgment until after the *fieri facias* had been delivered to the sheriff. In support of the

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summons the joint affidavit of the suppliant and his solicitor was fyled. The application was refused by Mr. Justice McCREIGHT, but was granted on appeal to the Full Court, which set aside the writ, judgment, and all proceedings. The suppliant then brought his petition of right to set aside the Crown grant to Corbould, who, among other things pleaded that the affidavit of the suppliant upon which the proceedings were set aside was false. From the judgment of the Court in favour of the suppliant the present appeal is brought, and if the case turned upon the truth of the affidavit I should, for reasons which I shall presently discuss in considering the question of costs, be prepared to hold that the petition ought to have been dismissed; but, as I am of opinion that for want of registration of the judgment previous to the writ of *fi. fa.* being handed to the sheriff, the sale was a nullity, the Divisional Court had, I think, irrespective of the question whether the writ had been served or the other proceedings were regular, no alternative but to annul the sale, and that consequently the judgment on the petition of right in favour of the applicant must be upheld.

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The right of execution against the lands of a judgment debtor is created by the Execution Act, C.S.B.C. (1888) Cap. 42. Section 31 of that Act provides that the writ of execution against lands shall not be delivered to the sheriff until the judgment on which the writ is issued has been registered in the office of the Registrar-General of Titles, in pursuance of the Land Registry Act; and section 32 provides that the writ of execution when delivered to the sheriff shall affect the lands of the defendant from the date of the registration.

It is clear then that the lands are not to be affected until registration, and it would tend to impair the validity of titles to real estate if it were otherwise, for then a purchaser or other person trusting to the Registrar might find himself postponed to a judgment of which he had no knowledge.

By 27 & 28 Vic. (Imp.) Cap. 112, where land has been

actually delivered in execution by writ of *elegit* or other local authority, it is unnecessary to register the judgment, writ, or other process of execution, except for the purpose of obtaining under section 4 of the Act a summary order for sale ; but before any creditor to whom any lands of his debtor shall have been actually delivered in execution can obtain such summary order, his writ or other process of execution must be duly registered pursuant to section 3 of the Act ; and Lord Justice COTTON, in *Re Pope*, 17 Q.B.D. 750, remarks upon this provision, "That was another protection to purchasers, but the provision which rendered registration necessary was not merely in order to prevent land being affected where there was no execution of the judgment or of the writ, but in order that it might not be affected by a judgment or writ where there was no registration."

The same remarks appear to me to apply to sections 30 and 31 of the Execution Act. The Execution Act confers a new right upon a judgment creditor and points out the manner in which such right is to be executed, and, according to well recognized legal principles, where a right is conferred by a statute, and the method of enforcing that right is enacted by the said statute, that is the method you can adopt, and no other, see *Ross* v. *Rugge-Price*, 1 Ex. Div. 269 ; also Maxwell on Statutes, 3rd Ed. p. 521, where it says : "It seems that when a statute confers a right, privilege or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative in the sense that non-observance of any of them is fatal."

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It follows, therefore, that the judgment in this case not having been registered before deliverance of the writ to the sheriff, as prescribed by section 31, all proceedings under the Execution Act fail, and the sale by the sheriff is void. I do not lose sight of the fact relied upon by respondent's counsel that the judgment was in fact registered before the land was actually sold, but in my opinion

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that fact does not help respondent. He has to comply with the Act expressly, and anything short of compliance renders the proceedings thereunder nugatory.

The principal ground, however, upon which the petition was defended was an attempt to uphold the statements contained in the affidavit of Spiers and his solicitor, used upon the application to set aside the proceedings. In that affidavit Spiers deposed that he was never served with the writ in the action, nor did the same ever come to his knowledge or possession, and for that reason he did not appear to the writ, and that he had a good defence to the action (disclosing such defence with particularity).

The solicitor swore that judgment was signed against Spiers, "according to the Registrar's record of this Honourable Court, on 11th day of April, 1888, the same date that the writ was issued;" he goes on to say that he has searched the registry, but without success, for the papers in the suit, and that "delay in making this application has been caused on that account." The obvious conclusion which the casual reader of this affidavit would come to would be that the long delay in making the application, from at all events the date of the sale, 20th December, 1889, was accounted for by the loss of the papers, and that the Court did look upon the loss as satisfactorily accounting for the delay is shewn by their setting aside not only the sale by the sheriff but the writ and the judgment, on grounds of mere irregularity, which would have been clearly waived by the delay unless explained. But a further fact, which would have been an answer to every suggestion of mere irregularity, including even the non-service of writ, if such were the case (see *Holmes* v. *Russel*, 9 Dowl. 487), whilst not expressly denied was concealed from the Court by a carefully framed statement in the affidavit. The fact to which I allude was, that on 19th June, 1889, the defendant Spiers appeared upon a summons issued upon this very judgment which his affidavit caused the Court to set aside for irregularity,

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and there and then submitted to examination as a judgment debtor regarding his estate. When the matter was before the Court of Appeal the papers were still missing out of the Registry, for the reason as explained upon the trial, of the shifting about the papers in consequence of a fire, and hence the statement in the affidavit had evidently the effect of concealing the fact of the judgment debtor examination from the Court.

In the affidavit the suppliant referred to his examination as a judgment debtor before the Registrar, by saying, "In June, 1889, the said Angus Beaton and myself were called before Mr. Falding, and I shewed the dissolution of partnership advertised in the Columbian. I did not know that there was any judgment against me." He goes on to say, "I heard no more about the matter until, some time after, I got a letter from *Corbould & McColl*, wishing me to do something about it, to which I paid no attention, considering that I had nothing to do with it. The next thing I heard of it was that my farm had been sold by sheriff's sale." He goes on to say that the said farm was then worth from $4,000.00 to $5,000.00, and that he is informed that Mr. Corbould purchased the said farm at the sheriff's sale for $150.00, and has since registered a Crown grant of the property.

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Upon the trial before McCREIGHT, J., the sheriff, William James Armstrong, distinctly swore to serving the writ on the suppliant, personally, on 11th April, 1889, producing the writ with his endorsement of service at the time, and also the affidavit of service, which was amongst the records of the Court missing at the time of the judgment of the Divisional Court, but subsequently found. The sheriff swore to the personal service, not merely from his endorsement on the writ and former affidavit, but from personal recollection of the occurrence which enabled him to state the precise place and occasion of service upon the suppliant Spiers, with whom he had been personally acquainted for

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ten years previous to the service. His journal, also entered up at the time, corroborated his recollection and endorsement of service. The Registrar, Mr. Falding, was called, and he produced the summons and examinations of the suppliant and Beaton as judgment debtors, and the writ, affidavit of service and judgment were also produced.

The suppliant being called, whilst denying that the writ was served upon him (which he does somewhat evasively), admits that he became aware of the property being sold by the sheriff in January, 1890. He took no action, however, until the following March, when his son, A. J. Spiers, who was the one to inform him of the sale and that the property had been sold for Marvin & Tilton's debt, went to see Mr. Corbould, who told him that he had purchased the place, and explained how the matter had happened. The father tells us that Mr. Corbould would hardly listen to the son. On coming from Mr. Corbould, the son told the suppliant what Mr. Corbould had told him, and it was then, so the son tells us, he concluded to consult a lawyer. There seems to have been no hurry in coming to this conclusion, the son stating that it was arrived at "the same summer," but he cannot fix the date or the month. It seems, however, from the evidence of the father, that it was not until the fall, the month of November, that he went to consult Mr. *Morrison*, a solicitor, regarding the matter. He says that the reason he waited so long was because he had no means to pay the lawyer with, yet he admits that during the interval he had been earning $3.00 per day, and when he did go to consult Mr. *Morrison* he did not pay him anything, so it is evident that his excuse about want of means is a subterfuge; so, here is the unexplained fact, that learning of the sale of the place by the sheriff in January he never even goes to make enquiries until March, when he sends his son to Mr. Corbould, the purchaser, who "will hardly speak to him," although informing him of how the sale took place, and then both father and son permit matters to

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rest until November, when they went to Mr. *Morrison*. The suppliant tells us that he knew there must have been a judgment when the place was sold, although previously in his affidavit he was positive that, although aware of the sale, he knew nothing of any judgment. Directly contrary to his affidavit, he tells us that he saw Mr. *Morrison* twice upon the subject, the second time being some four or five days after the first, which he has sworn was in October or November, and that on the second occasion Mr. *Morrison* told him he could not do anything for him. Spiers then says that the reason of *Morrison's* so telling him was that he went into partnership with *Corbould & McColl* a few days afterwards, whereas it is proved that there was no change in Mr. *Morrison's* professional associations for months afterwards, and that, although he did join the firm of *Corbould & McColl*, it was not until the month of May following, and that, until a few days before his so joining Messrs. *Corbould & McColl*, the partnership was not in contemplation. Mr. *Morrison* was called as a witness, but, of course, could not be questioned as to communications between himself and his client. It would be interesting to enquire what was the reason of his advice to Spiers that he could do nothing for him, a topic upon which Mr. Spiers is silent. Spiers swears in one part of his evidence that when served with the judgment summons he did not know whether Marvin & Tilton's name was in the summons, and that he obeyed the summons not knowing what he was summoned for; whereas he shows in another part of his evidence that he not only knew what he was summoned for, but carried with him a Columbian newspaper for the purpose of showing an advertisement which he claimed freed him from liability for Marvin & Tilton's debt.

An attempt was made at the trial to prove the sheriff mistaken as to the service, by establishing an *alibi* for Spiers, but, in my opinion, the attempt fails, and the positive evidence of the sheriff upon this point remains unimpaired.

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From consideration of the foregoing review of the evidence adduced at the trial, I think it is established that the Court of Appeal was imposed upon by an untruthful and misleading affidavit when they set aside the judgment, the untruthfulness and misleading character of such affidavit being established in the following particulars :

1. That when appearing on the judgment summons, suppliant was unaware of any judgment against him.

2. In concealing the fact that he submitted to examination as a judgment debtor upon this judgment.

3. That the judgment was signed the same day the writ was issued.

4. That the delay in applying to the Court was due to the loss of the papers out of the Registry Office, the fact being that with full knowledge of the judgment and sheriff's sale he permitted nearly a year to elapse before even consulting a solicitor, and eighteen months before taking a step in the matter.

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The evidence of the suppliant upon the trial is equivocal and contradictory to a degree, and not worthy of belief upon any material point.

For these reasons I am of opinion that, although the judgment must be upheld on the ground of non-registration of the Marvin & Tilton judgment, the suppliant, Spiers, who has tried to support his case by falsehood, should be deprived of all costs, and the judgment below varied accordingly. There should be no costs of this appeal.

CREASE, J.: I have examined the evidence, cases and arguments brought forward on this appeal with anxious care. I confess it is not without a certain reluctance where a suggestion of fraud is mooted (though fraud does not necessarily, of itself, make a contract or judgment obtained by its means more than voidable) that I can only come to the same conclusion as is arrived at in the judgment of Mr. Justice McCREIGHT; this was that the plaintiff, Spiers,

succeeds in his claim, and the defendant, Corbould, fails in his claim and counter-claim. The latter had but neglected the ample opportunity and time, which the law allows, of interposing to get his claim and right to interfere recognized. He probably considered that it was not an unmixed evil; that he should not interfere as third party, and serve both plaintiff and defendant with notice of such intention, and that he so far remained a stranger to the case, *Jacques* v. *Harrison*, 12 Q.B.D. 136, and C.A. 165, and thereby also prevented himself from disputing successfully by plea or counter-claim the validity of the judgment of the Full Court between Marvin & Tilton and Spiers & Beaton.

There were several grounds, some of which were alluded to by the learned Judge, for doubting whether the Full Court, in forming their judgment, were imposed upon by fraud, and the perjury alleged as to the service of the writ, *e.g.*, the non-registration of the judgment, which, under section 26 of the Land Registry Act, is a condition precedent; a doubt also whether the original judgment was capable of proof had Marvin & Tilton tried it out, instead of taking a judgment of default and the like.

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For these and other reasons which suggest themselves, and upon full consideration of the case, I am distinctly of opinion that the judgment of the learned Trial Judge should be supported, and, therefore, adjudge that the present appeal be dismissed, and I would have said that the costs should follow the event, but there is so much to find fault with in Spiers' evidence that it is a duty to deprive him of costs, therefore the judgment must be varied to deprive Spiers of costs altogether, and for a return to Corbould of the purchase money paid by him to the Crown.

DRAKE, J (after discussing the facts): Before the Judicature Act, if the judgment was reversed on appeal, the plaintiff obtained a writ of restitution, and CHITTY'S (Archbold's) Q.B. Prac. 14th Ed. p. 993 says the present

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practice is to make an application to the Court apparently in the original action. In addition to the irregularities in the proceedings to obtain judgment, Spiers alleged and proved that the judgment was not registered until after the *fi. fa.* against the lands was placed in the sheriff's hands as provided by Section 31 of the Execution Act, and section 30 enacts that the sheriff shall not offer the lands for sale within a less period than thirty days from the date on which the writ was delivered to him. The effect of these two sections is that the judgment must be registered thirty days before sale.

The judgment was not registered until 5th December, and the lands sold on the 20th. When the application to the Full Court was made, no documents relating to the proceedings to obtain a judgment were forthcoming; but these have now been discovered and produced.

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The defendant, Corbould, in setting up a counter-claim to the petition of right, has not followed the course pointed out in *Jacques* v. *Harrison*, 12 Q.B.D. 165. A counter-claim is in the nature of a cross action, and the Crown Procedure Act, C.S.B.C. (1868) Cap. 32, does not contemplate that an action should be brought against the Crown except in the mode and under the restrictions pointed out in that statute. Section 7 enacts the procedure to be followed, and that is that the party served should plead or demur; section 10 makes the rules of pleading so far as applicable and so far as they may not be inconsistent with that Act to apply to petitions of right. It can hardly be said that a counter-claim is consistent with the Crown Procedure Act; if it was so held, a subject might set up an action against the Crown by counter-claim, which the Lieutenant-Governor had no opportunity of considering under section 4. For these reasons I think the counter-claim cannot be entertained.

To deal with the defence itself, Corbould says he bought the hereditaments at public auction in good faith and for

valuable consideration and without concealment of the facts, and denies that the sale to him is illegal and void upon many grounds, and in the argument Mr. *McColl* contended that Corbould was not a party to the proceedings before the Court, and must be treated as a stranger purchasing at sheriff's sale, without knowledge of any irregularity.

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Mr. Corbould was the solicitor on the record for Marvin & Tilton, both in the Court below and on the appeal; in *Boursot* v. *Savage*, L.R. 2 Eq. 142, Vice-Chancellor KINDERSLEY says a solicitor is an *alter ego* of his client, and his knowledge is his client's knowledge, and *Dressen* v. *Norwood*, 17 C.B. 466, and *Wyllie* v. *Pollen*, 32 L.J. Ch. 782, are *dicta* to the effect that the knowledge of the agent is the knowledge of the principal if derived from the same transaction—he cannot, therefore, be treated as a stranger to the transaction. Section 43 of the Execution Act protects a purchaser from all irregularities in the sale, whether he had notice or not, provided he was not a party thereto, but the facts preclude Mr. Corbould from invoking the protection of this section, as he must be treated as a party to the irregularities which induced the Court to set aside the judgment and execution.

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For these reasons, I am of opinion the judgment appealed from should be confirmed with costs.

Appeal dismissed with costs.

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Vendor and Purchaser—Time essence of contract—Right to rescind—Title to lands—Lis pendens—Whether a cloud.

Vendor had a good title to the lands at the time of the contract, which made punctual payment of the instalments of purchase money of the essence of the contract, and in default the vendor to have a right to re-sell. It also gave the vendee the right to pay the whole of the purchase money at any time and demand a deed. The lands were of speculative value. After the date of the contract and payment of deposit an action was brought against the vendor involving her title to the lands, and a *lis pendens* registered. Vendor and vendee then agreed that no further payments should be made until it was removed. After the original period for completion, and before the *lis pendens* was removed, the vendee tendered the whole amount of the purchase money, and a conveyance for execution, to the vendor, who asked time to see her solicitor. No further tender was made. The *lis pendens* was afterwards removed. The action was brought by the vendee for rescission of the contract and return of the deposit, and the vendor counter-claimed, demanding specific performance.

Held, *per* McCREIGHT, J., ordering rescission, refusing return of the deposit, and dismissing the counter-claim:

1. That time was of the essence on both sides. That the avowedly-speculative character of a purchase makes time of the essence, even where not so provided in the contract.
2. That, on the facts, the vendee had not waived his right to rescind.
3. *Quaere*, whether the existence of the registered *lis pendens* was a good ground for refusal of the title.
4. The Court may refuse to order return of the deposit where the vendor had a good title at the time of the contract.

Upon appeal to the Full Court: CREASE and WALKEM, JJ., affirmed McCREIGHT, J.

Per DRAKE, J. (dissenting), dismissing the plaintiff's claim, and ordering specific performance by him:

1. Where a purchaser has a right to rescind for want of title, time being of the essence of the contract, the effect of his giving further time to the vendor to cure the defect is not to waive that right, but he must, after default upon the extended period, give the vendor a reasonable time to complete.

2. That the purchaser had no right to rescind at the time he offered the money and deed for execution, and in any case the tender and refusal proved were insufficient.
3. That the purchaser having originally had a right to rescind, which he did not exercise, could not complain that the property had afterwards considerably depreciated, and such depreciation and the fluctuating value of the property were not therefore grounds for refusing the vendor specific performance.
4. *Quaere*, whether the existence of the registered *lis pendens* was a good ground for the refusal of the title.

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ACTION by the vendee for rescission of a contract for the sale and purchase of lands and for return of deposit paid by him. The facts fully appear from the head-note and judgments. The action was tried before McCREIGHT, J., at New Westminster, on 19th April, 1894.

Statement.

E. P. Davis, Q.C., and *Aulay Morrison*, for the plaintiff.
A. J. McColl, Q.C., and *L. P. Eckstein*, for the defendant.

October 8th, 1894.

McCREIGHT, J.: In this case Manson sues for a rescission of the contract with Mrs. Howison, as well as a return of his deposit, and Mrs. Howison counter-claims for specific performance of the agreement. The evidence is not very lengthy, and is remarkably free from, at all events, serious contradictions.

Judgment of McCREIGHT, J.

The first question is whether Manson is entitled to rescission, and I think he was so entitled in December, 1891, or March, 1892, as well as in June and July, 1892, especially as he had stipulated in his agreement of March, 1891, that he might at any time pay up all the unpaid purchase money, and this purpose apparently he wished to carry out, even as near as the year 1891. I gather this was his object and that he was prepared to do so, of course on getting a good title and deed, from the evidence, and I think he further was entitled to rescind because a purchase like that in question, avowedly entered into as a matter of speculation, and the nature of the contract rendering

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expedition obligatory, as Mrs. Howison must have known from the conversations with Manson, in 1891 at latest, brings this case, as it seems to me, within the case of *Macbryde* v. *Weekes*, 22 Beav. 533, referred to in Fry on Specific Performance, pp. 499 & 501, Ed. 1892, and p. 468, Ed. 1881, *Compton* v. *Bagley* (1892) 1 Ch. 313.

It seems to have been assumed during the argument by all that the withdrawal of the *lis pendens*, I believe in July, 1892, by consent, made the title free from objection; but on reference to the notes in *Le Neve* v. *Le Neve*, W. & T. Ldg. Cas. 6th Ed. Vol. II. 26, I doubt whether the fyling or the withdrawal of the *lis pendens* was of as much importance as was considered. It there appears, and from the cases cited, that the *lis pendens* affects a person only who purchases from a party during the pendency of a suit, whereas here the plaintiff had purchased and paid over $4,000.00 before the *lis pendens* was fyled. Again, the parties in *Donahue* v. *Howison and Manson* evidently treated the discharge of the *lis pendens* for the purposes of that action as immaterial, and thought Donahue might still recover against Mrs. Howison or Manson, and went down to trial in November, 1892, and early in 1893, though it so happened that the hearing was postponed on those occasions; and in May or June, 1893, the trial came on before me, and no objection was made to the continuance of the action on the ground of the discharge of the *lis pendens*, and I think this is the meaning of the Act. The Act merely deals with the case of and provides an indemnity in the case of a sale or mortgage made before final decree to a person who had no notice of the pending proceedings, thus rendering a new suit necessary. I believe nothing of the kind has happened here moreover.

Judgment of McCreight, J.

The certificate of indefeasible title obtained by Mrs. Howison in October, 1893, does not, I think, affect Manson's right to rescind, whatever might have been the result if obtained in 1891; but even then, and in any case, it could

not have been made with Donahue's knowledge and consent, without which it could not have been or be binding on him on the simplest principles of justice. I will only further refer on this point of the right of rescission to the remarks which I shall presently make when I come to deal with the question of Mrs. Howison's right to specific performance set forth in her counter-claim. The next question is as to Mrs. Howison's right to recover the deposit; Manson delayed, through having the same solicitor as Mrs. Howison, or else none at all, to press for either the completion or rescission of the contract, and Mrs. Howison might, perhaps, in case of pressure have obtained, of course on terms, a release of Donahue's claim. She seems to me in no way to blame in making the contract. No claim was made by Donahue for months afterwards, and Manson must have known that like all tax sale titles it was liable to be questioned; what is of more importance, she has succeeded so far in the Donahue suit—of course I cannot tell what the result of an appeal may be either in the Full Court or in the Supreme Court of Canada, as I have intimated in my judgment in the Donahue suit; but holding as I did then, and still think, that she has a good title, I cannot make her refund the deposit as if she had none.

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I arrive at this conclusion from the cases referred to in Fry on Specific Performance, Ed. 1892, p. 653, where he refers to *Southcomb* v. *Bishop of Exeter*, 6 Hare 225, and *Rede* v. *Oakes*, 2 De G. J. & S. 518, which shews that before the Judicature Acts a Court of Equity in many cases did not order the return of the deposit, but left the parties to their remedies at common law. I refer especially to the argument of Mr. James PARKER (afterwards an eminent Equity Judge), in *Southcomb* v. *Bishop of Exeter*, 6 Hare at p. 226, that the Court of Equity, where the vendor's bill had been dismissed, sometimes ordered the deposit to be returned, but that had been where the vendor could not make a good title, and where, therefore, the purchaser

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would be entitled to recover the deposit at law; and he points out also that a decree that the deposit should be returned would, in fact, amount to a decision that the deposit could be recovered at law, and would be a decision on the question of title adverse to the vendor, whereas I have held, invoking common law jurisdiction, in the suit of *Donahue* v. *Howison* that she had a good title. The Vice-Chancellor seems to have agreed with this argument. It must, however, be borne in mind that, as I have already intimated, it is doubtful whether my decision in *Donahue* v. *Howison* may not be reversed on appeal, and so Mrs. Howison's title held to be bad, in which case, adopting the same reasoning, it might be held that Manson was entitled to his deposit, and, of course, he should not be prejudiced in the exercise of such very possible claim by my decision in the present case, and my judgment on this point of the return of the deposit must be without prejudice to such claim; at present, however, I cannot see anything inequitable in the retention by Mrs. Howison of the deposit or part payment; *Soper* v. *Arnold*, 35 Ch. D. 386, 37 Ch. D. 96; *Rede* v. *Oakes*, 2 De G. J. & S. 518.

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The last question is as to the right of Mrs. Howison to specific performance. I think the title is one which should not be forced on Manson; see the cases of *Pyrke* v. *Waddington*, 10 Hare 8, and *Palmer* v. *Locke*, 18 Ch. D. 381, and Fry on Specific Performance, Ed. 1892, pp. 406–412. I may refer to my judgment in *Donahue* v. *Manson and Howison*, where I held Mrs. Howison's title to be good, but mentioned that owing to the opposite schools of thought prevailing among judges on tax sale titles I could not but feel uncertain as to the result of an appeal.

I have discussed points not argued before me, and the questions are difficult, and I think the best course I can pursue is to act as Lord WESTBURY did in *Jackson* v. *Duke of Newcastle*, 33 L.J. Ch. 698, of directing this judgment to lie in the Registrar's office for a time, in case either side

may wish for a re-argument. If neither side so wish, then the above must be taken as my judgment. Costs, plaintiff partly succeeds, partly (rescission, but no return of deposit) fails, no costs ; *Saner* v. *Bilton*, 11 Ch. D. 416.

Mrs. Howison fails on counter-claim ; she must pay costs of it.

Judgment for plaintiff.

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From this judgment the defendant appealed to the Full Court, and the appeal was argued before CREASE, WALKEM and DRAKE, JJ., on 10th and 11th December, 1895.

A. J. McColl, Q.C., for the appellant.

E. P. Davis, Q.C., and *Aulay Morrison*, for the respondent.

Cur. adv. vult.

January 17th, 1896.

CREASE, J.: This is an appeal against the judgment of Mr. Justice McCREIGHT in favour of the plaintiff on the claim, as far as a rescission was concerned, and against him as to the return of the deposit, and against the defendant on a counter-claim.

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Manson had sued for a rescission of a contract for sale of land with Mrs. Howison and return of the purchase money. Mrs. Howison counter-claimed for specific performance.

The facts were as follows : The action arose out of an agreement made on 25th March, 1891, between Mary Howison, vendor, and William Manson, vendee, for the purchase of forty-three acres of land fronting on the City of New Westminster, Lot 11, Group 2, in South Westminster. The price was $13,000.00, payable one-third in cash, one-third at six months, date, 26th September, 1891, and the remaining one-third at one year, viz., 25th March, 1892, the instalments carrying interest until paid. There were two provisions, viz.: The purchaser might complete

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his purchase by paying up at any time, and that upon paying up he should receive his deed.

Mr. Manson paid the first instalment, $4,334.00, entered on the land, and set to work vigorously improving it, and sold one lot for $500.00—$2,500.00 per acre.

Mrs. Howison had bought the land seven years previously at a tax sale, and was on the point of getting her certificate of indefeasible title when the original owner, called Donahue, claimed the land, and commenced suit against her for the recovery of it and covered it with a *lis pendens*.

Meanwhile Manson found the land going down in value, and he was unable to sell for want of a clear title and conveyance to himself.

On application to her in the interim for a conveyance, as he kept his money ready to pay up, he was put off by information that she could not give him a conveyance until the *lis pendens* was removed, which was shewn she could have done at any time.

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Turner, her agent, informed Manson that she could not take her money from him unless the Donahue suit was settled; that she was not in a position to give title. Meanwhile she waived her interest. She put him off from time to time, and told him not to take any more money until the suit was settled. At last, the land still going down, on 2nd June, 1892, Manson tendered her the balance of the purchase money, $8,668.00, in exchange for a conveyance; this she could not accept, and, wearied out with waiting, he at once sued her for a rescission.

Now, at the time of the agreement in March, 1891, prices were very inflated. Manson had entered into agreement to sub-divide and sell. Mrs. Howison knew this was the purpose of the purchase. When Manson enquired as to the title, Turner, her agent, verbally guaranteed it to be perfectly correct. She was bound to give him a deed when he paid the money. The provision gave him liberty to pay

up any time within the period. So that, after tender, during the currency of the agreement, he was entitled to the deed. Time was of the essence of the contract as against her. She was bound to keep the title in a condition to receive his money at any time within the contract, but she did not.

It is contended that he did not take advantage of that provision within the time. The answer to that was that she extended the time of the agreement to 25th June, 1892. Any such extension must carry with it all the rights and provisions of the agreement, if not expressed to contrary either by writing or unequivocal act.

A good authority on the subject of waiver or election by conduct is found in *The Earl of Darnley* v. *The London, Chatham & Dover Railway Company*, 36 L.J. Ch. 404, at p. 413.

Here the payment was indefinite until settlement of the Donahue suit. It was then incumbent on the defendant to prove that Manson agreed not to exercise this privilege. The questions whether she extended the time, and was bound to give a good title and of conduct giving him a right to rescission, bring the case under *Hunter* v. *Daniel*, 4 Hare 420, at p. 432, and *Monroe* v. *Taylor*, 8 Hare 51. Her request to him not to make any more payments on account of the agreement was an effectual waiver of the time of payment, which itself creates an extension. Manson's passiveness was not an election on his part to waive; he was not bound at all. *Clough* v. *London & Northwest Railway*, L.R. 7 Ex. 26, shews what would take away the right to elect. As long as a man does nothing and says nothing, he does not elect unless the rights of the third party intervene, and then election is either by express words or unequivocal act.

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Manson suffered a good deal of hardship from the course Mrs. Howison pursued. He had spent much money in clearing and in other ways, and $4,300.00 in cash paid her, and sustained loss of expected sales. The moment he

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heard of the *lis pendens*, and was served by Donahue, he went out of possession of the property, and all his sub-sales whence he expected to recoup his loss ceased. He could have gone out of the property, or, as he expressed it, "got out even in June," but was prevented. Manson wanted the title straightened out, but was always put off. It is really a question of fact, and I cannot but conclude, upon a careful consideration of all the circumstances of the case, that Manson is entitled to rescission of the contract, and I adjudge that it should be rescinded accordingly; but, for the reasons stated by Mr. Justice McCREIGHT in his judgment, Mrs. Howison must be allowed to retain the money paid her on account of the contract by Manson, and, as each party has only partly succeeded here, I decide that each pay their own costs here and in the Court below.

Judgment of CREASE, J.

WALKEM, J., concurred with the judgment of CREASE, J.

DRAKE, J.: In this appeal the defendant by counter-claim asks for specific performance of a contract for the sale and purchase of land which the learned Judge in the Court below refused, on the ground of *laches*, at the same time ordering rescission of the contract.

At the time the contract of sale was entered into, the vendor had a *prima facie* good title and the register was clear.

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The purchaser neither asked for an abstract of title or made any requisition on title. The presumption, therefore, is either that he was satisfied with the title that appeared on the register, or that he was satisfied with the vendor's contract to give a good title.

After the sale and after the payment of the first instalment a *lis pendens* was registered by Donahue, who commenced an action against both vendor and purchaser.

A *lis pendens* is not in itself a charge on the land, but it is notice of an adverse claim. Such a claim may either be made in respect of the actual ownership or it may be only

a limited claim to some pecuniary interest in land which can be cleared off by payment.

A *lis pendens* of the latter class may be removed by an order of the Judge upon terms of giving security sufficient to meet the demand.

If the claim is to the ownership, it is doubtful if a Judge can compel a claimant to relinquish his claim for a pecuniary security. In this case the claim was to declare Mrs. Howison's title null and void as against the three plaintiffs.

The same solicitor appeared for both the parties in this action, as it was considered that it was the vendor's duty to clear the title, the purchaser being only, in fact, a nominal defendant.

Before Donahue's action was brought to a hearing an order was consented to by Donahue whereby the *lis pendens* was removed from the register on security being given. By the contract for sale, time is made the essence of the contract. This condition is equally applicable to the vendor not being in a position to give a good title when demanded, as to the purchaser not being prepared with his purchase money on the days appointed for payment of the instalments.

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Manson, the purchaser, took no steps to rescind the contract on the grounds of this adverse claim of title of which he thus had notice, except as appears hereafter. Both plaintiff and defendant appear to have consented tacitly to let matters stand for the time, Mrs. Howison waiving all claim to interest under the contract until Donahue's action was disposed of; and, in fact, under the circumstances, the purchaser would not be liable to interest. A waiver may either be by agreement or by conduct of parties. Any negotiating after the time fixed for completion will amount to a waiver; see *Flint* v. *Woodin*, 9 Hare 618.

The evidence shews that the negotiations and discussions

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were proceeding for some time after the second and third payments became due. The vendor desired Donahue's claim to be disposed of before she received the money, and to this the purchaser did not dissent, although he expressed dissatisfaction, and he did not, as he undoubtedly could have done, rescind the agreement.

Mr. *Wilson*, in his evidence, states that he did not remove the *lis pendens* in order to save the costs of doing so, but that there was no trouble in getting it done whenever it was necessary. I could understand his position better if he was acting for Donahue, as he might then consent to take cash security for Donahue's rights; but acting for Mr. Manson and Mrs. Howison, he could hardly predicate that Donahue would agree to such a course. Notice of this action was a cloud, but his evidence is undisputed when he says it could be removed at any time.

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Matters thus drifted on until June, when Manson instructed Mr. Turner to tender a deed and the balance due under the contract to Mrs. Howison. The account of this transaction as given by Mr. Turner is as follows: That on June 22nd, 1892, at request of Mr. *Morrison*, Mr. Manson's solicitor, he tendered a deed and marked cheque for $9,185.96 to Mrs. Howison; Mrs. Howison said she was unable to sign the deed and receive the money, but that she would call on her solicitor and see him again; Mrs. Howison says that Turner called between five and seven in the evening and said, "Mr. Manson has sent me with $9,000.00 and some hundreds." That she said it was a strange time to come after the banks were closed, but that she would go down in the morning and see her solicitor and settle the business at once; he did not shew her a deed or go into the house but had a paper in his hand. The deed which Turner thus claims to have tendered is an ordinary deed with the usual limited covenants for title. No information was conveyed to Mrs. Howison that Manson had waived all claim to have Donahue's *lis pendens* removed

and that he was prepared to take the title subject to the contingency of Donahue establishing his rights.

Mrs. Howison naturally refused to transact the business without her solicitor's advice, and having told Turner she would see her solicitor next morning she accordingly did, and Mr. *Wilson* thereupon told Turner not to bother his client but come to him ; he did not apparently see the deed tendered, nor did he take any steps to complete the bargain with Turner, although Turner states he told *Wilson* he had tendered a deed and cheque. Apparently Mr. *Wilson* considered that the *lis pendens* was the only obstacle, so he took steps to remove it, and obtained from Donahue a consent order to that effect, and the *lis pendens* was finally removed on 21st July, 1892.

Up to the date of the alleged tender of the deeds and cheque both parties had undoubtedly waived strict compliance with the contract. The day after the alleged tender of the deed an action was commenced by Manson to rescind the contract.

The rule as to rescission of a contract for misrepresentation, is, that the party wishing to escape must determine the contract immediately he discovers the misrepresentation, but if the vendor suggests that if time is given the misrepresentation may be cured ; the purchaser by giving time does not lose his right of rescission at the end of the time if the vendor fails to make good his suggestion and to rely on the misrepresentation as a ground for determining the contract, and to determine it accordingly, *Tibbatts* v. *Boulter*, 73 L.T.N.S. 534 ; the principle is the same if the ground for determining the contract is, as in this case, inability to give a good title. But no time here was fixed by the purchaser in which to give a clear title, and, in my opinion, although the purchaser did not by the delay which ocurred waive his right to rescind, yet he had to give a reasonable time before he could enforce his right.

Prior to 20th June Manson had grumbled about the

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delay and apparently would have been glad to get out of his contract but took no decisive steps in that direction, and I think the very fact of his tendering a cheque is clear evidence that he had not up to that time rescinded his contract.

Mr. *Davis* points out that Manson practically abandoned all qustions of title and was willing to accept an ordinary deed with the usual limited covenants, and that so far from the vendor's conduct being unreasonable it was in accordance with the contract, for by this contract the purchaser might pay the purchase money at any time before 25th March, 1892. But the contention is, that the stipulation as to time having been eventually waived the rest of the agreement stood practically extended indefinitely as to all the other clauses, and thereby the vendor was supposed to be always ready to execute a formal deed in exchange for the purchase money, and on the refusal to take the monies there was no necessity to give any time to rescind the contract, and that this refusal was a breach of the contract.

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Then the question is, was the non-execution of the deed on the spot and under the circumstances detailed sufficient tender and refusal by Mrs. Howison to enable Manson to rescind ?

A reasonable time is always allowed to enable a person to read through a document and obtain a solicitor's advice on it before executing. Here is a woman, acting through a solicitor, who is asked to execute an important document without being allowed to consult her legal adviser; the deed is not subsequently tendered to him and he apparently has not knowledge of the contents of the deed which was offered to his client.

Mr. *Davis* strongly argued that as under the contract Manson was entitled to pay the purchase money at any time, therefore Mrs. Howison was bound to execute the deed on demand without obtaining legal advice. Stating the argument thus it is hardly a reasonable proposition,

more especially when the circumstances surrounding the tender are looked at.

Mrs. Howison acted reasonably in receiving her solicitor's opinion, Mr. Turner unreasonably in trying to force on her a deed without giving her time for consideration.

As time being the essence of the contract was waived, the contract became an open one as to date of completion, which either party could terminate on notice. A notice of this kind should be a reasonable notice.

In *Parkin* v. *Thorbold*, 16 Beav. 59, at p. 71, the Master of the Rolls says that it is the settled law of a Court of Equity that if one of two parties to a contract for sale of land give the other notice he will not perform his contract, and the party receiving the notice does not in a reasonable time take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment; in that case, notice to perform was given on 21st October to complete on 5th November, it was held not a reasonable time, and *Webb* v. *Hughes*, L.R. 10 Eq. 281, at p. 286, and *McMurray* v. *Spicer*, L.R. 5 Eq. 527, a week or even a month's notice held insufficient. But it is contended here that the circumstances were peculiar; there was an inflation of real estate, and it became essential for a purchaser to sell speedily in order to take advantage of the increase in price. We are all wise after the event, but it cannot be said that because the value of the land has dropped considerably that fact alone would make it inequitable to decree specific performance now. Manson bought, as he says, to sell again, and the delay that occurred prevented his making a profit; if so, there was no reason why he could not have given notice of rescission long before; his only notice of rescission was the commencement of an action for that purpose.

This step rendered it unnecessary for Mrs. Howison to commence an action for specific performance, because she could, under our rules of practice, raise this claim by

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counter-claim to the plaintiff's action, and thus save the cost of a second action.

As the defendant had not made out her title after the action, I don't think she is entitled to the costs of the Court below, *Long* v. *Collier*, 4 Russ. 269.

The order should be for specific performance of the contract of March 25th, 1891. The plaintiffs to pay the balance of the purchase money with interest from the date of the removal of the *lis pendens*, 20th July, 1892, at the rate specified in the agreement, and the plaintiff to have costs of the appeal.

Appeal dismissed with costs.

BRITISH COLUMBIA IRON WORKS CO. v. ERNEST BUSE, JOHN G. BUGBEE, AND ROSA MUELLER, CARRYING ON BUSINESS AS THE BUSE MILLING COMPANY, AND ERNEST BUSE.

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Partnership — Agency — Evidence — Opposite party — Rules 723, 725 — Costs — Misdirection — New trial.

When a *prima facie* liability to the plaintiff is made out against one defendant, then, upon the issue of whether another defendant is also liable as being his partner therein, such defendants, as between themselves, are "opposite parties" within the meaning of Rule 723, upon the issue involved, as it is the interest of the first that the second should be held as a contributor to the obligation, while it is the interest of the latter to be discharged, and therefore the examination before trial of one of such defendants for discovery is evidence at the trial on behalf of the other.

The plaintiff sought to give evidence, in proof of the partnership, of *ante litem* statements by the former defendant that the latter was his partner in the transaction in question.

Held inadmissible, as the foundation for the admission of such evidence is the implied authority and agency of the person making the statement to make it on behalf of the person sought to be bound by it, arising from the nature of their relationship, which was itself the matter sought to be proved.

Notwithstanding the rule that objections going to misdirection not taken at the trial are not open on appeal the Court may *mero motu suo* consider the question of whether there was miscarriage of justice arising from misdirection, and direct a new trial.

ACTION by the British Columbia Iron Works Co. against Ernest Buse, John G. Bugbee and Rosa Mueller, carrying on business as partners under the style of the Buse Milling Company, and Ernest Buse, for the amount of three promissory notes, signed in the name of the firm and by Ernest Buse, and a balance due for work done and material supplied. The defendants Buse and Bugbee defended by one solicitor, and Rosa Mueller by another. All, in their statements of defence, denied the partnership, and Buse and Bugbee counter-claimed for goods supplied. The action was tried at Vancouver, before WALKEM, J., and a common

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jury. The learned judge in his charge directed the jury that the only question they were to consider in reference to Rosa Mueller's liability was whether she was a partner or not, because if she was not a partner there was no liability on her. The jury found Rosa Mueller to be a partner and judgment was given against her. She moved the Divisional Court for a new trial on several grounds of improper admission and rejection of evidence, and the motion was argued before CREASE and MCCREIGHT, JJ., on 12th April, 1894.

A. J. McColl, Q.C., for the motion.

It was suggested by the Court that the learned Judge had not properly directed the jury, and that the liability of Rosa Mueller depended upon whether Ernest Buse was her mandatory to sign the note for her, and was not concluded by a finding of whether she was a partner or not.

Argument.

L. G. McPhillips, Q.C., and *A. E. McPhillips, contra:* We submit that no objection can now be taken to the charge of the learned Judge; no objection was made at the trial, the point is not raised by the notice of motion, and defendant's counsel admits in argument that he deliberately refrained from taking exception to the charge on this point, considering it best in the interest of his client not to do so. Where a Judge has in the opinion of counsel omitted to submit some material point or view of the case to the jury, he should be reminded of it, *Major* v. *Chadwick*, 11 A. & E. 571, at p. 584; *Wedge* v. *Berkeley*, 6 A. & E. 663. A party is bound by the course pursued by his counsel at the trial and cannot move for a new trial on grounds omitted to be urged there, *Commissioner for Railways* v. *Brown*, 13 App. Cas. 133.

Cur. adv. vult.

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Judgment of CREASE, J.

CREASE, J.: The sole question which was left to the jury

in this case was whether Mrs. Mueller was in partnership with Buse and Bugbee or not? This indefinite expression "partnership" has led the parties away from the real question in the case. It is unfortunate that the law as laid down in *Cox* v. *Hickman*, 8 H. of L. Cas. 268, and the series of cases which followed it, amongst which is *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238, was not brought to the attention of the Judge, as by those cases it appears that her liability depends upon a mere question of principal and agent. Lord CAMPBELL lays down, in *Cox* v. *Hickman*, 8 H. of L. 302, "that the defendants can only be liable upon the supposition that the person who wrote the acceptance on the bill of exchange was their mandatory for that purpose;" and the other Law Lords likewise agreed "that the whole question was one of principal and agent." If the case should go down to a second trial the question will be, in Lord CAMPBELL's language, whether Buse and Bugbee were her mandatories for the purpose of making her liable by the promissory notes, with of course the necessary explanation. Since this question was not considered on the trial, and there was a lengthy and useful argument also before us, it may not be amiss to call attention to certain considerations which were not dealt with at the trial where the mere question of partnership was considered. If she, Mrs. Mueller, were a partner, or Buse or Bugbee had authority to bind her, we should expect she would have been privy to the alleged partnership account in the Bank of British North America, where her name was used as a partner. And it is unfortunate that neither she, nor her son, nor Roberts, nor Buse, nor Bugbee, were questioned as being privy to the alleged partnership account in that Bank. If she were aware how her name was used in that account and permitted and sanctioned cheques being drawn in that form so as to bind her, by Buse and Bugbee, that would go a good way toward making her liable on these notes. If, on the other hand, they kept from her the use

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made of her name in that account, notwithstanding she was in Vancouver for six weeks, from the beginning of March to the middle of April, and were using her name and responsibility entirely without her knowledge or authority, the jury would put their own construction on such conduct. The alteration of the date of the conveyance, from Buse to Bugbee of his quarter of the land, from 17th February, 1892, to 6th December preceding (the date of the conveyance from Buse to Mrs. Mueller being December 5th) may be read as throwing light upon the action of Buse and Bugbee with reference to the alleged firm account in the Bank, such an *ex post facto* alteration was at all events calculated, if not intended, to raise an inference of partnership. The powers of attorney given to the sons were of course inconsistent with the claim of Buse and Bugbee to be her partners, and would in the ordinary course have been objected to by them as inconsistent with their claim to be partners, if such they were. Buse's statements to outsiders, to the effect that one of the sons was his partner, made from time to time, further raises an unfavourable impression against him, we think; possibly a somewhat different question may arise as regards the machinery purchased by Buse and Bugbee from the British Columbia Iron Works Company, as she was perhaps absolutely or conditionally a tenant in common of the land and personal estate, but even then we should have expected that resort would have been had to the power of attorney of the son in order to make her liable. Moreover, it should be remembered that a tenant in common is not an agent to bind the other tenants. We think we have the power to order a new trial, under Rule 436, although the Judge's attention was not directed to the law we have discussed. This rule was probably framed to renew the former equity practice of the Vice-Chancellor directing a new trial of an issue which he had sent to a court of law, where he thought there had been a miscarriage; besides, it is plain that counsel did not elect to ignore the law as laid down in

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Cox v. *Hickman*. The only remaining question is as to the costs of the trial, as to which it is laid down in Chitty's Archbold's Prac. 14th Ed. p. 751, "that the Court may in its discretion make such order as to costs as it thinks fit. As a general rule, the costs of the first trial abide the result of the second."

Probably, while setting aside the judgment and ordering a new trial, the best course to be pursued as to costs is to make no order, as was done in *Creen* v. *Wright*, 2 C.P.D. 354 (C.A.), and *Field* v. *Great Northern R. R. Company*, 3 Ex. D. 261. If the plaintiffs succeed in the next trial, they will get the costs of both trials. If the defendant succeeds she will get the costs of the second trial, but not we think the costs of the first, but this we think may safely be left to the discretion of the Judge at the new trial, who will no doubt have in his mind the law laid down in *Forster* v. *Farquhar* (1893) 1 Q.B. 564 (C.A.), which gives the rule in such cases.

McCREIGHT, J., concurred.

New trial ordered accordingly.

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The new trial was had before DRAKE, J., and a special jury, at Vancouver, on 5th June, 1895. The learned Judge admitted the evidence of Buse taken before the trial and refused to admit the evidence of statements made by him prior to the commencement of the action, to the effect that Mrs. Mueller was his partner. The verdict of the jury was that Mrs. Mueller was not a partner.

Statement.

The plaintiff gave notice of motion to the Divisional Court for a new trial on several grounds of mis-direction and non-direction, and of the improper admission of the evidence of Buse taken for discovery before the trial, and the rejection of evidence of statements made by him prior to the commencement of the action, tending to shew that Rosa Mueller was his partner.

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E. P. Davis, Q.C., for the motion: The examination of Buse was improperly admitted; he was not an opposite party to Mrs. Mueller in whose behalf it was asked to be received in evidence, and Rule 725 only provides for the use in evidence of the examination of an opposite party. As to what is an opposite party, see *Molloy* v. *Kilby*, 15 Ch. D. 162, COTTON, L.J., p. 164; *Eden* v. *Weardale Iron Company*, 28 Ch. D. 333; *Marshall* v. *Langley*, W. N. (89) 222; *Brown* v. *Watkins*, 16 Q.B.D. 125; *Shaw* v. *Smith*, 18 Q.B.D. 193; *Sutor* v. *McLean*, 18 U.C.Q.B. 490; Ann. Prac. 1894, 599; Daniell's Ch. Prac. 6th Ed. 596. The evidence of the statements made by Buse should have been admitted; a *prima facie* case of partnership had been made out and the statements of either partner were admissible to bind the other, *Norton* v. *Seymour*, 3 C.B. 792; *Nicholls* v. *Dowding*, 1 Stark, 81.

Argument.

A. J. McColl, Q.C., contra: The evidence of Buse taken before the trial is admissible. Buse and Mrs. Mueller were opposite parties at the second trial, *Eden* v. *Weardale Iron Co.* 34 Ch. D. 223. Depositions always were evidence, *Sturgis* v. *Morse*, 26 Beav. 562; *Lord* v. *Colvin*, 3 Drew, 222. All evidence, whether taken on examination-in-chief or cross-examination, is open to be used by all parties, *Moore* v. *Boyd*, 8 P.R. 413. Depositions are affidavits, and may be read under Rule 365, see *Blackburn Union* v. *Brook*, 7 Ch. D. 68. The admissibility of the evidence as to the statements made by Buse depends upon his agency for Rosa Mueller, and this has not been proven, Lindley on Partnership, 5th Ed. 86.

Cur. adv. vult.

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DAVIE, C.J.: This action has been tried twice, resulting the first time in a verdict for $2,125.30, which the Court set

aside. On the second trial the defendant had a verdict, which the plaintiff now moves to set aside.

The action was upon a promissory note made by the Buse Mill Company and Ernest Buse. There was also a small claim upon an open account, and the sole question upon the second trial was whether the defendant Rosa Mueller was a partner in the Buse Mill Company so as to be bound by contracts made in the name of the firm. There was nothing in writing indicating any partnership; no participation in profits is shewn; nor had Mrs. Mueller held herself out as a partner. The evidence connecting Mrs. Mueller with the Buse Mill Company, and relied upon as shewing a partnership, was that of Ernest Buse, and certain expressions of Mrs. Mueller, to which I shall refer again presently, made in presence of Mr. Godfrey, the manager of the Bank of British North America, and to Mr. McArthur, at the time of the service of the writ in the suit.

The facts of the case shew that Ernest Buse owned and operated a saw mill at Hastings, and being in financial straits went to Minneapolis and called upon the defendant Rosa Mueller, a widow then living with her two sons and daughters in that city. He had known the Mueller family during the husband's lifetime; his visit was that of "a family friend," and he was received with every confidence. Taking advantage of Mrs. Mueller's desire to see her two sons settled in life, he introduced the Buse Mill project, and recommended it as a desirable investment, entirely concealing its financial condition. We have Mr. Buse's own statement of what occurred on that occasion given in his examination before trial. "There was nothing arranged as to how profits or losses were to be borne. There was very little said. I merely asked if her boys would not like to come with me to British Columbia and take hold of a quarter interest in the mill;" that he wanted money to carry on the business, and that he suggested to Mrs. Mueller to put up some money to buy her boys an interest, and in

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reply to the question "Was Mrs. Mueller to have an interest in that herself?" Mr. Buse replied "She did'nt say so." It seems that Mr. Buse's visit as a "family friend" culminated in an agreement by Mrs. Mueller to lend him $9,000.00. to be secured in some way upon the property. It was further arranged that the boys were to go out to British Columbia. Mr. Buse was asked the question "Was there to be a partnership between you and the boys at that time, or was the partnership to commence at some future time?" and he answered "Nothing was talked about partnership; she was to put certain money in there and to be secured by deed of a portion of the property." He further states that the Mueller boys in going out were to work for wages, and not for profits. After this Buse went back to British Columbia, where, in reply to his letters, Mrs. Mueller, who is unable to read English writing or to write in English herself, sent him $6,000.00 in various sums. These letters are not in existence, having been destroyed by Mrs. Mueller, who considered them of no importance. Considerable point is attempted to be made against Mrs. Mueller on account of the non-production of these letters, but the simple evidence

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of Amelia Mueller, her mother's secretary, I think completely accounts for their destruction and shews that there was nothing in them further than a request for money. In one of them was enclosed a form or deed intended as a security, which at Buse's request Mrs. Mueller returned to him. After advancing the $6,000.00 Mrs. Mueller was herself summoned to British Columbia by the news of an accident to her son John. She arrived at Vancouver on 1st March, 1892, and was engaged nursing her son until 15th April, when she returned home. During this time she gave Buse the remaining $3,000.00; she asked for the security which was to be given her, and was told that he would give her a bond for a one-quarter interest. She evidently placed entire dependence in him, did not understand nor enquire as to the nature of the documents Buse

was to give her, and left the preparation of them, such as they were, entirely to him, accompanying him to Mr. Rand's office where deeds of transfer of a quarter of the property, prepared solely at Buse's instructions, were read over to her. It was about this time that Mrs. Mueller accompanied Mr. Buse to the office of the manager of the Bank of British North America for the purpose of giving Mr. Buse the remaining $3,000.00. Whilst here she had a conversation with Mr. Godfrey, the manager. Mr. Godfrey does not attempt to state the conversation, and when asked to give the purport of it says that he cannot remember the conversation; asked again, however, he says that "the purport was that Mrs. Mueller was a partner in the Buse Mill Company." Pressed to give some particulars of the conversation, Mr. Godfrey confesses his inability to do so, confining himself to what he terms "the impression left on my mind."

After Mrs. Mueller's return to Minneapolis, and reports from Vancouver shewing matters in anything but a satisfactory light, she sent Mr. Peztalozzi to have matters arranged, and then for the first time the true position of matters became known. Besides a previous mortgage upon the property, the existence of which Mrs. Mueller had discovered before she left Vancouver, there were mechanics' liens against the property, and judgments which were likewise registered against it, with the result that in order to secure Mrs. Mueller by a first charge upon the property, she had to advance for paying off prior incumbrances and charges, monies to the extent of $17,000.00, which included $4,000.00 due upon a note, which she had been induced to endorse, or a total of monies advanced amounting to $26,400.00. In taking this mortgage there was no mention of any partnership, and the circumstances of its being given in fact seems to negative it. This action was commenced shortly afterwards for the purpose of fastening liability on Mrs. Mueller, and, as already pointed out, Buse's evidence

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given before trial altogether negatived any suggestion of Mrs. Mueller being a partner.

Between the time of that evidence, however, and the first trial, Mrs. Mueller concluded to and did enforce her $26,000.00 security, and since then Mr. Buse has had an entirely different story to tell. He appeared at the first trial as a witness, and as strongly testified to an agreement for partnership as he had negatived it before. At the second trial he was missing, and his two versions, the one given at and the other before the first trial, were admitted by the Judge and read to the jury.

J. B. McArthur swore that on 17th January, 1893, he served the writ of summons in this action on Mrs. Mueller, at Minneapolis, Miss Amelia Mueller was present at the service. The writ and statement of claim, shewing that she was being proceeded against as a partner in the Buse Mill Company, were read by Mr. McArthur to Mrs. Mueller, who said that she had been a partner but she had dissolved it a month ago; that she had paid a lot of debts of the firm a short time before and had secured herself in some manner by taking a mortgage. McArthur's version of this conversation is denied by Mrs. Mueller and by her daughter Amelia, and I think their evidence bears the indication of truth far more than that of the process-server McArthur, who appears to have gone out of his way to extract evidence which it was no part of his function to procure. Upon these facts the jury found that there was no partnership, and I cannot see what other verdict they could have arrived at.

But a new trial is asked upon several grounds, in considering which I will first take up the alleged improper rejection of the evidence of Charles Hach and A. St. G. Hamersley, both of whom were prepared to testify to *ante litem* statements said to have been made by Buse to the effect that Mrs. Mueller was a partner, and it was argued that such evidence should have been admitted because a

prima facie case of partnership had been established by the evidence of Buse, Godfrey and McArthur, according to the principles laid down in *Nicholls* v. *Dowding*, 1 Stark, 81; *Alderson* v. *Clay*, Ib. 405, shewing that *prima facie* evidence of a partnership having been given, the declarations of one of the defendants against the other were admissible. But this reasoning, I think, overlooks the substantial test which in such cases as the present must be looked to to determine the question of partnership. The liability of Mrs. Mueller in this case depends upon a mere question of principal and agent, as laid down in *Cox* v. *Hickman*, 8 H. of L. Cas. 268, p. 302, where it is said that the defendants can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose, see also *Walker* v. *Hirsch*, 51 L.T. N.S. 481.

Following then this reasoning, the declarations of Buse could be binding upon and admissible against Mrs. Mueller only upon the supposition that he was her agent at the time he made such statements, and that the declarations of the agent bind the principal. But it is clear that such declarations bind the principal only when made in the course of the agency in regard to a transaction then depending, *et dum fervet opus*, *Fairlie* v. *Hastings*, 10 Ves. 123; *Kirkstall Brewery Co.* v. *Furness Ry. Co.* L.R. 9 Q.B. 468.

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Before the declarations then are admissible, the agency must be established, which view involves the appellant in the circuitous reasoning that the evidence of the declarations is admissible because made by the agent in the course of his agency, and he was such agent because he declared himself to be so; in other words, the admission of such testimony begs the entire question at issue here, that Buse was the agent of Mrs. Mueller and made the declarations during the continuance of the agency. But even if I should have been of opinion that the evidence was wrongly

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rejected, I should have been prepared to say that a new trial should not therefore have been granted, for in my opinion it would be flagrantly unjust to hold Mrs. Mueller affected by any statements made at any time by so reckless and unreliable a man as Buse has been proved to be; and, moreover, giving the fullest effect to the testimony of Godfrey and McArthur, nay, even taking the last evidence of Buse to be truth as against his former evidence negativing any partnership, there is nothing in the whole of the evidence to supply the test of partnership laid down in *Cox* v. *Hickman*, which must have established affirmatively that Buse was Mrs. Mueller's mandatory to sign the note and incur the obligation in question.

Then it is objected that the evidence of Buse given before the trial was wrongly admitted; but even apart from Rule 725, under which the learned Judge admitted it as being the examination of an opposite party, which I am inclined to think it was, evidence of a witness's former declarations inconsistent with the evidence at the trial is always admitted, and Rule 723 seems also to fully warrant its admission. Upon a review of the proceedings, I cannot see any mis-direction or non-direction which could have changed the verdict, and I am therefore of opinion that the motion for a new trial must be discharged with costs.

Judgment of DAVIE, C.J.

CREASE, J.: This was an application to the Divisional Court for an order setting aside the verdict of the jury and the judgment of DRAKE, J., upon the trial of the issues herein, directed to be tried by the Divisional Court on 14th May, 1894, and for a new trial, on several grounds, the principal of which were:

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The improper admission as evidence of portions of the evidence of Ernest Buse taken before the trial, under order of His Honour Judge BOLE, on 17th April, 1893, and tendered on behalf of the plaintiffs; and rejection of the evidence of A. St. George Hamersley, and of certain portions of the

evidence of Charles Hach, tendered on behalf of the plaintiffs; and for mis-direction of the learned Judge in telling the jury that the evidence of partnership rested solely on the statements of Mr. Godfrey and McArthur; and for mis-direction and non-direction on other points, in not making certain bald statements to the jury which would have been decisions on the questions at issue before the Court.

I have gone through the evidence, arguments and cases adduced herein, with care. The facts of the case, and the reasonable deductions from them, are so fully and clearly stated in the judgment of the learned Chief Justice, which I have been allowed to read, that it is not necessary to go over the same ground again.

The conduct of Ernest Buse, from first to last, has been one prolonged attempt, unfortunately too successful, to take advantage of the trusting confidence of a widow with whose husband he had been formerly well acquainted—she unable to read or write English—to draw from her large sums of money, some $26,000.00, upon the security of a business in the state of financial embarrassment of the Buse Mill Company, which he carefully concealed from her.

The whole of his contradictory evidence was very properly admitted by the Judge, not only the latter part of it but the earlier sworn statements on the same subject, which the latter evidence flatly contradicted, in order that the jury, having all available materials before them, should pass upon his credibility. Their decision marked their opinion that he was unworthy of credit.

The portions of Hach's evidence relating to admissions of partnership by Mrs. Mueller could not be received as evidence against her, because the relation of principal and agent between her and Buse was not first proved against her to make such declarations admissible under *Cox* v. *Hickman*, 8 H. of L. Cas. 268, at p. 302, and so were rightly rejected.

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The alleged non-directions complained of were sufficiently included and dealt with in the learned Judge's charge, and the verdict of the jury was such as reasonable men might fairly be expected to draw from the evidence before them, and had the learned Judge's approval.

I see no reason, therefore, for granting a new trial, and the motion must be dismissed with costs.

WALKEM, J., concurred.

Motion for a new trial dismissed with costs.

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Statutes—Construction of—Municipal law—Conflict between special and general Acts.

An amendment to the special Act of the City of Vancouver required a three-fifths majority of votes to pass a certain class of by-laws requiring submission to the electors. An amendment to the general Municipal Act passed on the same day authorized such by-laws to be passed by a majority only of the electors, and gave the same power to the cities of Vancouver and New Westminster, notwithstanding anything in the special Acts relating to said cities inconsistent with or repugnant thereto.

Upon a rule *nisi* to quash such a by-law, upon the ground that it received the assent of a majority only of the electors:

Held, by the Divisional Court (McCreight and Walkem, JJ., over-ruling Drake, J.):

Wherever there is a particular enactment and also a general enactment, and the latter, taken in its most comprehensive sense, would over-rule the former, the particular enactment must be operative to the exclusion of the other.

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APPEAL by William Bailey from a judgment of DRAKE, J., dismissing a rule *nisi* to quash By-law 214 of the City of Vancouver, authorizing the purchase, construction and operation of works for supplying the inhabitants of the City of Vancouver with electric light.

Statement.

The Vancouver Incorporation Act, 1886 (special), Sec. 127, Sub-sec. 8, dealing with the question of the number of votes required to pass by-laws of the class in question requiring submission to the electors, was amended by Stat. B.C. 1893, Cap. 63, Sec. 7, in answer to a petition from the City Council to the Provincial Legislature, by inserting therein the words "three-fifths" instead of the words "a majority," the section as amended being as follows: "Upon receiving the returns for the several wards, the city clerk shall add

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up the names; and if it shall appear from such returns that the total number of votes cast for such by-law be three-fifths of the votes polled, the city clerk shall forthwith declare such by-law carried, otherwise he will declare the by-law lost."

The General Municipal Act, 1892, contained a provision (section 4), "This Act shall be construed as applying to the Cities of New Westminster and Vancouver only so far as it is not repugnant to or inconsistent with their Acts of incorporation, or any amendments thereto, or any Acts or proclamations applicable to either of them," etc.

The provisions of the General Municipal Act, 1892, relating to by-laws of the class in question were section 104, "The Council may make by-laws [sub-section 9, as amended by Stat. B.C. (1895) Cap. 30, Sec. 15] for purchasing, constructing, operating and maintaining works for supplying the inhabitants of the municipality with water, electric light, or gas" subject by sub-section 10a of section 104, as amended by Stat. B.C. (1893) Cap. 30, Sec. 5, to the following, "The assent of the electors, in manner provided by section 119 of this Act, as amended by the Municipal Act Amendment Act, 1893, shall be and is hereby declared to be necessary to the validity of any by-laws to be passed under the preceding sub-sections of section 104;" and by section 119, "No by-law to which the assent of the electors is necessary before the final passing thereof shall be valid or of any effect unless the votes polled in favour thereof be that of at least three-fifths of the persons who shall vote upon such by-law."

Statement.

By statute passed on the same day as the above amendment to the Vancouver charter requiring a three-fifths vote for the passing of by-laws of the class in question, instead of a majority as formerly, section 119 of the General Municipal Act, *supra*, was amended, by requiring a majority of votes only instead of three-fifths as formerly, and section 104 of the General Act, *supra*, was amended by adding thereto a

sub-section " (140) The power granted by this section (104) and its sub-sections are hereby conferred upon the Municipal Councils of the Cities of Vancouver and New Westminster, and the said section and its sub-sections shall apply to the said cities notwithstanding anything in the special Acts relating to the said cities which may be inconsistent with or repugnant to the provisions of the said sub-sections."

There was no express power given in the Vancouver charter to pass by-laws for the construction and maintenance of electric light works *eo nomine*, but by section 142 of the private Act, *supra*, the Council may pass by-laws (1) ' for lighting the city, and for this purpose perform any work and place any fixtures," etc.

Statement.

The by-law in question was stated upon its face to have been passed by a majority of the electors to whom it was submitted.

A. J. McColl, Q.C., and *E. P. Davis, Q.C.*, for the applicant.

A. St. G. Hamersley, for the City of Vancouver.

DRAKE, J.: *Bailey* obtained a rule *nisi*, calling on the Corporation to shew cause why the by-law for raising $100,000.00 for electric lighting, passed 8th October last, should not be quashed, on the ground that the by-law was never duly carried by the ratepayers in accordance with the statutory provisions in that behalf, and that the by-law did not receive a three-fifths majority of the votes of the ratepayers, and further, was *ultra vires* of the Corporation.

Judgment of DRAKE, J.

The whole argument was addressed to the point, whether or not a three-fifths majority was necessary for the passage of this by-law.

Mr. *Hamersley*, for the Corporation, raised two preliminary objections—first, that the proceedings should have been by *mandamus* addressed to the Clerk of the Corporation, commanding him to declare the by-law not carried; secondly, that there was such irregularity in the affidavits on which

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the rule *nisi* was founded, that the by-law could not be looked at.

I over-ruled both these objections, holding that an objection to a by-law for illegality could be taken, although the illegality did not appear on the face of the by-law itself, but in the proceeding required by statute to be observed in its passage or inception.

This by-law was passed on 8th October last by a plurality of votes only, and not by a three-fifths majority. In order to trace out the particulars of this contention it is necessary to examine—first, the charter of the Vancouver incorporation and its numerous amendments, as well as the General Municipal Act and its numerous amendments, to ascertain how far the special Act has been varied and altered by the general Act.

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The special Act was passed in 1886, and by section 129 every by-law for raising money upon the credit of the city not required for its ordinary expenditure, shall receive the assent of the electors; and by sub-section 8 of section 127, as amended by section 7 of Stat. B.C. 1893, Cap. 63, the assent has to be signified by a majority of three-fifths of the votes cast.

In 1892 the General Municipal Act was passed, section 104 of which authorized every municipality to make, alter or repeal by-laws for the purposes therein specified.

Sub-section 9 gave power to make by-laws for constructing, operating, maintaining and supplying the inhabitants with, *inter alia*, electric light, and regulating the terms and conditions under which the same may be supplied and used. And sub-section 10a required the assent of the electors to the validity of any by-law passed for such purpose, or for any purpose mentioned in the previous ten sub-sections. By Stat. B.C. 1893, Cap. 30, this Act was amended, and a variety of additional powers were added to section 104, by sections 12 to 22; and by section 21 the powers given by section 104, as thereby amended, were conferred on the

Vancouver Municipal Council, notwithstanding anything in the special Act inconsistent with or repugnant to the said sub-section. The result of this clause is that Vancouver has all the powers given by sub-sections 9 and 10*a* of section 104, if it had not them before.

Sub-section 10*a* is amended by Stat. B.C. 1893, Cap. 30, making it read "the assent of the electors in manner provided by section 119 of this Act, as amended by the Municipal Act, 1893, shall be," etc.

Section 119, as amended by section 33 of the Act of 1893, reads as follows: "No by-law to which the assent of the electors is necessary before the final passing thereof, shall be valid or of any effect unless the vote polled in favour thereof shall be that of at least a majority of the persons who shall vote on such by-law."

Sub-section 10*a* of section 104 therefore requires every by-law for the purpose mentioned in sub-section 9 to be passed by a plurality of votes only, and not by a three-fifths majority.

The contention is that this by-law is purely a money by-law, and as such requires a three-fifths majority as mentioned in sub-section 8 of section 127 of the Vancouver Act, 1886, as amended by section 7, Cap. 63, of 1893. The by-law (214) recites that it is expedient to provide for the construction and operation of works for supplying the inhabitants of Vancouver with electric light, and in order to carry out these objects to raise a loan upon the credit of the city of $100,000.00. The first section authorizes the Mayor to raise such sum "to be paid into the hands of the treasurer of the city, for the purposes and with the objects hereinbefore recited." This language in connection with the recital discloses the sole object for which the money is to be raised and defines how the money is to be expended, and it is one of the objects mentioned in sub-section 9 of section 104. The by-law is not, therefore, a simple money

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by-law, for the recital is an estoppel *in pais* against the city expending money for any other purpose than that mentioned, and in my opinion a bare majority vote, which it duly received, was all that it required.

It was contended that any by-law relating to electric lighting should stand by itself; in other words, that if the Corporation desired to take power to construct the necessary works, they should pass a by-law for that purpose, and have such a by-law sanctioned by a bare majority vote, but any money required to give effect to the proposed works should be separately submitted, and would then have to be passed by a three-fifths majority. It is conceived that such a course would be more conducive to caution on the part of the voters, but there is nothing in the Act that compels this course to be adopted, and as long as the by-law clearly indicates its object, and at the same time states the amount of money required and mode in which it is intended to raise the necessary funds, I think it all sufficient.

Judgment of DRAKE, J.

The only question raised in this case is of the construction of the statutes, and if I can ascertain the meaning of the Act from the language used, I must give effect to it in its primary and ordinary sense. If the language used is dubious, I must then endeavour to construe it so as to carry out the object for which the Act was passed. Keeping these objects in view, I think this by-law is valid and carried by the statutory majority of voters.

The rule will therefore be dismissed with costs.

Rule dismissed with costs.

Statement.

From this judgment the applicant appealed to the Divisional Court, and the appeal was argued before

Argument.

McCREIGHT and WALKEM, JJ., on 14th and 24th December, 1894.

A. J. McColl, Q.C., and *E. P. Davis, Q.C.*, for the appeal: This is a by-law for raising upon the credit of the city, money not required for the ordinary expenditure, and not payable within the same municipal year, and, under the Vancouver Incorporation Act, 1886, section 129, should receive the assent of the electors in the manner prescribed in that Act, *i.e.*, by section 127, sub-section 8, as amended by Stat. B.C. (1893) Cap. 63, Sec. 7, which requires the assent to be that of three-fifths of the votes polled. By section 45 of the Vancouver Incorporation Act, 1886, the Council may levy a rate on the property assessed not exceeding one and one-third cents on the dollar to provide for the necessary expenses of the city, but by-laws for raising any money required over what is procured in this manner must receive the assent of the electors in the manner provided by section 127, sub-section 8, *supra*. The Legislature in passing the Municipal Act Amendment Act, 1893, Sec. 33, evidently did not contemplate interfering with the operation of Stat. B.C. 1893 Cap. 63, Sec. 7, amending section 127, sub-section 8 of the Vancouver charter, by requiring a three-fifths instead of a majority only of votes cast, as that amendment was made, at the same session, expressly on the petition of the City Council of Vancouver. If there is any inconsistency, the amendment to the charter, Stat. B.C. Cap. 63, Sec. 7, must prevail, being a particular enactment in reference to the city of Vancouver, as against a general enactment having reference indiscriminately to all municipalities not otherwise provided for.

Argument.

A special Act is not repealed by a subsequent general Act, *Pretty* v. *Solly*, 26 Beav. 606; *Conservators of Thames* v. *Hall*, L.R. 3 C.P. 415; *Thorpe* v. *Adams*, L.R. 6 C.P. 125, at p. 138; Hardcastle on Statutes, 2nd Ed. 244–346; *Mount* v. *Taylor*, L.R. 3 C.P. 645.

A. St. G. Hamersley, contra: The by-law in question is governed by the general Municipal Act. There is no power conferred by the Vancouver charter on the Council

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of Vancouver to pass by-laws for the purchase, maintenance, construction and operation of works for supplying electric light. This power is conferred by the general Municipal Act, 1892, Sec. 104, Sub-Sec. 9, which, with the sub-sections of section 104, is by the Municipal Act Amendment Act, 1893, Sec. 21, made applicable to the city of Vancouver, notwithstanding any repugnant or inconsistent provision in the Vancouver charter. The provisions of the Vancouver charter relating to the passing of money by-laws authorized by that charter, do not therefore apply to this by-law, as to which reference must be had to the provisions of the general Act, which authorizes and governs the exercise of the power. Sub-section 10*a* of section 104, as amended by the Municipal Act Amendment Act, 1893, Sec. 15, requires the assent of the electors in manner provided by section 119 of the general Municipal Act, *supra*, which as amended by the Municipal Act Amendment Act, 1893, Sec. 33, requires the assent of the majority of the electors only. The Vancouver Incorporation Act, Sec. 129, deals generally with money by-laws, and section 127, prescribing the manner by which such by-laws shall receive the assent of the electors excepts (sub-section 2) cases otherwise provided for. The general Municipal Act, *supra*, Sec. 104, deals with particular by-laws, of which this is one, and, if there is any conflict, must over-ride sections 127 and 128 of the charter, which apply generally to all by-laws except where "otherwise provided for," *Pretty* v. *Solly*, 26 Beav. 606, ROMILLY, M.R., at p. 610; *De Winton* v. *Brecon*, 28 L.J. Ch. 598–600; *Churchill* v. *Crease*, 5 Bing. 177, BEST, C.J., at p. 180; *Fitzgerald* v. *Champneys*, 30 L.J. Ch. 777, WOOD, V.C., at p. 782; Endlich-Maxwell on Statutes, Ed. 1888, pp. 287–289. The Legislature having conferred on the Council, by the (general) Municipal Act, *supra*, power to purchase, construct, operate and maintain works for supplying electric light, must necessarily have intended also to confer the power of raising money for the purchase,

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etc., by the same by-law and in the same manner. The power to purchase implies the power to raise the money to purchase, *Summers* v. *Holborn*, 62 L.J.M.C. Lord COLERIDGE, C.J., at p. 84 ; *Brown* v. *Great Western Railway Co.*, 9 Q.B.D. 753 ; *Gard* v. *London Commissioner of Sewers*, 28 Ch. D. 511 ; *Regina* v. *Tonbridge*, 13 Q.B.D. 339 ; *Reid* v. *Reid*, 31 Ch. D. 407.

E. P. Davis, Q.C., in reply.

Cur. adv. vult.

11th January, 1895.

MCCREIGHT, J.: My brother WALKEM and I have carefully considered this case and have come to the following conclusions :—

In this case the only question appears to be whether the by-law passed by only a majority of the electors of Vancouver whose votes were polled was legal, or whether it was necessary that there should be a majority of three-fifths of the votes polled, and this of course depends upon the true construction of the municipal Acts, particularly those which relate specially to the City of Vancouver.

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By section 127 (sub-section 8) of the city charter, 1886, a majority only was required, but in April, 1893, an Act was passed to amend the charter, and the preamble recited that a petition had been presented praying for certain amendments thereto, and by section 7 of the said Act of 1893, passed, I presume, in pursuance of the petition, the said sub-section (8) of section 127 was amended by striking out the words "a majority," in the third line thereof, and inserting in lieu thereof the words "three-fifths." It would be difficult to conceive a more deliberate expression of intention that in Vancouver a three-fifths majority should be necessary, and we find in the preamble reciting the petition for the amendments of the charter of 1886, that it was deemed expedient to grant the prayer of such petition,

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and then the passage of the above mentioned section 7, along with other amendments. But it has been contended on behalf of the city that the general Municipal Act of 1892, and amending Act of 1893, altogether displace this deliberate expression of intention.

The contention seems to be absolutely inconsistent with well-known rules of law which have guided our Courts for many years.

Out of the many instances of the application of such rules, I will only refer to the judgment of BOVILL, C.J., in *Thorpe* v. *Adams*. L.R. 6 C.P. 125, at p. 133, and see the remarks of one of our most learned Judges, Mr. Justice WILLES, at p. 138 of the same case. The section mainly relied on by the counsel for the city is section 21 of the Municipal Act of 1893, which reads as follows (quoting the section *vide* page 435, line 1 *supra*).

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On reference to section 104 of the Act of 1892, that deals but very imperfectly with the nature of the assent, and the assent generally, to be given to by-laws by electors. Its main object is to enumerate certain subjects of legislation to be dealt with by by-laws of municipalities in general, and of course, by the Municipal Act of 1893, the Cities of New Westminster and Vancouver are to enjoy those powers of legislation, but on perusal of section 104 many subjects are specified as requiring assent where the necessity for such assent was fully provided for by other and appropriate sections, and in dealing with many of the subjects involving the expenditure of money to perhaps a large amount, there is silence as to the assent of electors, and throughout as to the nature of the assent; shewing that when we wish to find what majority is required we must turn either to the Municipal Act of 1892, Sec. 119, requiring three-fifths, or the repealing section of the Municipal Act Amendment Act, 1893, Sec. 33, requiring only a majority. These sections, as might be expected, deal only with municipalities in general, leaving the Cities of Vancouver and New West-

minster of course to be dealt with by the provisions of their respective charters and amendments. In truth, the fallacy of the argument on behalf of the city consists in neglecting the rule which that very learned Judge, Mr. Justice WILLES, calls a "cardinal rule that the Courts should be guided more by the words of a clause dealing specially with the matter than by general inference from the whole," *Roberts* v. *Bury Commissioners*, L.R. 4 C.P. 755, at p. 760. No doubt he is there speaking of the construction of a contract, but substantially the same rules apply whether the object be to interpret a statute, a will or a contract, the main object in each case being to ascertain the intention of the framer of the document. There is further a very recent case in which this cardinal principle was applied by the Privy Council namely, *St. Catherine's Milling & Lumber Company* v. *The Queen*, L.R. 14 App. Cas. 46, see specially at page 59, where it was held that the rights of the Province of Ontario in Indian lands must be determined by section 109 B.N.A. Act, 1867, dealing with the particular subject, rather than by section 91 and its sub-sections dealing, as their Lordships say, "only with the distribution of legislative power."

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Of course the application of this cardinal rule to the present case becomes even more obvious when we regard Section 7 of Cap. 63 of 1893, requiring for Vancouver by a private Act a three-fifths majority. Another fallacy in the argument is the neglect of the equally settled rule mentioned by ROMILLY, M.R., in *Pretty* v. *Solly*, 26 Beav. 606, at p. 610, where he says the rule is that "wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would over-rule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply," and the application of this rule must be the same when the enactments are in the same statute, or passed on the same day, see Endlich-

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Maxwell on Statutes, Ed. 1888, p. 59, Sec. 45, or although not passed at the same time are *in pari materia*, see *per* Lord CAMPBELL, in *Waterlow* v. *Dobson*, 27 L.J.Q.B. 55.

The appeal must be allowed with costs here and below, and the by-law quashed.

WALKEM, J., concurred.

Appeal allowed.

NOTE.—This judgment was sustained by the Supreme Court of Canada on appeal, see 25 S.C.R. 62.

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Practice—Pleading—Discovery—Rule 178.

When it appears from the statement of claim that the defendant has, on the circumstances alleged, the means of knowing the details of the matters charged, and the plaintiff has not, general allegations are not embarrassing, and the defendant is not entitled to particulars until after he has given discovery.

A plaintiff may in his statement of claim deduce from the facts alleged, and set up, alternative causes of action.

Allegations that, etc., "as far as the plaintiffs can discover," in such a statement of claim are not embarrassing.

Statement.

APPEAL by the plaintiffs to the Divisional Court from the order of DRAKE, J., striking out as embarrassing certain parts of the statement of claim. The action was brought by the plaintiffs, as being, together with the defendant Arthur Garesche, *cestuis que trustent*, under a certain trust deed executed by their mother, against said Arthur Garesche, in his capacity as trustee under the deed, and J. K. Wilson, who,

as alleged, had acted in the affairs of the estate under a power of attorney from Arthur Garesche during his absence from the jurisdiction, and, before the making of the power of attorney, had sold to the estate a property of his own in Portland, Oregon, U.S.A., for $25,000.00, the same being unimproved and speculative, and an improper investment of the trust funds. For the purpose of fixing the defendant Wilson with liability as a constructive trustee at the time of the transaction, the statement of claim stated certain facts as occurring prior to his dealing with the affairs of the estate under the power of attorney, *inter alia* that he was consulted concerning the way in which the trust funds were, at such prior time, invested, namely, in a certain private banking business, and that he examined into the affairs of the said bank on behalf of the trust estate, and knew of the trust deed, and proceeded, "and finally it was determined that the said interest of the said estate in the said bank should be sold," and that the proceeds came into the hands first of the trustee, the defendant Arthur Garesche, and that he, being about to leave the jurisdiction to reside abroad, arranged to leave the whole of the funds of the estate and its management in the hands of the defendant, J. K. Wilson, and "in effect" appointed him trustee thereof, and that a general power of attorney was thereupon executed from Arthur Garesche to J. K. Wilson, "which said appointment the plaintiffs say was in law to all intents and purposes an appointment of J. K. Wilson as trustee of said estate, pursuant to a power contained in the said trust deed for the appointment of another trustee by said Arthur Garesche, or at all events that the said J. K. Wilson was, under all the circumstances, in law a constructive trustee thereof." It was further charged that J. K. Wilson afterwards received $80,000.00 of the said estate monies and deposited them to his own credit in a bank, mixing the same with his own private funds, and that he carried on a series of speculations either directly with, or indirectly by the credit of, the said

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estate funds so standing to his credit, and made large profits thereby.

As to an investment by J. K. Wilson of estate funds, it was charged that he lent same to his own tenant on the security of a chattel mortgage, "the effect of the transaction being that the said J. K. Wilson had himself always a prior lien as landlord for rent, which was a very large sum, and was, after the date of the mortgage, allowed to be in arrear, so that the said estate had practically no security for the said advance, and the said loan became overdue and was unpaid, and said Tulloch left this Province." Mr. Justice DRAKE ordered the plaintiff to amend by stating by whom it was suggested and determined that the interest in the bank should be sold, and to give particulars of the transactions in which J. K. Wilson made profits by use of the estate monies, or that the allegations be struck out, and also ordered that the allegation that J. K. Wilson was in effect appointed a trustee by Arthur Garesche, or that he was on the facts a constructive trustee, be struck out, as being conclusions of law and uncertain and alternative.

Statement.

The appeal was heard before DAVIE, C.J., and MCCREIGHT, J., on 30th January, 1896.

Robert Cassidy, for the appeal.

A. P. Luxton, contra.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: This is an action brought by several *cestuis que trustent*, one of them an infant, by her next friend, against A. Garesche, surviving trustee of the trust estate, and J. Keith Wilson.

The said J. K. Wilson, as I can gather from the statement of claim, has either been actually appointed a co-trustee by the defendant A. Garesche, who, according to paragraph 5, had full power as surviving trustee to make such appointment, or at least holds a full power of attorney from the

said A. Garesche to deal with the trust estate and who has so dealt with the funds as to incur liability either as such co-trustee, or assuming that he was only agent for A. Garesche, has by such dealing made himself liable to account as principal to the plaintiffs, in which case he has become a "constructive trustee," see Lewin on Trusts, 9th Ed. p. 196. Mr. Justice DRAKE had decided as to paragraph 9, that the words "after the death of the said Alexander Alfred Green it was suggested, etc., and finally it was determined that the said interest of the said estate in the said Bank should be sold," be struck out, or that the said paragraph 9 be amended so as to state by whom the determination alleged was suggested. I think this decision is in conflict with the well known rule in pleading "That which is more peculiarly within the knowledge of the defendant the plaintiff is not bound to state," see *Hobson* v. *Middleton*, 6 B. & C. 295. The plaintiffs here probably know litttle or nothing of the transaction whilst the defendants must know all about it. See also *Murphy* v. *Glass*, L.R. 2 P.C. 408, as to the pleading of facts which are peculiarly within the knowledge of the opposite party. The same rule regulates the burden of proof, see Stephen's Digest of the Law of Evidence, Ed. 1893, Art. 96, p. 108.

The words "in effect," in paragraph 9 also should not be struck out, for the same reason. I think the last six lines of paragraph 11 should not be struck out, either for the above reason or because the plaintiffs have a right to contend that J. K. Wilson is liable as trustee, whether actual or constructive. It would be manifestly unjust to oblige the plaintiff to confine himself to either one of the two theories. Inconsistent facts may be pleaded, Cunningham & Mattinson on Pleading, 2nd Ed. p. 50, and see also Rule 178, "If a person so pleading desires to rely in the alternative upon more, etc., relations than one, as to be implied from such circumstances, he may state the same in the alternative." I think the rule fully authorizes the

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allegation in the alternative that J. K. Wilson was either an actual or a constructive trustee.

The next decision is that paragraphs 12, 13 and 14, shall be amended as plaintiffs may be advised, or that the same be struck out. I think it is important in the interests of justice that they should be retained, and very much as they are framed now, at least I fail to see that any material alterations should be made in them. They charge in substance that it was arranged between the defendants that J. K. Wilson should sell some doubtful investments which he had in Portland for $25,000.00 to the trust estate, the consideration mentioned in the deed is alleged to be one dollar, which is certainly strange—anyhow this seems to be in plain violation of the rule that a trustee should not buy from the *cestui que trust* any part of the trust estate, *Fox* v. *Mackreth*, 1 W. & T. Ldg. Cas. 141; the converse case is of course open to the same objection, *e.g.*, as where the trustee sells the trust estate. The danger of fraud is about the same in the two cases, and aggravated by the circumstance as alleged that A. Garesche reserved to himself the power of treating the sale as either to himself or to the estate, as the sale might in the event turn out to be either an imprudent or a prudent speculation for himself.

Judgment of McCREIGHT, J.

I see nothing improper in the frame of the allegations, for they describe something by which J. K. Wilson may have profited or may profit at the expense of the trust estate. They are framed similarly to the forms in Cunningham & Mattinson on Pleading, 2nd Ed. pp. 571, 577–8, where a form of statement of claim for breach of trust is given also for breach of trust in investing the trust funds in trading speculations. If the plaintiffs did not allege these transactions it would be suggested that they were not entitled to interrogate about them, and so perhaps justice might be defeated. Under the old rules of equity pleading a bill would have been framed in this manner. I think it is not right that the words "thereby accounting for the

amount of such estate monies and interest at four per cent. per annum," should be struck out. Curiously enough, the form at page 578 of Cunningham & Mattinson on Pleading, 2nd Ed., "action against trustee for breach of trust in regard to two funds claiming interest on one fund and profits made with the other," covers this case, and it is I believe well known law that the *cestuis que trust* may claim either interest or profits in such case at his election. I think paragraph 19 indicates a grave breach of trust, and that to strike out any portion of it might hamper the plaintiffs in interrogating and proving such breach of trust. The plaintiffs are bound to state the material facts upon which they rely.

The gravamen of the charge is that whilst $2,100.00 of trust funds was lent on the chattel mortgage, such chattel mortgage was liable to be defeated and rendered worthless by J. K. Wilson enforcing his claim for rent by distress on the chattels. The case of *Pearl* v. *Deacon*, 1 De G. & J. 461, shews how a Court deals with such a transaction in the case of a surety, and the Court is at least equally anxious in the case of a trustee. In the case of *Pearl* v. *Deacon*, I think no fraud was charged. The words in paragraph 19, "and the said Tullock left this province," seem to be material as further indicating the perilous character of the security, and the "overdue interest has not been paid." I see nothing wrong in paragraphs 23, 24 or 25 of the statement of claim; what embarrassment can be caused by the plaintiffs averring something with the qualification "as far as they can discover." I think the words struck out by DRAKE, J., in paragraph 25 are material, as shewing at least negligence on the part of J. K. Wilson, and should be retained.

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As regards particulars, *Miller* v. *Harper*, 38 Ch. D. 110, and 57 L.J. Ch. 1091, shews that where the defendant has means of knowing facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he

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has given the discovery, and I think no particulars need at present be given. I have only to add that the language of Lord BRAMWELL, in *Phillips* v. *Phillips*, 4 Q.B.D. (C.A.) 127, shews this statement of claim to be the reverse of embarrassing in the legal sense of the word. It is well framed, and as particular and minute as can be expected where the facts are peculiarly within the knowledge of the defendant, and not of the plaintiff. I think the statement of claim as originally framed should stand, and the judgment appealed from should be reversed.

DAVIE, C.J., concurred.

Appeal allowed with costs.

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HUDSON'S BAY COMPANY v. HAZLETT.

Execution—C.S.B.C. 1888, Cap. 57, Sec. 10—Exemption from seizure and sale of goods and chattels—Whether book debts within.

Book-debts are not within the exemption of the following provision of the Homestead Act, C.S.B.C. 1888, Cap. 57, Sec. 10, "The following personal property shall be exempt from forced seizure and sale by any process at law or in equity; that is to say, the goods and chattels of any debtor . . . to the value of $500.00," as not being within the description of personal property capable of seizure, or capable of being dealt with conformably to the provisions of the Act relating to the mode of claiming the exemption.

Statement. APPEAL from a judgment of DAVIE, C.J., dismissing a summons, obtained by the judgment debtor, to discharge an order granted by him appointing a receiver of certain

book debts due to the judgment debtor, by way of giving the plaintiffs equitable execution upon their judgment. The grounds of the application were that the receiving order ought not to have been granted, as the appropriate remedy was by way of attachment of the debts; and also that the whole of the book debts in question, which were under $500.00 in value, were exempt from process by way of execution by virtue of the Homestead Act, C.S.B.C. 1888, Cap. 57, Sec. 10 (*a*).

Archer Martin appeared for the judgment debtor on the application.

B. H. T. Drake, contra.

DAVIE, C.J: The plaintiffs are judgment creditors of the defendant, who until recently carried on a grocery business at Victoria, the stock-in-trade of which was sold out on 21st May last, by virtue of a chattel mortgage. He is not the owner of any exigible real or personal estate. He has some book debts owing to him, but, as the books are in the possession of the defendants' solicitor and the defendant himself has departed for San Francisco, the plaintiffs are unable by the ordinary process of attachment to realize upon these debts. The plaintiffs' cashier states in his affidavit that without the aid of this Court the plaintiffs will be defrauded from obtaining the full benefit of their judgment, as notices have been sent out by the defendant's solicitor to the various debtors of the defendant, requesting them to pay the amount of their indebtedness to him. Under these circumstances it appeared to me "just and convenient" that a receiver of the defendant's estate should

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NOTE (*a*). "10. The following personal property shall be exempt from forced seizure or sale by any process at law or in equity; that is to say, the goods and chattels of any debtor, at the option of such debtor, or if dead, of his personal representative, to the value of five hundred dollars."

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be appointed to get in these debts, and by an order dated 4th June, Mr. Sharp, the plaintiff's cashier, was appointed as such receiver.

On 8th June Mr. *Martin* moved upon notice to discharge the receiving order, on the grounds that it was made inadvertently, and if not without jurisdiction, contrary to the usual practice of the Court, and also on a further ground, which I shall presently discuss.

I think that the facts in this case bring it within *Kirk* v. *Burgess*, 15 Ont. 608; *Re Coney*, 52 L.T.N.S. 961; *Manchester Banking Co.* v. *Parkinson*, 22 Q.B.D. 173; *In re Shephard*, 43 Ch. D. 131, and *Harris* v. *Beauchamp*, 9 R. 653, which seem to recognize and lay down the principle that where there are special circumstances making it just or convenient to appoint a receiver, there is jurisdiction to appoint one. In *Westhead* v. *Riley*, 25 Ch. D. 413, it was held that a receiver might be appointed in a case where the ordinary remedy of attachment was inapplicable, and equally I think may a receiver be appointed here, where, although not inapplicable, process of garnishment cannot be resorted to for want of information as to what debts are owing. I therefore think that the receiving order was regular. But a more serious question has been presented under section 10 of the Homestead Amendment Act, which, under the head of "Exemption of Personal Property," enacts (quoting the section), and, it being admitted that the debts which will be covered by the receiving order in this case do not amount to $500.00, Mr. *Martin* has argued that book debts come within the definition either of "goods and chattels" or of "personal property," and are therefore exempt. My impression was that the point urged by Mr. *Martin* was not open to argument, but the authorities which he quoted convince me that there is more to be said in support of his view than I thought. The question whether book debts were exempt as goods and chattels from process of garnishment came before WALKEM, J., and myself on 6th June, in

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the case of *Anglo-Columbian Co.* v. *Blake* (*a*), and the point was practicably given up by counsel in favour of exemption. The decision in that case was against the exemption, and would bind me I think in this case. Apart, however, from the decision in that case, I am of the opinion that the exemption cannot be supported.

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If the case turned merely on the question, what is to be included under the general expressions "personal property" or "goods and chattels," I should be disposed to say that Mr. *Martin's* contention was unanswerable. See the authorities quoted by him of Williams on Personal Property 13th Ed. 11; *Robinson* v. *Jenkins*, 6 T.L.R. 158, and *Colonial Bank* v. *Whinney*. 55 L.J. Ch. 585, at p. 590, where Lord Justice LINDLEY remarks that choses in action have been deemed to be included within the expression "goods and chattels" in all bankruptcy Acts from the time of James I. downwards. But there are words in the section which, in my opinion, qualify and limit the expressions "goods and chattels" and "personal property"—these are the words "seizure and

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NOTE (*a*). This was an appeal to two Judges of the Supreme Court by way of case stated from a judgment of BOLE, Co. J. The plaintiff, having an unsatisfied judgment, garnished a debt due to the judgment debtor, whose entire personal property including the debt attached was under $500.00. The judgment debtor fyled a claim to exemption under the Homestead Act, C.S.B.C. 1888, Cap. 57, Sec. 10. BOLE, Co. J., held that debts due to the judgment debtor to the extent of $500.00 are, under the Act, exempt from garnishing proceedings, as being goods and chattels liable to seizure, etc., but stated a case for the opinion of the Supreme Court, containing the following questions:—(1) Is the debt of $59.65 garnished and paid by the garnishee into Court goods and chattels within the meaning of section 10 of the Homestead Act and Amending Acts? (2) Was the attachment of the debt due from the garnishee to the defendant a forced seizure or sale by any process at law or in equity of the goods and chattels of the defendant, within the meaning of said section and Acts? (3) Did the defendant claim the benefit of the Homestead Act and Amending Acts, and select within two days after seizure or notice thereof, in conformity with the provisions of the Homestead Amendment Act, 1890? (4) Was it

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sale;" goods and chattels are to be exempt, it is true, not exempt for all purposes, but exempt from "seizure and sale" under any process of law or in equity. Consequently, I take it, that unless "goods and chattels" are such as might be seized or sold, they are not exempt. In presenting this view Mr. *Drake*, who argued the case for the judgment creditor, drew my attention to the 95th section of the English Bankruptcy Act, 1849, Sec. 133, and to the case of *Re Hutchinson Ex parte Plowden*, 54 L.T.N.S. 302, decided thereunder. Section 133 enacts that "notwithstanding any prior Act of bankruptcy, any execution or attachment against the 'goods' of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication should be valid," etc. In reference to this section, CAVE, J., in the case just referred to, remarks that "it was never concluded or suggested that a garnishee order *nisi* attaching debts due to a debtor was an execution or attachment against the goods of a debtor, probably because, whatever might be the meaning to be attached to the word "goods" in that section, such an order cannot

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necessary for the defendant to exercise the option mentioned in section 10 of the Homestead Act strictly in conformity with the Homestead Amendment Act, 1890? To these questions the learned County Court Judge added the following: Where the entire personal property of the judgment debtor is shewn to be less than $500.00, can a garnishing summons for an amount under $500.00 be enforced? citing *Gibbs* v. *Lawrence*, 30 L.J. Ch. 170, and Wharton's Law Lexicon, pp. 131 and 330. The appeal was argued on 6th June, 1895, *G. H. Cowan* appeared for the plaintiff, *J. A. Russell* for the defendant. The Court (Davie, C.J., and Walkem, J.), *held* that the term goods and chattels in section 10 of the Homestead Act, *supra*, must be construed with reference to the Homestead Amendment Act, 1890, and that the attachment of a debt is not a "forced seizure . . . of goods and chattels of the defendant" within the meaning of the said Acts, service of a garnishing order not being a seizure.

NOTE.—As to the exercise by a judgment debtor of his option of claiming an exemption, see *Pilling* v. *Stewart*, 4 B.C. 94.

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be executed by "seizure and sale." Although ordinarily a garnishing order *nisi*, attaching debts due to a debtor, may be said to be a "form of execution," as remarked by JESSEL, M.R., in *Simmons* v. *Storer*, 14 Ch. D. 155, yet when you come to deal with a statute referring to seizure and sale as a method for carrying out execution, a garnishing order *nisi* is not an execution, because, as remarked by CAVE, J., *In re Hutchinson Ex parte Plowden*, *supra*, "whatever might be the meaning to be attached to the word 'goods,' such an order cannot be executed by seizure and sale." The same reasoning it appears to me applies to section 10 of the Homestead Act, which exempts the goods and chattels, but only from forced seizure or sale by some process at law or in equity. The process of attachment by garnishing or receiving order is not a process under which the debts would be seized or sold, and therefore the exemption does not apply.

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There is also much force in Mr. *Drake's* argument, based on the County Courts Amendment Act, 1893, Sec. 19, which specially exempts the wages of a labourer from attachment to the extent of $40.00. If choses in action had already been exempt to the extent of $500.00, this provision would have been unnecessary. The amendment seems to be equivalent to a declaration by the Legislature that choses in action were not the subject of exemption.

Holding these views I am of opinion that this motion must be dismissed.

Summons dismissed.

Statement.

From this judgment the judgment debtor appealed to two Judges of the Supreme Court, and the appeal was argued before MCCREIGHT and DRAKE, JJ., on January 31st, 1896.

Argument.

Archer Martin, for the appeal: Book debts are personal

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property within the meaning of the term "goods and chattels," and so exempt. By the County Courts Act, C.S. B.C. 1888, Cap. 25, Sec. 134, "Every officer executing any process of execution . . . may . . . seize and take *any* of the goods and chattels" of the person against whom the same is issued. An interest in a partnership may be seized under a *fi. fa.*, also a term of years, also an interest in a ship, yet none of these has any physical existence. Simple contract debts have been constantly seized in outlawry proceedings, *Bullock* v. *Dodds*, 2 B. & Ald. 275. Book debts were held to be within the language of a statute providing an exemption in respect of "personal property liable to levy and sale," *Kennedy* v. *Smith*, 11 Southern Reporter, 665; and the word "levy" is more comprehensive than "seizure," for it imports not only seizure but also recovery of the debt into the sheriff's hands. [DRAKE, J., the exemption imports power of selection.] Not necessarily, *Vye* v. *McNeill*, 3 B.C. 24. A judgment creditor cannot obtain, even under a receiving order, from an insurance company the money due for goods which are exempt from attachment or seizure, *Osler* v. *Muter*, 19 O.A.R. 94; yet such a right of recovery is even less tangible if possible than a chose in action. The sections relating to appraisement apply only to the case of an excess in value; here the admitted value is below $500.00; even did they apply there is no necessity for a physical existence to apply rules of appraisement; there is no difficulty whatever in appraising things which have no physical existence; it is done continually in this Court, *e.g.* on probate valuations, and in partnership and other estates where book debts have to be valued and apportioned.

Argument.

J. A. Aikman, *contra*, not called on.

Judgment of McCREIGHT, J.

McCREIGHT, J.: We are called upon to say that the judgment of the Chief Justice was wrong. When asked to interpret the language of a statute, it must not be done in

the abstract, but the intention of the particular Act must be considered, *Blackwood* v. *The Queen*, 8 App. Cas. 82. We must examine similar language in the same statute to find in what sense words have been used. What do the Legislature here intend to do? There is nothing similar to the language of the Homestead Amendment Act, 1890, in the Ontario Act. It is quite plain that the Legislature in making the exemption had reference to tangible property. Sections 2 and 3 of the Homestead Amendment Act, *supra*, (*a*) appear to me to contemplate the exemption of specific goods and chattels capable of being selected physically, and of being stated to be in certain places. It is impossible to say that the language of the sections is properly referable to book debts. The sheriff has no power of ascertaining what the book debts may be worth; the only way effectually to seize book debts is to stop the debtor from paying them over. In section 4 it is provided that if the goods claimed by the debtor be appraised at more than $500.00, then the

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NOTE (*a*) "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 five hundred dollars from the personal property so seized; and every debtor whose personal property has been seized as aforesaid may, within two days after such seizure or notice thereof, whichever shall be the longest time, select goods and chattels to the amount of five hundred dollars from the personal property so seized, and thereupon, if a list of these selected articles shall not have been delivered to the sheriff or other officer by the debtor, the sheriff or other officer shall make a written list thereof, a copy of which he shall give to the debtor, and the sheriff or other officer shall forthwith, if in his opinion the goods and chattels so selected do not exceed in value the sum of five hundred dollars, withdraw from possession of the same, and the same shall be, and such sheriff or other officer shall certify in writing that they are the goods and chattels exempt under section 10 of the Homestead Act."

"3. Should such sheriff or other officer be of the opinion that the goods and chattels selected by such debtor exceed in value the sum of five hundred dollars, he shall, within one day after the receipt or

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appraiser shall (the debtor still being allowed his option if he claims it) appraise so much of the claimed goods as shall not exceed $500.00, and the goods so appraised at $500.00 shall constitute and be certified as the exempt goods. And I think the word goods does not include book debts. In the opinion contended for by the judgment debtor the appraiser had no power of tendering him an oath as to the face value of the book debts; there would be no means of preventing the debtor from shewing that the book debts were worth a small proportion of their face value, and thus obtain a very large exemption. In my opinion the meaning to be applied to the words "goods and chattels" is that to be taken from common parlance. The test is whether the thing in question is capable of larceny, that is of being physically seized and taken away.

Judgment of DRAKE, J.

DRAKE, J.: I agree with the judgment just pronounced by my brother MCCREIGHT. The exemption intended in the Act was limited to goods of particular character. In 1 & 2 Vic. Cap. 110, Sec. 12, power was, for the first time, given to the sheriff to seize cheques, bonds, etc.; it also gave power to the sheriff to collect money thereon and to

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making of the list referred to in the preceding section, notify such debtor to that effect in writing, and he shall (unless within one day more such sheriff or other officer and such debtor agree upon the goods and chattels to be exempt not to exceed in value the sum of five hundred dollars) without delay call upon a Justice of the Peace residing in the locality, who shall at once name an appraiser, whose duty it shall be to appraise, and who shall when sworn, without delay, appraise the selected goods and chattels in the presence of the debtor or after one day's notice to him, to be served either personally or tacked up in some conspicuous place where the seized goods are situate; and when a claim to exemption has been made, and has been admitted or agreed upon as aforesaid, or when the goods claimed have been selected and appraised under or at the sum of five hundred dollars, such sheriff or other officer shall withdraw from possession of the same, and the same shall be, and such officer shall certify in writing that they are, the goods and chattels exempt under section 10 of the Homestead Act."

give the final discharge, and it does not touch the question of book debts. The sheriff has power to seize personal property, but not all kinds of personal property. The law has provided a special form of procedure for realizing upon book debts, namely garnishment. A consideration of the language of this Act shews that tangible goods only were intended to be exempt. The language of section 4, that the notice of appraisement shall be tacked up in some conspicuous place where the seized goods are situate, is inapplicable to book debts.

Appeal dismissed with costs.

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THE EDISON GENERAL ELECTRIC COMPANY v. THE VANCOUVER & NEW WESTMINSTER TRAMWAY COMPANY AND THE BANK OF BRITISH COLUMBIA.

C.S.B.C. Cap. 51, Sec. 1—Confession of Judgment—Fraudulent preference—Pressure.

The Tramway Company being insolvent, the plaintiffs, on 29th December, obtained a default judgment against it, but did not issue execution thereon. On 13th January the Tramway Company obtained a Chamber summons, signed by a Judge, to set aside the plaintiffs' judgment as irregular and in breach of an agreement not to proceed. The summons contained the words "in the meantime let all proceedings be stayed." On 17th January the Bank of British Columbia commenced an action against the Tramway Company by specially endorsed writ, and on the morning of 24th January, before the hour for the regular sitting of the Judge in Chambers, the Tramway Company, by their counsel, attended without summons in the Judge's private room and consented to an order for judgment thereon, which was immediately registered and execution issued. Afterwards, on the same morning, in Chambers, the summons of the Tramway Company to set aside the plaintiffs' judgment was argued; judgment was reserved, and on 27th was delivered, dismissing the application.

In an action to set aside or postpone the judgment and execution of the Bank, as being a confession of judgment by the Tramway Company obtained by collusion, and therefore void within the meaning of the Fraudulent Preference Act,

Held, per CREASE, J., at the trial: (1) That what took place was not a confession of judgment within the Act.

(2) That there was pressure on the part of the Bank of the Tramway Company to do what they did, rebutting the inference that it was done with intent to prefer.

Upon appeal to the Full Court:

Held, per DAVIE, C.J., and MCCREIGHT, J., that what took place was a confession of judgment.

Per DAVIE, C.J., and DRAKE, J., that there was pressure rebutting the intent to prefer.

Per MCCREIGHT, J., that the plaintiffs' cause of action was not governed by the Act, but lay to the general equitable jurisdiction of the

Court to relieve against a transaction whereby the plaintiffs, through no fault of their own, had, through the operation of the dilatory process of the Court, by the Tramway Company, and its combination with the Bank to expedite the latter, been deprived of the fruits of their prior judgment, and that there should be a new trial to obtain such findings of fact as would determine whether the Bank was entitled, as against the plaintiffs, to take advantage of its priority of execution.

Per DRAKE, J.: (1) A term in a summons signed by a Judge, "In the meantime let all proceedings be stayed," does not operate as a stay, but only as an intimation that upon its return a stay will be asked for.

(2) The registration of a judgment against lands is not a breach of an order staying proceedings upon it.

(3) Judgment for a *bona fide* debt consented to with the object of giving one creditor a priority over another, is not a collusive judgment or within the prohibition of the Act.

APPEAL by the plaintiffs from a judgment of CREASE, J., at the trial dismissing the action. The findings of the learned Judge, as stated in his judgment, were as follows: "(1) I find from the evidence that *bona fide* pressure was exercised by the Bank of British Columbia on the Tramway Company, and that the consent of that company to the proceedings of the Bank throughout this case was by reason of that pressure. (2) *Bona fide* pressure takes such a transaction out of section one of the Fraudulent Preference Act, C.S.B.C. 1888 Cap. 51. (3) I also hold that the proceedings taken by the Bank to secure their judgment did not constitute a confession of judgment within that section. (4) I also find, although it is a branch of my first finding, that the judgment obtained by the Bank from the debtor was neither collusive nor voluntary, nor a fraudulent preference within that section. And I give judgment generally in favour of the defendants." Statement.

E. V. Bodwell, for the appeal: We contend that the judgment attacked was a judgment by confession and was obtained by collusion and with intent to defeat, delay and prefer the Bank, within the Act. Interference by a defend- Argument.

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ant accelerating the ordinary course of law is a different thing from refraining from active defence, *Turner* v. *Lucas*, 1 Ont. 623, and *Young* v. *Christie*, 7 Gr. 312, are not binding here; *Labatt* v. *Bixell*, 28 Gr. 593; *Macdonald* v. *Crombie*, 11 S.C.R. 107, is binding on this Court. The judgment of RITCHIE, J., indicates that if any instrument had been given that case would have been within the statute. Here there was a written consent to judgment by the solicitor for defendants equivalent to a confession. Collusion does not necessarily mean that some fraud has been practised on the Court, it merely imports playing into each others hands, and is a legal fraud by virtue of this statute, *White* v. *Lord*, 13 U.C.C.P. 289, and see *Meriden Silver Co.* v. *Lee*, 2 Ont. 451; *Batterburg* v. *Vyse*, 2 H. & C. 46; *Churchward* v. *Churchward* (1895), Prob. 7, at p. 30, "Collusive" judgment must mean a mere agreement apart from question of fraud, for what fraud could there be if the debt were really owing; if not owing, this statute need not be invoked, for it would be a fraud, and void under Stat. Elizabeth.

Argument.

The question of "pressure" does not arise if collusion is shewn, for the statute distinguishes between voluntary judgments and judgments by collusion, see *Martin* v. *McAlpine*, 8 O.A.R. 675; *Macdonald* v. *Crombie*, *supra*.

L. G. McPhillips, Q.C., on the same side: The transaction was a collusive confession of judgment. A judgment on a Judge's order is a judgment by confession, *Andrews* v. *Deeks*, 20 L.J. Ex. 127. The statute being for the suppression of fraud should receive a wide construction, *Twyne's Case*, Smith's Ldg. Cas. 9th Ed. 1. The appearance here was entered for the purpose of giving the solicitor power to give the consent. The judgment is one in pursuance of Rules 454–5; these rules are a re-production of Rules 156–7, Hil. T. Rule, 1853, which were framed to prevent frauds, Wilson's Jud. Act, 7th Ed., Rule 578*n*; *Andrews* v. *Deeks*, 20 L.J. Ex. 127, 4 Exch. 828, and see *Bray* v. *Manson* and *Baker* v. *Flower*, 10 L.J. Ex. 468; *Dixon* v. *Sleddon*, 15 M. &

W. 427, 15 L.J. Ex. 284. Execution on a Judge's order obtained by consent is execution on a judgment by confession, within 6 Geo. IV. Cap. 16, Sec. 108, which is within the principle of the Fraudulent Preference Act. The judgment is drawn up by consent and confesses the cause of action.

E. P. Davis, Q.C., contra: The object of this action is to take away the priority of the Bank and substitute for it the priority of the Edison Company. The Edison Company lost their priority by their own negligence. The action of the Tramway Company was not voluntary, they were afraid that if they did not give the consent to judgment the Bank would close them out, and that if they gave it the Bank would assist to carry them on. There was no actual fraud, and the Statute of Elizabeth does not apply, *Gottwalls* v. *Mulholland*, 15 U.C.C.P. 61; *Union Bank* v. *Douglass*, 2 Man. 309; *Molson's Bank* v. *Halter*, 18 S.C.R. 88; *Holbird* v. *Anderson*, 5 T.R. 235; May on Fraudulent Conveyances, 2nd Ed., 105 & 107. The only question here is was there an intent to prefer. It must be spontaneous, *Molson's Bank* v. *Halter*, *supra*; *Stephens* v. *McArthur*, 19 S.C.R. 446; *Davies* v. *Gillard*, 21 Ont. 431, 19 O.A.R. 432. The English Bankruptcy Act, 1883 (46 & 47 Vic. Cap. 52), Sec. 48, includes both Stat. Elizabeth and our Act, but is more favourable to creditors, and it was decided under it, *Ex parte Taylor*, 18 Q.B.D. 295, that an intent to prefer must be *ex mero motu*. If there is a mixed motive the transaction is not void, *In re Walker*, L.R. 8 Ch. 614; *Re Hall*, 19 Ch. D. 538; *Ex parte Tempest*, L.R. 6 Ch. 70; *Embury* v. *West*, 15 O.A.R. 357; *Bank of Australasia* v. *Harris*, 15 Moo. P.C. 97; *Nunes* v. *Carter*, L.R. 1 P.C. 342; *Ex parte Hill, In re Bird*, 23 Ch. D. 695; *Ex parte Griffith*, 23 Ch. D. 69. Here there may have been an intent to prefer, but that was not the sole motive. If agreement only constitutes collusion, every agreement would be collusive and every confession void, for it is either voluntary or by agreement. In *Martin*

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v. *McAlpine*, 8 O.A.R. 675, the Chancellor took it for granted that the intent to prefer existed. *White* v. *Lord*, 13 U.C.C.P. 289, was under the Absconding Debtors' Act, and does not apply to this Act, *McEdie* v. *Watt*, 1 Can. L.J. 722. This was not a confession of judgment, *Labatt* v. *Bixel*, 28 Gr. 593; *Heamen* v. *Seale*, 29 Gr. 278. To withdraw a defence is not an active step, *Union Bank* v. *Douglass*, 2 Man. 309; *Davis* v. *Wickson*, 1 Ont. 369. This was not a judgment under Rules 454–5; it was under Order XIV. The pre-requisites to judgment under that order are, as was the case here, a writ specially endorsed and appearance entered, and the defendants, by coming voluntarily, rendered the summons unnecessary. *Andrews* v. *Deeks* does not apply; if there are no proceedings, then judgment on Judge's order would be a confession of judgment. But here appearance had been entered and defendant fyles a consent.

Argument.

E. V. Bodwell, in reply: Playing into one another's hands as between debtor and creditor is collusion, *Merritt* v. *Lea*, 1 Ont. 455. Writ and appearance are just as necessary under Rule 455 as under Order XIV. The whole object of the transaction was to delay the Edison Company, for if the proceedings by that company could not be stopped the Tramway Company could not have continued business.

Cur. adv. vult.

January 30th, 1896.

Judgment of DAVIE, C.J.

DAVIE, C.J.: The statement of claim, in an action brought by the Edison Company on behalf of themselves and all other creditors of the Westminster & Vancouver Tramway Company, alleges that the Westminster & Vancouver Tramway Company, being at the time in insolvent circumstances and unable to pay their debts in full, as the

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defendants the Bank well knew, by their solicitor voluntarily and by collusion with the Bank, at that time a creditor of the Tramway Company, gave a confession of judgment with intent thereby to defeat and delay the plaintiffs, and with intent thereby to give the Bank a preference over the plaintiffs and the other creditors of the Westminster & Vancouver Tramway Company, and by reason of such confession the Bank entered judgment against the Tramway Company on 24th January, 1894, for $261,217.67 for debt, besides costs, and the plaintiffs claim that the judgment of the Bank against the Tramway Company may be declared null and void, and the execution issued thereon and the registration of a charge in respect of such judgment against the Tramway Company may be set aside and cancelled.

The material facts are that the Tramway Company, a running concern, operating between the cities of Vancouver and New Westminster, being in insolvent circumstances, were indebted to their bankers on account current in the amount for which judgment was recovered, and were also indebted $18,470.12 to the Edison Company, who, on 27th November, 1893, issued a writ, and on 29th December entered up a judgment by default of a defence for that sum.

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It would appear from the evidence that the Bank had been pressing for their money and threatening to wind the Company up, but, in the hope that negotiations then pending for reconstruction and the formation of a syndicate to take it over would be successful, the Bank had not only refrained from carrying their threat of winding up into execution but had recently advanced some $1,600.00 towards pacifying the Edison Company, and at the time of doing so had received an express promise that in the event of suits against the Tramway Company they should have first judgment.

The only hope of those connected with the Tramway Company was the formation of the new syndicate, which,

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if successful, would not only pay off all debts in full, but realize to the stockholders something upon their shares, and such hope affords the principal motive so far as the Tramway Company is concerned for the events giving rise to this action. It was of vital importance to the success of these negotiations to keep the Bank from closing the account current, for to close the account, to say nothing of the more forcible remedies of a winding-up proceeding, would have at once ruined all chance of re-construction.

The delay between the time of the Edison Company issuing their writ and obtaining judgment was due principally to a disputed cross-claim of the Tramway Company for $5,000.00, but also upon some hope held out to them by the Edison Company for time, and consequently in that hope it would seem the Tramway Company waived their cross-claim, and moreover committed themselves to an undertaking directly repugnant to their agreement with the Bank to afford them first judgment. This waiver and undertaking took the form of a resolution of the Tramway Company, dated shortly after 30th November, and is as follows:

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"Resolved that the arrangement made with Messrs. *McPhillips* and *Williams*, solicitors for the Edison General Electric Company, on October 18th, 1893, by our President and Vice-President, be carried out, and we hereby agree to waive and give up any defence or counter-claim which this Company may have to the action commenced against us by the Edison General Electric Company on the 27th day of November, A.D. 1893, or any other defence or counter-claim or action which we have or might have at this date against them, excepting the two armatures last received, if any; and this Company hereby declares that it has not placed the Bank of British Columbia, or any other creditor or creditors, in any better position, or given the said Bank, or any other creditor or creditors, any better or further or other

security since the said 18th day of October, 1893; and this Company hereby agrees not to place the said Bank or any of its creditors in any better or other position, or give them any further or better security, without the consent and approval of the said *McPhillips* and *Williams*, solicitors for the said Edison General Electric Company, until the payment of all the present indebtedness of this Company to the Edison General Electric Company. This agreement is understood not to cover the general running accounts and expenses of the said Company incurred from day to day. And the Secretary and President are hereby authorized to give the said Edison General Electric Company an agreement covering this resolution, signed in the manner in which this Company is authorized, and under the seal of this Company."

The Edison Company did not sign the judgment until 29th December, and upon or shortly after discovering the judgment a dispute seems to have arisen between the solicitors, resulting in a summons to set aside the judgment, on the grounds:

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1. That it was entered in breach of faith;
2. That it was vexatious;
3. That it was entered in breach of agreement, or in the alternative;
4. That the defendants had a good defence on the merits.

At that time, as now, it should be remarked, the Judges held weekly chambers sittings at Vancouver; the Judge on the *rota* at Vancouver was also attending Court work at New Westminster. The summons was not issued as of course out of the Registry, but was issued by special leave of the Judge at New Westminster and signed by him, calling upon the parties to attend the Judge in Chambers, at the Court House, Vancouver, on Tuesday (the next but one ordinary Chambers day), 23rd January, 1894, at 10:30 a.m., on the hearing of an application on the part of the Tramway Company to have the judgment set aside (stating

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the grounds). The summons wound up as follows: "The affidavit of E. A. Jenns, D. Oppenheimer, and P. Smith, fyled herein will be read. In the meantime let all proceedings be stayed. By special leave. (Sgd.) Geo. A. WALKEM, J. Dated this 13th January, 1894."

Whatever may have been the object of the unusual course pursued in obtaining this summons, and whether in point of practice the summons operated as a stay of proceedings in the interim between its issue and return, as to which I think there is much doubt, although it seems to have been treated as a stay by the Edison Company and the Judge (*vide* his remarks on dismissing the summons), it is not shewn or suggested for a moment that the Bank or their solicitors in any way procured the issue of the summons, or were even aware of it. On the 17th January, however, the Bank, who, although aware of the Edison Company having issued proceedings seemed unalarmed, relying evidently upon assurances made them by the Tramway Company, issued a writ for recovery of their debt; and after this time, the Bank becoming aware of the *status* of matters between the Edison Company and the Tramway Company, were resolved to get first judgment, and in this were facilitated by the Tramway Company.

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The hearing of the summons to set aside the judgment was delayed, owing to the non-arrival of the Judge, until the 24th January, and at the hour of the return of the summons on that day (10:30 a.m.) the time for appearance to the Bank's writ had not expired, but to expedite their getting judgment the Tramway Company's solicitor entered an appearance early on the morning of the 24th, and then upon a consent to judgment for the Bank's claim the Judge, upon hearing the solicitors and without a summons, signed an order empowering the Bank to take judgment for their claim.

The Edison Company's solicitors knew nothing of what was going on, but immediately after the order for judgment

was signed, the Judge and the parties to the summons went into the Chamber Court, where the Judge heard the argument upon the summons to cancel the Edison judgment, reserving his decision thereon, which he rendered on 27th January, dismissing the application with costs.

In the meantime, in fact before the argument upon the summons was concluded, the Bank's solicitors had perfected their judgment, registered it, and placed their execution in the sheriff's hands, thereby gaining the priority over the plaintiffs in this action which is now sought to be displaced.

The plaintiffs' claim is that the Bank's judgment be declared null and void, and that the execution issued thereon and the registration thereof against the lands of the Tramway Company may be set aside and cancelled, and that the plaintiffs' judgment (which they afterwards entered and perfected) may be declared a first charge.

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Mr. *Bodwell's* contention upon the argument was that the Bank's judgment under these circumstances was a judgment by confession obtained by collusion and signed with intent of defeating and delaying the Edison Company, and as such was void under section 1 of the Fraudulent Preference Act, C.S.B.C. 1888 Cap. 51, which enacts that in case "any person, being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors, gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, with intent of giving such confession, *cognovit actionem*, or warrant of attorney to defeat or delay his creditors either wholly or in part, or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors, or over any one or more of such creditors, every such confession, *cognovit*, or warrant of attorney, shall be deemed and taken to be null and void as against the creditors of the party giving the

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same, and shall be invalid and ineffectual to support any judgment or writ of execution."

There can I think be no question of the insolvency, nor, bearing in mind the decision of *Andrews* v. *Deeks*, 20 L.J. Ex. 127, that what took place amounted to a confession of judgment. Now, to come within the statute, that confession has to be given either (a) with intent to defeat or delay creditors, or (b) with intent to give a preference.

So far as an intent to defeat or delay creditors, the statute carries the law no further than does the Statute of Elizabeth, *Molson's Bank* v. *Halter*, 18 S.C.R. 88, at p. 105, and under that statute, following the ruling of Lord GIFFARD, in *Alton* v. *Harrison*, L.R. 4 Ch. 622, if the judgment is *bona fide*, that is to say if it is not a mere cloak for retaining a benefit for the person against whom it has been obtained, it is a good judgment under the Statute of Elizabeth. Here there is no question of *bona fides* of the debt upon which the Bank's judgment was founded. It has not been attacked in any way, and there is no suggestion that the judgment was a mere device for retaining a benefit for the Tramway Company. On the contrary, it was an effort, and a determined effort on the part of the Bank to prevent their being postponed to another creditor. There was no fraud in obtaining the confession, and in the absence of fraud it is unassailable, whether under the Statute of Elizabeth, or under the first branch of section 1 of the Fraudulent Preference Act, see *Gottwalls* v. *Mulholland*, 15 U.C.C.P. 61; *Union Bank* v. *Douglass*, 2 Man. 309; *Molson's Bank* v. *Halter*, 18 S.C.R. 105; *Holbird* v. *Anderson*, 5 T.R. 235.

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Neither under the Statute of Elizabeth nor at common law is the judgment assailable merely because given with intent to prefer. But for our local statute a debtor may prefer any creditor over another, *Ex parte Stubbins*, 17 Ch. D. 58.

Was the confession then given with intent to prefer the Bank over the Edison Company within the intent of the

local Act? In this connection we have to consider the doctrine of "pressure." Numerous authorities have decided that to avoid the transaction, the intention on the part of the debtor must be merely to prefer. But any such intent is negatived, in fact displaced, when it is shewn that there has been *bona fide* pressure by the creditor. To "prefer," involves "free will," and hence in *Stephens* v. *McArthur*, 19 S.C.R. 446, the mere demand of the creditor was held to take the case out of the statute. How much more then is the case taken out of the statute here, in view of the threats to wind the company up, the insistence upon first execution, and the demand of Mr. Murray, the manager, that the Bank have judgment. Moreover, it is clear upon the evidence, as before remarked, that the dominant idea of the Tramway Company was the formation of the new syndicate and the re-construction of the Company, which would have paid every one, and of which there was hope by giving the Bank judgment and so gaining time, but none if the Edison Company stepped in. In *Long* v. *Hancock*, 12 S.C.R. 532, where a mortgage had been given and the Company *bona fide* believed that by giving it and so getting an extension of time for payment of plaintiffs' debt they would be able to carry on their business and extricate themselves, it was held that the transaction was unassailable.

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I am therefore of opinion that in this case there was neither intent to defeat nor delay creditors, nor to prefer, and that the action fails.

It has been suggested in the judgment of Mr. Justice McCREIGHT, which I have had the advantage of perusing, that although, as he admits, the action as presented in the pleadings, as directed in Court, and as argued before the Court of Appeal, fails, yet that possibly the plaintiffs might, by reforming their pleadings and directing their attack in a different way, bring themselves within the principle of *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, 6 Q.B.D. 333, and other cases, shewing that where one man persuades

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another to break his agreement to the detriment of a third, the party injured has a cause of action against the persuader; and the learned Judge, on the footing of the resolution amounting to a binding agreement not to give the Bank a preferential judgment, thinks that the Edison Company might succeed upon proof that the Bank persuaded the Edison Company to break this alleged agreement. I do not wish to be considered as holding that such an action could or could not be maintained, but in the meantime I think it sufficient to say that no such cause of action has been raised or suggested either in the Court of first instance or of appeal, nor was the evidence directed to any such issue at the trial.

Judgment of DAVIE, C.J.

If, not having raised the issue in the Court below, the plaintiff had urged such a point for the first time in the Court of Appeal, it would have been held not open to him, *Connecticut Fire Ins. Co.* v. *Kavanagh* (1892), App. Cas. 473. If not open to the party it cannot, I think, be taken by the Court.

I am therefore of the opinion that the appeal must be dismissed with costs.

McCREIGHT, J.: This is an action to set aside a judgment of the Bank of British Columbia v. the Westminster & Vancouver Tramway Company, obtained on 24th January, 1894.

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The statement of claim alleges that the Tramway Company "being at the time in insolvent circumstances and unable to pay, etc., by their solicitor voluntarily and by collusion with the Bank of British Columbia, at that time a creditor of the said Westminster & Vancouver Tramway Company, gave a confession of judgment with intent thereby to defeat and delay the plaintiffs, and with intent thereby to give the Bank of British Columbia a preference over the plaintiffs and the other creditors of the said Westminster & Vancouver Tramway Company, and that by reason of such confession the Bank entered their judgment for $261,217.07,

etc., against the Tramway Company, on the said 24th January, A.D. 1894."

It also states in substance that the plaintiffs previously, *i. e.* on 29th December, 1893, had recovered judgment against the defendant Tramway Company for $18,470.12, but that on 13th January, 1894, a summons was taken out by the Westminster & Vancouver Tramway Company to set aside the said judgment of the plaintiffs, and that all proceedings on said judgment were stayed by order in the summons until the return of the said summons, which was on the said 24th January, 1894.

The statement of claim further alleges in substance that by reason of the premises the Bank of British Columbia was enabled to enter their said judgment and to have certificates of such judgment registered prior to the registration of the now plaintiffs' certificate of judgment, whereby the plaintiffs lost benefit of their said judgment and have been delayed in realizing the amount. The substance of the plaintiffs' ground of complaint appears to be that the stay of proceedings from the 13th January till the 24th January, 1894, or really till the 27th, (the day on which Mr. Justice WALKEM gave judgment refusing to set aside the judgment of the Edison Company) their hands were tied so that they could not realize on their judgment and the Bank of British Columbia got prior execution and registration. Now a judgment creditor who obtained his judgment on 29th December, 1893, cannot *prima facie* have any interest or claim to set aside a judgment entered on 24th January following, under the Fraudulent Preference Act, C.S.B.C. (1888), Cap. 51, nor would it even be right to have it declared null and void as prayed for. Subject at all events to the judgment of the Edison Company the judgment of the Bank is *prima facie* correct, and the amount not disputed, but it is in the antecedent and the surrounding circumstances set out in the statement of claim, and more fully as might be expected

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appearing on the evidence, that the real ground of complaint appears. I have thought it right to point this out because the main, if not the whole contention before the trial Judge was whether or no the Bank's judgment was collusive or given with intent to prefer under section 1 of the Fraudulent Preference Act, C.S.B.C. (1888), Cap. 51, and the same line of argument was in the main adopted before us in the Full Court. But quite independently of the Act, a very grave question arises. The Edison Company obtained judgment on 29th December. On 13th January following a summons is taken out by the Tramway Company to set it aside, returnable on 23rd January, and it contained the following words, "in the meantime let all proceedings be stayed." Now, no doubt, under Rule 474, a Judge may stay execution under certain circumstances, but it is more than questionable whether this can be done *ex parte*, see Chitty's Archbold's Practice, 14th Ed. pp. 789 and 792, and Annual Practice, 1895, p. 801, by an ordinary summons, and whilst a rule is a stay of proceedings at once, a summons is only so from the time at which it is attendable, see Chitty's Archbold's Practice, p. 1407. The Judge's order on the summons was made on 27th January, dismissing the summons along with the stay of proceedings, and as I gather he disapproved of the conduct of the Tramway Company; and he observed also on the advantage the Bank had gained by the conduct of the Tramway Company in consenting to judgment "about an hour previously and without notice to the Edison Company."

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The contention of the plaintiffs, or at least their real ground of complaint, seems to me to be that, without any fault on their part, they have in substance lost the benefit of their judgment; in other words, that by the action of the Courts and the conduct of parties concerned, such benefit has been taken from them and given to another.

I think there must be a new trial in this case, as it seems to me not to have been worked out on the true lines, and

evidence has been in several instances ruled out which was important; and some other important questions (as, with great respect, they seem to me to be) lost sight of; and as the case will probably be taken down to a new trial I shall avoid making comments, further than to say that I hope my silence will not be construed as an approval of all that has taken place. I shall then proceed to state briefly some questions which seem to me worthy of further consideration. It is observable that the judgment of WALKEM, J., delivered on 27th January, 1894, was not appealed from; it must therefore be taken as binding between the Edison Company and the Tramway Company, at all events to the extent that the former had a good judgment of ascertained amount against the latter, and that there was no reason for restraining execution. Whether this holds good also against the Bank is perhaps a rather more complicated question. The course to be pursued by a party interested in setting aside a judgment obtained by default is discussed in the judgment of the Court of Appeal in *Jacques* v. *Harrison*, 12 Q.B.D. 165 (C.A.), and see cases cited Ann. Prac. 1895, p. 1026. There appears to be evidence that the advisers of the Bank were, to say the least, well aware of the order of WALKEM, J., on 24th January, and so might themselves have appealed against it, or adopted the course pointed out in *Jacques* v. *Harrison*. Whether the Bank can now raise the objection of alleged breach of faith by the Edison Company or insist on a reduction of the amount of the judgment for any cause, is a question which I will not now discuss, and it possibly may be thought worthy of further consideration. The learned trial Judge in his judgment appears to think it of importance that the Bank authorities "knew nothing of such a stay of proceedings as was made here until it had been made." It will be well to consider whether an obvious fallacy is not involved in this view. Turning to the questions and answers in Murray's evidence, as well as his examination before the trial, supposing the Bank

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anxious to "get their execution in ahead of the Edison Company," they would of course give general directions and make general arrangements in that behalf, leaving the details to their lawyers, and whatever was done accordingly by their legal advisers it might fairly be contended that the Bank was responsible for it, especially if they subsequently invoked a benefit arising from such operations. The "stay of proceedings" has hitherto been an effectual way, whether legal or not, of getting "execution in ahead" against the Tramway Company; and less questionable machinery might have failed to produce the desired effect. Mr. *Davis* in his skilful argument complains that Ward was not questioned by Mr. *Bodwell* as to whether the resolution of the Tramway Company or agreement was shewn to him, Ward, or not, on 30th November, 1893, but it is to be observed that such questioning should more properly come from the bank's counsel, who must know the facts, rather than from Mr. *Bodwell*, who was on the other side and not likely to be informed on the subject. Such information, however, seems to be important, for if the Bank authorities knew of the agreement between the Tramway Company and the Edison Company, and gave general directions which resulted in the proceedings taken between 13th and 24th January, the doctrine of *Bowen* v. *Hall*, 6 Q.B.D. 333–8 (C.A.) and *Flood* v. *Jackson* (1895), 2 Q.B. 24–41 (C.A.), and the cases there cited dealing with the question of one man persuading another to break his agreement with a third party to his detriment, or for the benefit of the party exercising the persuasion, may have a serious bearing upon this case. It should be remembered also that for many purposes, and especially as regards notice, the principal and his agent are to be considered as identified the one with the other; and that equity can find a remedy in addition to, or as a substitute for, that more appropriate to a common law jurisdiction.

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These last remarks may apply to the contention that the

Bank authorities did not personally direct the order for the stay of proceedings to be inserted in the summons, as the trial Judge claims, as well as to the circumstance, if such is the case, that the Bank authorities had no actual knowledge of the Tramway Company's resolution of the 30th November, 1893 (or about that date), or of the agreement alleged to ensue thereupon—of all this knowledge of the agent may perhaps be sufficient for many purposes.

The maxim "*Actus curiæ nerminem gravabit*" may also be important, for if WALKEM, J.'s order had been made *instanter* on the morning of the 24th, the Edison Company might still have got the first execution, and see the conclusion of the report in *Cumber* v. *Wane*, Smith's Ldg. Cas. 9th Ed. 366, and the notes thereon. Further, it may be contended that the Edison Company should not be injured by obedience to the order of a Judge, even though contained in an ordinary summons, *e.g.* It is pointed out by COTTON, L.J., in *Richmond* v. *White*, 12 Ch. D. 364 (C.A.), "that the Court never allows an order for payment of money into Court to prejudice the rights of the person paying it in."

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Whether a judgment obtained under a Judge's order is a judgment by confession, was decided in the affirmative in *Andrews* v. *Deeks*, 20 L.J. Exch. p. 127. Probably if the attention of the trial Judge had been called to this case and the judgments at greater length, he would have felt himself governed by it; for in the Court sat at least two eminent Judges, Barons PARKE and ROLFE (afterwards distinguished law Lords), and the Judicial Committee point out in *Trimble* v. *Hill*, 5 App. Cas. 342, at pp. 344–5, that Colonial Judges should defer to the high authority of English Judges of eminence. However, in the view I take of this case, I think the point has but little application.

I have already said that a good deal of evidence was ruled out, as it seems to me erroneously, and upon the whole I think there must be a new trial. I think no order should be made as to costs. The trial Judge has, to use an

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expression of Mr. Justice MAULE, misdirected himself, and moreover ruled out evidence where it should have been admitted, as it seems to me. There are perhaps other reasons, to which I will not now allude, for making no order as to costs, Chitty's Archbold's Practice, 14th Ed. 750.

I have discussed points not raised by counsel, for Lord ESHER says, in *Emden* v. *Carte*, 19 Ch. D. at p. 323, that "it is the duty of the Judge to take all the points which the case fairly raises."

If the Judge at the new trial decides in favour of the plaintiff the amount of damages which the plaintiffs have really sustained will require careful consideration, owing to the existing mortgages, etc., and securities to the Bank, and so will the distribution of such damages among creditors. I think there should be a new trial, both parties to be at liberty to amend their pleadings as they may be advised.

Judgment of McCREIGHT, J.

DRAKE, J.: The contention in this case, which was heard before a Judge alone, is that the judgment obtained by the Bank is void, and that the judgment of the learned Judge who tried the case is wrong. In appeals of this nature the presumption is that the decision of the Court below is right, which presumption must be displaced by the appellant, and he must satisfactorily make out that the Judge is wrong before the judgment will be reversed, but if the case is left in doubt it is the duty of the Court of Appeal not to disturb the decision of the Court below, *Savage* v. *Adam*, W.N. (95) 109. I allude to this ruling as guiding this Court, as the evidence is rather more remarkable for its omissions than for its assertions.

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The facts, which I think are proved, are as follows: The Tramway Company was heavily involved, chiefly to the Bank of British Columbia. The Edison Company were also pressing them. On 15th October, 1893, a letter was written to the Tramway Company by the solicitors of the

Edison Company, apparently in answer to an application for time to pay, stating that they were satisfied the Edison Company would bring no action to recover the balance due, for ninety days from 13th September, unless it was necessary to protect the Edison Company's interests; the letter expressly stated that the Edison Company were not to be bound by it. This letter, if there was no other agreement, falls within the class of illusory contracts, dependent on the will of the solicitors.

The Tramway Company, however, paid the Edison Company $1,523.00, which they obtained from the Bank, apparently as a consideration for the delay mentioned in the letter.

On 27th November the Edison Company issued process against the Tramway Company, who, some time after 30th November, caused a resolution to be entered on their books, and communicated to the Edison Company, to the effect that the Tramway Company had not at the date it was passed placed the Bank in any better position than it occupied on 18th October, and agreed not to place the Bank in any better position than it occupied on the same 18th October, without the consent of the Edison Company; and the Tramway Company agreed to waive a claim for damages which they had against the Edison Company—the consideration for this waiver does not appear in evidence. This resolution it was strongly urged must have been given in consequence of some other promise on behalf of the Edison Company, and Oppenheimer's evidence clearly intimates that further time was promised.

In order to prevent the Bank, who were pressing for their debt, from commencing an action against the Tramway Company, Mr. *McColl*, as counsel for the Tramway Company, and Mr. D. Oppenheimer, President of the Company, on 30th November (at which time the Bank were aware that process had been issued by the Edison Company) informed the Bank that they should under any circumstances have

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first execution. At this time it was clearly shewn that if the Bank sued they could have obtained a judgment in priority to the Edison Company, if the Tramway Company did not defend, and this promise of Mr. *McColl* was equivalent to an undertaking not to defend.

The Edison Company signed judgment on 29th December, but this fact was not known apparently to the Tramway Company or the Bank for more than a week afterwards.

The Edison Company did not issue execution or register their judgment. This to me appears as an indication that there was some agreement for delay, but the evidence on this head was excluded.

The Tramway Company considered this signing judgment a breach of the verbal agreement, whatever it was, and took out a summons to set aside the judgment and to stay proceedings. The summons is dated 13th January, and is in the usual form, calling upon all parties to attend on Tuesday, 23rd January, on hearing an application on the part of the defendants to set aside the judgment obtained therein, on certain grounds. It then states what affidavits will be read in support, and then goes on : "In the meantime let all proceedings be stayed, by special leave. Geo. A. WALKEM, J." Both parties have treated this summons as a stay of proceedings ordered by the Court. This is not an order of the Judge in any sense of the word. A summons acts as a stay of proceedings from the return day until finally disposed of, *Morris* v. *Hunt*, 2 B. & Ald. 355 ; *Glover* v. *Watmore*, 5 B. & C. 769. A summons need not be proceeded with ; if served it need not be attended by any party. Special leave is usually given to accelerate the hearing, under Rule 587, and not to postpone the hearing, unless it has been found impossible to serve the summons in proper time before the return day. If the mere fact that a Judge has signed a summons containing a variety of statements makes the contents an order of the Court, it will be a very dangerous practice and one which will establish a new

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procedure and one not contemplated by our Rules. If parties desire a stay of proceedings or execution, the usual course is by motion or summons returnable forthwith, *Walford* v. *Walford*, L.R. 3 Ch. 812. Rule 589 indicates the form in which an order should be drawn up. The summons in this case is not in the form of an order. But, even if it had the effect of an order, what is there to prevent the Edison Company registering their judgment in the Land Registry Office? That is not a proceeding in the action which would be affected by an order to stay; and, in my opinion, all that was effected by the summons was an intimation that the parties would apply for a stay of proceedings on the return.

It is to be remarked that there are several alterations in dates in the summons unmarked, and in consequence it is impossible to say whether these alterations were made before or after the signature was attached. Every alteration or erasure in a summons should be authenticated, according to the practice, before it is issued.

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However, the Bank, on 17th January, 1894, commenced their action, and the Tramway Company appeared and agreed to a judgment on 24th January, for the amount of the Bank claim, and on that day judgment was signed and registered, and execution issued.

The Edison Company had from 29th December to register their judgment and issue execution. They were not delayed by any step taken by the Tramway Company or the Bank. The fact that they mistook the operation of the summons as an actual stay, is a matter which I do not think the Court has anything to do with. They could have gone on with their remedies in spite of the summons, and thus have raised the question of stay or no stay, if they thought proper; but the Court will not relieve against a mistake of law.

The Edison Company contend that under any circum-

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stances the Bank judgment is void, because it was given voluntarily or by collusion.

Their action is brought on behalf of all the creditors of the Tramway Company to set aside the judgment obtained by the Bank and to declare the plaintiffs' judgment a prior charge on the Tramway Company's lands, and that the said lands be applied in satisfaction of the plaintiffs' judgment and for an injunction. The other creditors are ignored in the relief asked, and if it was not for the statement that the action is brought on behalf of the creditors, it would have to be dismissed, as under the Fraudulent Preference Act, C.S.B.C. (1888), Cap. 51, there is no preference of the Bank over the Edison Company. The Edison Company had their judgment, and giving a judgment to the Bank did not prefer the Bank, but only placed both parties on the same footing. A preference means some advantage over another. There was no advantage given the Bank here, as between the Edison Company and the Bank, and unless it could be shewn that the Bank were parties to preventing the Edison Company from obtaining the fruits of their judgment by some unlawful act, there is no cause of action.

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On the question of voluntarily giving the judgment, the evidence is very strong to shew the judgment was given under pressure, and it is only necessary to refer to Mr. Jenns' evidence, in which he says the Bank intended to wind up the Company unless they had a prior judgment—the Bank insisted upon getting first execution—and Mr. Ward says: "I had been talking of commencing proceedings over and over again, and insisted the Bank must have first judgment, and there was an understanding that such should be allowed, both before and after the conversation with *McColl*, which was on 30th November, and otherwise the Company would have to be wound up;" and Mr. Murray says he told Mr. Oppenheimer the Bank must have judgment.

The Company were negotiating for the sale of some bonds,

which if carried out would relieve them of all pressing liabilities and enable them to continue the business, and the Bank were anxious that the Company should have time to carry out their negotiations.

The whole tenor of this evidence shews that the Bank were pressing for their money, and only refrained from suing on the express understanding they were to have first execution if anyone else attempted to forestall them.

The next question is, was the judgment obtained by the Bank given by collusion? Collusion is agreement to deceive, or in other words two or more persons conspiring to take an improper advantage of some one else. There is no evidence to shew that the Bank had any knowledge of the resolution of the Tramway Company, or that they instigated it; the inference is, that if it had been brought to their notice they would not have delayed a day in commencing action.

The definition of collusion in *Churchward* v. *Churchward*, (1895) P.D. 7, will not help, as collusion there refers to proceedings in the Divorce Court. Dr. LUSHINGTON says a collusion does not mean consent, but it is keeping back a just defence or allowing a false case to be substantiated, and the result of the cases referred to by the president in that case is, that if a divorce suit is provided for by agreement, as to its initiation or its conduct, it is collusion. A mere consent is not collusion, there must be an intent to deceive someone else. It has to be remembered that the Edison Company had a free hand to take any steps they thought fit to reap the fruits of their judgment from 29th December up to 14th January, on which day they fancied they were stopped by a stay of proceedings; therefore if there was any collusion it did not arise until after the Edison Company had had ample time to enforce their rights.

But a judgment given for a *bona fide* debt, in answer to

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pressure, is not a collusive judgment, although it may in effect postpone some one else.

It is quite clear that the summons taken out by the Tramway Company to set aside the Edison judgment was a proceeding taken quite independently and apart from the Bank's action. Neither the Bank's solicitor nor any of the managers of the Bank knew of it, still less suggested it. If this step had been agreed upon between the Bank and the Tramway Company in order to assist the Bank in obtaining priority and deceive the Edison Company, it would be collusion. An intention to deceive is a necessary ingredient of fraud. I see no intention to deceive on the part of the Bank. They apparently had an opportunity arising from the supineness of the Edison Company, and took advantage of it. I see no evidence of any concerted plan between the Tramway Company and the Bank, or of any knowledge of the Bank of any action by the Tramway Company to upset the Edison judgment. Without some such evidence it cannot be said that there was collusion of such a nature as to render the Bank's judgment void under the statute. But there must be intent to prefer; a judgment is not void without the intent to prefer. If there is a demand then there is no volition, and a judgment asked for and given, whether by confession or otherwise, is not void unless there is also an intent to prefer; the gist of the offence aimed at by the Act is voluntary preference; if this does not exist then a voluntary judgment is not void. But apart from this criticism on the first section of the Act, I do not see how the cases on the second section of the Act can be distinguished in principle from the cases which arise under the first section. The first section is aimed at judgments voluntarily or collusively given with intent to delay or prefer. The second section deals with gifts, conveyances and transfers made with similar intent. This second section has practically been wiped out of the Statute Book by a series of judicial decisions, and the only rag left is

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where the debtor without any request of the creditor gives him security. In *Stephens* v. *McArthur*, 19 S.C.R. 446, a mere request by a creditor for payment was held sufficient to take the case out of the statute. The difference in language in the two sections, it was contended, places voluntary judgments on a different footing from assignments made with intent to defeat or prefer. An assignment, to be void, must be voluntary, and if the words "voluntary or by collusion" were eliminated from the first section, and all judgments were rendered void that were given with intent to prefer, the principle on which the cases under the second section have been decided could not be distinguished. Retaining the words "voluntary or by collusion" does not add any force to the statute, the governing principle being the intent with which the act is done, coupled with the voluntariness of it, as distinguished from the willingness to do the act in pursuance of a demand.

For these reasons I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

NOTE.—This case has been appealed to the Privy Council.

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KANE v. THE CORPORATION OF THE CITY OF KASLO.

Municipal Act, 1892, Secs. 125-129—Quashing of by-laws—Time for moving—Words "after the passing."

Held by the Full Court (Davie, C.J., McCreight and Drake, JJ., overruling Walkem, J.), That an application to quash a by-law made within one month from the date of its publication in the British Columbia Gazette, though more than one month from the date of its passing the Council, was "within one month of the passing of the by-law," according to the true interpretation of the language of section 128 of the Municipal Act, 1892 (*a*), coupled with sections 122, 125 and 126 (*b*).

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RULE *nisi* to quash By-law 31 of the City of Kaslo, providing for the expropriation of certain lands within the city limits for the purpose of forming a new bed for the Kaslo River, in order in the future to avoid the recurrence of floods from overflow of the river, which had formerly

Statement.

NOTE (*a*)—"128. No application to quash a by-law . . . shall be entertained unless the application is made within one month after the passing of the by-law,"

NOTE (*b*)—"122. Every by-law passed by the Council shall be re-considered not less than one day after the original passage and . . . shall come into effect and be binding on all persons after the publication of the same in the British Columbia Gazette," etc.

"125. The notice to be appended to every copy of the by-law shall state . . . anyone desirous of applying to have this by-law . . . quashed must make the application for that purpose to the Supreme Court within one month next after the publication of this by-law in the British Columbia Gazette, or he will be too late to be heard in that behalf."

"126, sub-section (3) In case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette . . . the by-law . . . so far as the same . . . directs anything within the proper competence of the Council . . . shall . . . be a valid by-law."

taken place, and for carrying on works for the deflection of the stream, upon the ground that the said expropriation, expenditure and works are unauthorized by the Municipal Act and *ultra vires* of the Municipal Council.

The by-law passed the Council on 16th September, 1895, and was published in the British Columbia Gazette on 24th October, 1895, together with a notice as provided by section 125 of the Municipal Act, 1892, *supra*. The rule *nisi* to quash was issued on 19th November, 1895.

The motion came on for argument before WALKEM, J., on 4th December, 1895, and 15th January, 1896.

E. V. Bodwell and *G. H. Barnard*, for the City of Kaslo, took the preliminary objection that the motion was out of time as not being made within one month after the passing of the by-law, as provided by section 128. Argument.

Robert Cassidy, contra.

WALKEM, J.: The rule to shew cause in this matter was granted on 19th November last. Objection is now taken on behalf of the Corporation that the application for the rule was made too late by over a month, as the by-law was framed on 16th September previous, and as section 126 of the Municipal Act, 1892, declared that "No application to quash a by-law, order or resolution in whole or in part shall be entertained unless such application is made within one month after the passing of the by-law, order or resolution, except in the case of a by-law requiring the assent of the electors or ratepayers when the by-law has been submitted or has not received the assent of the electors." It is not suggested that the present by-law comes within this exception, nor does it appear to do so, for it neither authorizes an assessment nor imposes a rate. The preamble would imply that the construction of the intended protective works might possibly extend beyond the present municipal year—that is to say that the works would not be immediate, like roads, bridges or sidewalks, which would be chargeable Judgment of WALKEM, J.

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to this year's public works account. Indeed, if the latter had been the kind of works contemplated the by-law would have been needless. At all events there is no evidence to shew that the works might not be completed this year (1895) and paid for out of the current funds, under section 2 of the by-law, but this point has not been argued, and I only mention it as confirming what Mr. *Bodwell*, on behalf of the Corporation, stated, and Mr. *Cassidy* did not deny, viz., that the by-law was not on its face a money by-law. It seems to me to be more like a dyking by-law than anything else, for a dyking scheme is virtually the subject-matter of it, but whether or not, I must deal with it as it stands in considering the objection now made to the present application.

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Mr. *Cassidy* contends that the words "within one month after the passing of the by-law," as they appear in section 128, should be read as "within one month after the publication of the by-law," as they occur in section 125, so as to make the two sections harmonize, but I cannot assent to this.

The terms "passing an Act," or "passage of an Act," has a well-established parliamentary meaning, and hence a meaning which it must be assumed that a Legislative body especially would not be likely to overlook or pervert. An Act, as it is well known, may be passed and yet its operation be definitely or indefinitely postponed by reason of its containing what is commonly known as a suspending clause. The same observation applies to a by-law, as it is I need hardly say a legislative measure.

Section 122 recognizes the distinction I have mentioned. For instance, it requires that "every by-law passed"—it does not say *and published*—"shall be re-considered after the original passage, and if adopted and signed by the Mayor or Reeve it shall come into effect after the publication of the same, unless the date of its coming into effect is otherwise postponed by such by-law."

Thus mere publication is not meant to give effect to a by-law, for its operation after publication, as the last part of the section indicates, may be deferred by a suspending clause in the by-law itself. Moreover, publication necessarily implies that the by-law must have been passed at an antecedent period. Again, section 129 shews that the Legislature meant that the distinction should be observed between the passage of by-laws and their publication, or as section 124 puts it, the promulgation, for it fixes the time limit for moving against by-laws imposing assessments or rates at one month after their "promulgation," not—be it observed—after their passage. The sections which precede section 128 in no way modify it; on the contrary, that section being the latter enactment impliedly repeals what, if anything, there is in section 125 to the contrary. The form of notice given in section 125 is evidently not one which must in any event be followed. It has no more effect as it stands than if it had been placed in the schedule of the Act.

The fact that the Corporation did not publish the by-law in question until the 24th October—that is to say until eight days after the time limit of a month for moving to quash it had lapsed—cannot be held to operate as a change or repeal of the law as declared by section 128. A similar circumstance seems to have occurred in *Harding* v. *Corporation of Cardiff*, 2 Ont. 329. A motion to quash a by-law is a statutory proceeding and is unknown in the common law; hence the present motion is subject to the terms of the statute, and where the language of an enactment is clear, as it is in the present case, it cannot be disregarded, *Queen* v. *The Judge of the City of London Court* (1892), 1 Q.B. 290. I am of opinion that I am precluded from entertaining the motion by section 128, already quoted, *i.e.*, "no application to quash a by-law shall be entertained unless such application is made within one month after the passing of the by-law." As I have already remarked, such applications

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were unknown to the common law. Section 127 authorizes their being made, and section 128 forbids their being heard after a month has elapsed from the passage of the law.

Section 129 extends the time in case of money by-laws which authorize assessments or impose rates, but this by-law not being one of that class is not within the section. The rule in this case must therefore be discharged with costs. I am not called upon to state what remedy, if any, the applicant has. I merely decide that he is not entitled, for the reasons stated, to the summary remedy given by the statute.

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Mr. *Cassidy* states that his objection to the by-law is that it is *ultra vires* on its face and that such an objection can be raised at any time, but my opinion still is that I am precluded by section 128 from entertaining the application no matter what the grounds for it may be, as it is an application to quash which is out of time. The language of the section seems to me to be imperative.

Rule nisi discharged.

From this judgment the applicant brought an appeal to the Full Court, which was argued on 30th January, 1896, before DAVIE, C.J., MCCREIGHT and DRAKE, JJ.

Argument.

Robert Cassidy, for the appeal: Even in its strict technical signification, the "passing" of a statute or by-law means the conclusion of all the forms and ceremonies necessary to make it law, here including publication; see Endlich-Maxwell on Statutes, p. 700, note. The language of sections 122, 125 and 126 (3) of the Municipal Act, 1892, put the intention of the Legislature beyond question. The publication of the notice giving one month from publication within which to move to quash, is a conclusive answer to the objection as an estoppel, *Robertson* v. *Easthope*, 15 Ont. 430. Sec. 125, providing for such a notice is equally conclusive

as to the intention of the Legislature. The whole of the clauses must be read together and any repugnancy equivalent to an absurdity will be avoided if possible, Hardcastle on Statutes, p. 103 ; Endlich-Maxwell, p. 350.

E. V. Bodwell and *G. H. Barnard, contra:* The Ontario Municipal Act, R.S.O. 1887, Cap. 184, Sec. 547, provides, in regard to by-laws for the expropriation of lands, that any such by-law shall be registered "before it becomes effectual in law," and a motion to quash having been made after one month from the passing but within one month from the registration, it was held by BOYD, C., that the time ran from the passing of the by-law. The Legislature must have intended the word "passing," in section 128, to refer to the passing by the Council, as the next section (129) provides "In case a by-law by which an *assessment* is made or a *rate* is imposed has been promulgated in the manner hereinbefore specified no application to quash the by-law shall be entertained after the expiration of one month from the *promulgation*"—shewing that the distinction was in the mind of the Legislature.

Argument.

Cur. adv. vult.

February 3rd, 1896.

DAVIE, C.J. : The question arises under section 128 of the Municipal Act, 1892, which reads as follows : "No application to quash a by-law, order or resolution, in whole or in part, shall be entertained unless the application is made within one month after the *passing* of the by-law, order or resolution, except in the case of a by-law requiring the assent of the electors or ratepayers when the by-law has not been submitted to or has not received the assent of the electors." The question is, what is the period referred to by "passing?" Is it the "passing" which takes place when the by-law receives the final assent of the Municipal

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Council, or does it refer to the period when it comes into effect by publication as provided by section 122? An examination of the provisions of the Act relating to by-laws shews that there are several different stages in the progress of a by-law which are referred to as the "passing" of the by-law, and that, as used in the statute, the word "passing" is an ambiguous, or rather an elastic expression. There is the first "passing" of the by-law by the Municipal Council. If a by-law requiring their assent, there is the "passing" by the electors. There is the second "passing" by the Council, and there is the final "passing," in the sense of coming into force and effect by publication in the Gazette. Section 122 provides, "Every by-law passed by the Council shall be re-considered not less than one day after the original passage, and, if adopted by the Council and signed by the Mayor and Reeve, or confirmed by the municipal electors, as herein provided, shall come into effect and be binding on all persons after the publication of the same in the British Columbia Gazette," etc. The expression "passing," as used in this Act, being thus elastic in its signification, reference must be had to the whole of the Act dealing with the subject in hand, and particularly to sections dealing with the question of time for moving to quash by-laws. Section 124 enacts that every promulgation of a by-law shall consist in publication in the Gazette, and sub-section 3 of section 126 provides, "In case no application to quash a by-law is made (referring necessarily to the application to quash provided for in the other sections of the Act) within one month after the publication thereof in the British Columbia Gazette, and notice as required by section 125 of this Act, the by-law (saving certain exceptions) shall be a valid by-law." It is hardly possible that the period of one month within which the motion to quash is to be made for the purposes of sub-section 3 just referred to, and within which it is to be made for the purposes of section 128, were intended to be calculated from different

periods, and the result is that the word "passing," in section 128, must be taken to mean the same as in sections 124 and 126, the final passing and promulgation or coming into effect of the by-law by, and to be calculated from, its publication in the Gazette. Consideration of section 125 appears to put the question beyond doubt. It provides, "125. The notice to be appended to every copy of the by-law for the purpose aforesaid shall be to the effect following: 'Notice, The above is a true copy of a by-law passed by the Municipal Council of the . . . of . . . on the . . . day of . . . A.D. 18 . ., and all persons are hereby required to take notice that anyone desirous of applying to have such by-law or any part thereof quashed must make his application for that purpose to the Supreme Court within one month next after the publication of this by-law in the British Columbia Gazette, or he will be too late to be heard in that behalf.'" The appending of that specific notice is not optional. The notice itself is a part of the statute, and, in the absence of anything necessarily indicating a contrary meaning sufficiently shews the meaning which the Legislature intended to attach to the language under consideration in section 128. If any different construction were placed upon it, section 125, and the notice therein set out, could only be regarded as a mere trap to the ratepayers and other persons interested in by-laws. The Legislature has provided that the public are to be informed that an application to quash may be made within one month from the publication of the by-law. Here the Court is asked to put an unnecessary and strained construction on the word "passing," in section 128, which will stultify that notice.

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It has also been contended by counsel for the appellant, and with much force, that the doctrine of estoppel would prevent the Municipal Corporation from objecting that the time for moving to quash the by-law was not the time stated by the corporation in the notice, *Robertson* v. *Easthope*, 15 Ont. at p. 430, is an authority that where such a notice

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states the time for moving to quash the by-law as a longer period than that given by the statute, an objection that the motion is out of time, based on the limitation in the statute, is not open to the Corporation, on the ground that they are estopped by their notice. That case seems directly applicable here, but *a fortiori* since the notice was not voluntary but imperative in this case.

The appeal must be allowed with costs to the applicant in any event of the motion to quash, which we will refer back to Mr. Justice WALKEM for argument and determination before him.

McCREIGHT, J.: I concur with the judgment of the Chief Justice.

Judgment of DRAKE J.

DRAKE, J.: The point raised on this appeal is one of considerable difficulty, owing apparently to the confused way in which the various sections of the consolidated Municipality Act have been imported from cognate statutes. The point is whether a ratepayer has one month from the passage of a by-law to move to quash or whether he is limited to one month from the date of publication. Section 128 says that no application to quash a by-law shall be entertained unless the application is made within a month of the passing of the by-law. The preliminary steps necessary to what I may call the first passage of a by-law are doubtless provided by the rules of order, as the Act is quite silent on the subject. After a by-law is passed by the Council it is still waste paper until it has been re-considered under section 122. After its re-consideration and adoption by the Council it has to be sealed with the corporate seal, signed by the Mayor and Clerk, and this I consider its passing. But before it can become operative it has to be published in the Gazette. This publication apparently gives it legal effect in a manner similar to a bill of Parliament, with this difference, that a by-law is a good by-law before publication but not effective until that

requisite has been complied with. Its operation is in fact suspended until that time. The publication thus looked at appears to me to be entirely distinct from its passage, and section 128 limits an application to quash to one month from its passage, not from its publication.

Then section 129, which refers to assessment or rates imposed by a by-law, enacts that such a by-law shall not be quashed except within thirty days after its promulgation. Promulgation is provided for by section 124, which does not say that every by-law shall be promulgated, but that promulgation of a by-law shall be effected in a certain manner, and shall contain a certain notice. I think that sections 124–5, relating to promulgation, are applicable only to by-laws imposing an assessment or rate and not to ordinary by-laws. Read in this way, effect can be given to sections which in any other light are contradictory.

In this case the Corporation promulgated the by-law in question and gave a notice to the public that anyone wishing to dispute the validity thereof had thirty days in which to apply. The present appellant has brought himself within the terms of this notice. Can the Corporation now turn round and say, "We had no right to extend the time to apply to quash, as according to our notice we have, but we rely on the strict and literal wording of the Act that if you object to the by-law you must apply to quash within thirty days from passing." To hold so would be to mislead the public, and in my opinion the Corporation are estopped by their own act from now raising any such defence. They may have considered the by-law one which came under section 129, possibly erroneously, but whether it does or not the Corporation must be bound by their own published act.

The case of *Robertson* v. *Easthope*, 15 Ont. 430, is in point. There the Council gave a wrong notice, and the Court held that the applicants having followed the notice given by the Council should not be prejudiced in their

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rights because the notice was incorrect, and the Council were held to the notice there given. The appeal is therefore allowed with costs.

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NOTE.—The question was afterwards argued before WALKEM, J., who quashed the by-law upon the grounds moved.

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IN RE "GOOD FRIDAY," "TIMBER," "INDIANA," "OLD KENTUCK," AND "GOOD HOPE" MINERAL CLAIMS.

RE GOOD FRIDAY MIN. CLAIM

IN THE MATTER OF THE MINERAL ACT, 1891, AND AMENDING ACTS.

Practice—Time—Statutory limitation extended by Court—Order extending after lapse of time limited.

The Mineral Act (1891) Amendment Act, 1892, Sec. 14, Sub-sec. 2, provides, "An adverse claimant shall within thirty days after fyling his claim (unless such time shall be extended by special order of the Court upon cause being shewn) commence proceedings in a Court of competent jurisdiction to determine the right," etc.

Held, That the Court has jurisdiction to extend the time limited as well after as before the lapse of the thirty days.

Statement.

MOTION by the owners of the "Timber," "Indiana," "Old Kentuck," and "Good Hope" mineral claims, made after the lapse of thirty days from the fyling of their adverse claims to extend the time for their commencing proceedings in a Court of competent jurisdiction to determine the right of

possession to the said mineral claims. The motion was argued before DAVIE, C.J., on 8th February, 1896.

L. P. Duff for the motion.

P. Æ. Irving, contra.

DAVIE, C.J.: Section 14, sub-section 2 of the Mineral Act (1891) Amendment Act, 1892, requires that an adverse claimant shall within thirty days after fyling his claim (unless such time shall be extended by special order of the Court upon cause being shewn) commence proceedings in a Court of competent jurisdiction to determine the question of the right of possession, and the question upon this application is whether after the lapse of the thirty days provided by the statute the Court has power to extend the time. The omission to commence proceedings within the required time has been satisfactorily accounted for upon the affidavits, and in view of the fact that no decision of the merits has yet been reached, and bearing in mind the principles laid down in *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368, it is clear that the extension ought to be granted if the statute permits it. I think that it does; the ordinary meaning of the language employed by the Act imposes no limit, and the statute must, I think, be read in the light of the rules of the Court, which permit such extensions in the ordinary proceedings of the Court, and of judicial rulings upholding such practice under statutes similarly worded, see *Banner* v. *Johnston*, L.R. 5 H.L. 170, decided under the 124th section of the English Companies' Act, 1862, which limits the period for appeal to three weeks, which time shall not be exceeded unless the Court of Appeal shall extend the time, and in that case Lord HATHERLY remarks that it would be a narrow construction of the Act and one which the circumstances under which the Act was passed and the magnitude of the questions which must have been foreseen as possibly arising under it, would not warrant, and one likewise which it would be impossible to hold in

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itself a sound construction of the Act, to say that the word "extend" must be taken to mean that the application must be made before the original time has elapsed, because the time having elapsed there is nothing remaining to extend.

I think the applicant is entitled to the extension, and I order that his time be extended for thirty days from date.

The costs of this application must be paid by the applicants to the claim-holders, except the costs of the second adjournment. From their costs will be deducted the applicants' costs of the second adjournment.

Order made.

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REGINA v. BOWELL.

Constitutional law—Provincial tax on Dominion officials—Ultra vires.

The imposition of a tax upon the income of a Dominion official is *ultra vires* of the Provincial Legislature.

APPEAL from a conviction of the appellant by the Police Magistrate at Vancouver for non-payment of poll-tax imposed as a revenue *per capita* direct tax by the Revenue Tax Act.

Argument.

John Campbell, for the appellants, cited *Leprohon* v. *Ottawa*, 2 O.A.R. 522; *Ex parte Owen*, 20 N.B. 487.

A. St. G. Hamersley, contra.

Judgment.

DRAKE, J.: This is an appeal from the decision of Mr. RUSSELL, as Police Magistrate of Vancouver, whereby he held that the appellant, although an officer of the Dominion Government, being Collector of Customs for the Port of

Vancouver, was liable to pay the poll-tax, under the provisions of the Revenue Tax Act, 1891, and amending Acts. The appeal comes before me in a case stated, and the only ground taken is whether the determination of the magistrate is good in law.

Mr. *Campbell* desires to raise the question as to the validity of the Revenue Tax Act, on the ground that in whole or in part it was *ultra vires* of the Provincial Legislature. As this point was not taken in the Court below, I refused to entertain it on the present appeal. By the British North America Act, Sec. 92, the Provincial Legislature has power exclusively to make laws relating to *inter alia* "direct taxation within the province." It cannot be questioned that a poll-tax is direct taxation and falls within the words of this sub-section.

But it is contended by the appellant that as a Dominion Government official compelled to reside in the Province by the duties of his office he should not be subject to Provincial taxation in this form. His liability to contribute to the revenue in case he was possessed of real or personal property in the Province is not disputed, but it is urged this is a tax of a different character. The case of *Leprohon* v. *The City of Ottawa*, 2 O.A.R. 522, was cited ; that case decided that the income of a Dominion officer was not liable to Provincial taxation. Chancellor SPRAGGE in discussing the principles stated the case thus : A tax by or through a Provincial Legislature upon the means or instruments by which the Dominion Government is carried on is *ultra vires*. An officer of the Dominion Government is one of the instruments by or through whom certain duties for the Dominion have to be carried out. He is not a voluntary resident in the Province ; he is compelled to go where he is appointed, and the question is does he thereby become a subject of Provincial taxation in *propria persona ?* HAGARTY, C.J., in his judgment in the same case quotes with approval the opinion of some eminent American jurists, especially

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MARSHALL, C.J., in *McCulloch* v. *Maryland*, 4 Wheaton 316, at p. 428, in which, after discussing the broad principle of the right of taxation existing both in the State and Congress, he closes his remarks thus: "We find then on just theory a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers; the right never existed, and the question whether it has been surrendered cannot arise." And the Chief Justice then proceeds: "The officers of the Dominion exercise their functions within the bounds of any of the Provinces by permission of the Local Government; they are here by authority of a higher power."

Judgment.

The judgment of the Court in *Leprohon* v. *Ottawa*, *supra*, carried out to its legitimate conclusion, supports the view that as the Provincial Government is unauthorized to impose a tax on the income of Federal officers, so they are equally unable to impose a tax on their persons. It is to be noted that while the Assessment Act, C.S.B.C. 1888, Cap. 111, exempts the pay and personal property of officers in the army and navy, and also pensions, the Provincial Revenue Tax Act, C.S.B.C. 1888, Cap. 110, makes no exemption in respect of the poll-tax, except to clergymen. If the argument in favour of this tax is valid in regard to civil officers of the Dominion, it is equally valid as regards the officers and men of the military and naval forces stationed in the Dominion. To state the position in this way appears to me to answer the argument raised, for it would certainly be treated as *ultra vires* if this tax was attempted to be collected from those who, in performance of a duty they owe to the State, are compelled to reside where ordered. For these reasons the appeal must be allowed with costs.

Appeal allowed.

ROBERT WARD & CO. v. JOHN CLARK, JOHN CLARK, JR., AND HENNIGAR.

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Practice—Rule 684—Security for costs.

Upon an appeal to the Divisional or Full Court, the respondent is, under Rule 684, entitled, as of right and without shewing special circumstances, to an order for the appellant to give security for the costs of the appeal.

SUMMONS for the plaintiff to give to the defendant security for his costs upon plaintiff's appeal to the Full Court from judgment at the trial in favour of defendant.

Statement.

A. L. Belyea, for the application.

A. P. Luxton, contra.

DAVIE, C.J.: This was a summons taken out by the defendant, who has recovered judgment in an action brought against him by the plaintiff, to stay all proceedings upon an appeal brought by the plaintiff from such judgment, until the plaintiff shall have given security for the costs of the appeal. Mr. *Luxton*, for the plaintiff, objects that it is not alleged that the plaintiff is not fully able to pay the costs, nor are there any circumstances, special or otherwise, shewing the necessity for the security, citing *Wilson* v. *Perrin*, 2 B.C. 350, which assumes that special circumstances must be shewn. Mr. *Belyea* claims that he is entitled to the order as of right, without shewing special circumstances, and I am of that opinion. Comparison of the English and British Columbia rules supports this view. The English Rule 879 says that "such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." Our Rule 684 is identical, except that it omits the words "under special circumstances" and confers the power of directing security upon a Judge as

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well as the Court of Appeal. The omission of the reference to special circumstances in drawing our rule, which was adapted from the English rule, is most significant, implying, I think, a clear intention that security should be given whether special circumstances existed or not. "Such security shall be given as may be directed." There seems to be no discretion in the Judge but to order security. The power is coupled with a duty to exercise it, *Julius* v. *Bishop of Oxford*, L.R. 5 App. Cas. 214. The point now in question was not raised in *Wilson* v. *Perrin;* that was a decision only, that an application for a new trial is an appeal within the meaning of Rule 684, and that consequently a Judge had jurisdiction to order the appellant to give security for costs. That does not touch the present point.

Judgment.

If my view of this subject is right, it is worthy of consideration whether Rule 684 should not be amended so as to correspond with the English rule. I think it should be. Its tendency now is to needlessly increase the cost of litigation and to harass the suitor.

Let the appellant deposit $50.00 in the Registry as security for the costs of the appeal.

Order made.

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Assignment of chose in action—Notice to debtor—Sufficiency of—Constructive notice—Assignment creating express trust without notice—Priority over subsequent assignment with notice.

K. by deed assigned to plaintiff a proportion of certain sums to be earned and received by him from the City of Vancouver under a certain contract. He afterwards, to secure advances made to him by defendant, assigned to her all sums due or to become due to him under the same contract. The plaintiff gave verbal notice of the deed to her to the Chairman of the Board of Works and to the City Solicitor of Vancouver. The defendant subsequently gave formal written notice of her assignment to the City Clerk, and plaintiff afterwards gave a similar notice of her deed.

Held, per BOLE, Co. J., giving judgment for defendant, That priority of notice governs the priority of right.

2. That neither the notice of the plaintiff's assignment to the City Solicitor nor that to the Chairman of the Board of Works was notice to the city.

Per MCCREIGHT and WALKEM, JJ., on appeal, That by his deed to plaintiff, K. made himself a trustee for the plaintiff of the proportion of earnings to be received by him from the city, which he thereby assigned to her, and that the plaintiff had therefore an equity thereto which over-rode the subsequent assignment thereof to the defendant, and that the priority of notice of the latter assignment was immaterial.

Per MCCREIGHT, J., That, upon the evidence, the defendant having had actual notice of the existence of the deed to the plaintiff had constructive notice of its terms.

2. That the fact that the solicitor whom she employed to draw the assignment to her also drew the deed to the plaintiff fixed the defendant with constructive notice of such deed through the knowledge of the solicitor, though acquired in a different and previous transaction.

Statement.

APPEAL by the plaintiff to two Judges of the Supreme Court, from the following judgment of BOLE, Co. J., at the trial. The facts fully appear from the head note and judgments.

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BOLE, Co. J.: The question to be disposed of in this

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case is shortly this: Is the plaintiff or defendant entitled to certain money in Court, $538.22, admittedly due by the Corporation of the City of Vancouver to Dr. W. H. Kendall, under a certain contract made between him and Vancouver for the supply of crushed rock to that city?

A short statement of the facts as gathered from the evidence would indicate that Mrs. Annie E. E. Clark, the plaintiff, had, on 29th May, 1894, entered into a contract with the city to supply crushed rock for road making purposes, on certain terms therein set out, for the term of five years. Subsequently, and while the contract was in existence, with the concurrence of the city, Mrs. Clark entered into negotiations with Dr. W. H. Kendall with the intention that Dr. Kendall should assume the contract in her place and stead, and these negotiations resulted in producing the agreement of 29th December, 1894, which contemplates the retirement of Mrs. Clark from her contract of May, 1894, and the making of a new contract between Vancouver and Dr. Kendall, the purchase money, so to speak, or pecuniary consideration being $11,000.00, to be paid to Mrs. Clark by Dr. Kendall. Of this sum $5,000.00 was to be paid down in cash and the balance, $6,000.00, was to be paid Mrs. Clark at the rate of twenty cents for every cubic yard of rock as delivered and paid for by the said Corporation, in cash, under the terms of the contemplated rock contract between Dr. Kendall and the city, and engineer's report of quantities. This agreement also provides that in default of making this payment of the balance ($6,000.00) in the manner already mentioned, then Dr. Kendall thereby authorises the city to pay Mrs. Clark the said sum of twenty cents per cubic yard "and in case of such an event happening" thereby assigns to said Mrs. Clark a sufficient proportion of the monies owing or accruing due to him under the said contract as security therefor. This agreement also contains a covenant on the part of Dr. Kendall to pay Mrs. Clark this $6,000.00 with

interest in any event, whether he carries out his contract or not, or forfeits same, but provides that in case he does carry out his contemplated contract with the city, then the $6,000.00 to be paid at the rate of twenty cents per cubic yard as delivered to and paid for by the city. By this agreement Mrs. Clark releases the city from any claim she has against the city under her contract. It appears that $5,000.00 cash was paid, and some payments made on account of the balance. Accordingly, on 17th January, 1895, we find Dr. Kendall entering into a new contract with the city, reciting the history of the Clark contract, that both contracting parties have mutually released one another and that the former contract has been discharged. There is also a contract of even date between Dr. Kendall and the city *re* purchase of the rock-crusher and other machinery by Dr. Kendall from the city, and this contract (*inter alia*) provides for the payment for these articles by certain deduction per cubic yard of rock delivered to the city. It also appears that Miss Kendall, the defendant, lent Dr. Kendall (her nephew) $5,000.00 in December, 1894, or January, 1895, to pay Mrs. Clark, and on August 13th, 1895, to secure herself, she obtained from Dr. Kendall an absolute assignment of all money due or coming due him under the contract of 17th January, 1895.

Now as to the notices given the City of Vancouver of these assignments, Mr. Clark states that between 28th December, 1894, and 1st January, 1895, he told the Chairman of the Board of Works all about the agreement between Mrs. Clark and Dr. Kendall. At a committee meeting being held about the city consenting to the assignment from Mrs. Clark to Dr. Kendall, he says: "I told the Chairman all about the contract save the amount. I told the City Solicitor." The written notice to the Council was not given by Mrs. Clark till 26th August, 1895. On 13th August, 1895, Miss Kendall gave the City Clerk, Mr. McGuigan, notice in writing of the assignment from Dr.

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Kendall to her, thus the question of priority of notice becomes a matter of importance to determine, as between the plaintiff and defendant. As to the date of the written notices there is no question, the dates being admitted, and if that were the only question to decide the matter might be readily disposed of in favour of the defendant, as the earlier notice would give priority to the second assignment, *In re Freshfield's Trust*, 11 Ch. D. 198; but for plaintiff, Mrs. Clark, it is alleged that prior notice was given of the assignment by virtue of the verbal communication made by Mrs. Clark to the Chairman of the Board of Works and the City Solicitor, in December, 1894, or January, 1895. Assuming for a moment that the attention of the Board of Works was specially called to the assignment clause in the Clark-Kendall agreement of 29th December, 1894, although this has not been clearly proved, still to my mind something more is necessary to give this notice effect, *i.e.*, it must be given to the proper person entitled to get notice, and I am not prepared to hold that the Chairman of the Board of Works or the City Solicitor are either of them the proper channels through which to give such a notice to the Corporation. I know of no authority in this direction with respect to the Board of Works or its chairman, and *Saffron Walden Building Society* v. *Rayner*, 49 L.J. Ch. 465, is a distinct authority the other way so far as regards the City Solicitor, more especially as there was no suggestion the City Solicitor communicated any such alleged notice to the Corporation, and there is no evidence that the Corporation received any notice of the Clark-Kendall assignment till 26th August, 1895, save as already stated. It is also alleged that Miss Kendall had notice of this first assignment before 13th August, 1895, and the fact that the Clark-Kendall agreement was in her house, although it does not appear it was then executed, is relied on in that direction. Miss Kendall positively says she knew nothing of the assignment or the contents of the deed, that she first heard of the

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assignment on 12th December, 1895. I can see no valid reason for doubting her statements. Furthermore, even were the deed executed there was no duty then cast upon her to read it or make herself conversant with its contents, and her action in taking no steps in securing herself and giving notice till nearly eight months after the agreement was entered into between Mrs. Clark and Dr. Kendall seems inconsistent with the theory of her knowledge of the assignment, and I am of opinion that there is no evidence to shew or warrant me in inferring that Miss Kendall had notice or knowledge of the assignment to Mrs. Clark when she on the 13th August gave notice to Vancouver.

With reference to the alleged constructive notice to Miss Kendall through Mr. *C. B. Macneill* as one of the firm of solicitors employed by Miss Kendall as occasion required to do her business, and who drew that agreement of 29th December, 1894 (under instructions from Dr. Kendall, but without any reference to or instructions from Miss Kendall), and that as he knew of the assignment he was bound to communicate his knowledge to Miss Kendall, and that Miss Kendall was bound by his knowledge. The answer to that is, in my opinion, obvious, for while notice to the agent is notice to the principal, the solicitor cannot stand in the place of the principal until the relation of principal and agent is constituted, for as to all the information he had previously acquired, the principal is a mere stranger, *Mountford* v. *Scott*, 18 R.R. 189, 193, and *Re Brown's Trust*, 5 L.R. Eq. 88. In December, 1894, no such relation as that of principal and agent appears to have existed between Miss Kendall and Mr. *C. B. Macneill*, nor do I think the details of the contract of 29th December, 1894, were present to his mind when he prepared in August, 1895, the assignment from Dr. Kendall to Miss Kendall. Nearly eight months had elapsed in the meantime, and there was no special reason given why he should remember all the clauses of that agreement, and any notice Mr. *Macneill* had

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of the assignment was not received as Miss Kendall's agent. While he was concerned for her in the course of this transaction, it must be borne in mind that Mr. *Macneill* or his firm had no general retainer from Miss Kendall, but only acted from time to time under specific instructions in each instance as required. Moreover, a solicitor is not a standing agent for his client to receive mercantile notices in respect of mercantile business, *Tate* v. *Hyslop*, 54 L.J.Q.B. 594.

I do not think Mr. *Macneill*, although Miss Kendall's solicitor, was her agent to receive notice of incumbrances, nor that either of these so-called notices was such as would give priority to the plaintiff, or prevent a subsequent assignee who gave direct notice, from obtaining priority over her. The *onus* of proving the notice relied on, or a state of circumstances from which notice will be inferred, lies on the plaintiff, see *In re Hall*, 57 L.J. Ch. 288, 291, and I do not think she has done so, for the reasons already stated—either as to actual notice or constructive notice; and Miss Kendall, being unaware of the previous assignment, having given the first notice to the Corporation of her assignment, and as this priority of notice completed her title, *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Arden* v. *Arden*, 54 L.J. Ch. 655, 658; and *Wigram* v. *Buckley*, 7 R. 469, 471, 476, 478, she must, in my opinion, succeed in her contention, and I so find, and that she is entitled as against the plaintiff to the money paid into Court herein by the City of Vancouver, and I direct judgment be entered accordingly for the defendant with costs.

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Judgment for defendant.

The plaintiff's appeal was heard before McCREIGHT and WALKEM, JJ., on 14th February, 1896.

A. H. Macneill, for the appeal.

E. P. Davis, Q.C., contra.

Cur. adv. vult.

March 16th, 1896.

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McCREIGHT, J.: In this case the facts as appear from

the judgment of the County Court Judge, and which I gather, except as regards the question of notice, are not disputed, indicate that Mrs. Clark, the plaintiff, on 29th May, 1894, entered into a contract with Vancouver City to supply crushed rock for road-making purposes on certain terms therein set out, for the term of five years; subsequently, and while the contract was in existence, with the concurrence of the city, Mrs. Clark entered into negotiations with Dr. Kendall, with the intention that Dr. Kendall should assume the contract in her place, and these negotiations resulted in an agreement of 29th December, 1894, contemplating the retirement of Mrs. Clark from her said contract of May, 1894, and the making of a new contract between the city and Dr. Kendall, substantially to the same effect as that between the city and Mrs. Clark.

The main consideration of this transfer, or in reality substitution by agreement of Dr. Kendall for Mrs. Clark, was $11,000.00, to be paid to Mrs. Clark by Dr. Kendall, and of this sum $5,000.00 was to be paid in cash and the balance, $6,000.00, was to be paid to Mrs. Clark, as follows, *i.e.*, "twenty cents for every cubic yard of rock delivered and paid for by the said Corporation, in cash, under the terms of the said contract between the party of the second part (*i.e.* Dr. Kendall) and the said Corporation, on the basis of the City Engineer's reports of quantities, until the whole of the said sum of $6,000.00 is fully paid and satisfied." There seems to have been a further provision, as follows: "And it is hereby agreed that should the party of the second part (Dr. Kendall) make default in payment of the said balance as set out in the preceding clause, then the party of the second part (Dr. Kendall) hereby authorizes the Corporation of the City of Vancouver to pay to the party of the first part (Mrs. Clark) the said sum of twenty cents per cubic yard as aforesaid."

The city were to pay $1.22 per cubic yard for the crushed rock, by the first contract, to Mrs. Clark, and under the

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second or substituted contract the same amount to Dr. Kendall, as I understand the transaction.

These provisions of the contract between Mrs. Clark and Dr. Kendall seem to me to create a trust between him and Mrs. Clark in respect of the twenty cents per cubic yard payable out of the $1.22 per yard when and as the same should be paid by the city to Dr. Kendall, and for this I cite *Gregory* v. *Williams*, 17 Revised Reports, 136, explained in *Re Empress Engineering Company*, 16 Ch. D. 129 (C.A.), and see *Re Flavell*, 25 Ch. D. (C.A). This seems to give Mrs. Clark an equity to the fund which nothing has occurred to displace, and I think Miss Kendall has not an equal equity, certainly none by reason merely of an advance made in January, 1895, of $5,000.00 to Dr. Kendall, quite irrespective of the present security and an assignment made only in August, 1895, to secure such advance. I will only refer to *Ward* v. *Duncombe* (1893), A.G. 391, and Lord CAIRNS' observations therein quoted by Lord MACNAGHTEN, that "in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct," etc. Nor do I see that Mrs. Clark is affected by the circumstance that the city by arrangement with Dr. Kendall have a set-off against him for machinery. The real question is whether Mrs. Clark has a better claim than Miss Kendall to the $538.22, for she would also be affected by that set-off, if any, and I understand the city wish to pay that sum to whomsoever is entitled to receive it. Mrs. Clark's case might be rested on the above doctrine and cases, but I further think she has the better equity through Miss Kendall having "constructive notice" of the Clark-Kendall agreement both personally and through her counsel, Mr. *C. B. Macneill.* It seems to have been assumed that because "Miss Kendall positively says she knew nothing of the assignment or of the contents of the deed,

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i.e. the Clark-Kendall deed, and the County Court Judge sees no valid reason for doubting her statements," (and of course I accept his findings) that she was therefore not affected with "constructive notice," but I must observe that the doctrine of "constructive notice" pre-supposes the absence of the express notice, or at all events a failure to prove it, if there is express notice *cadit questio* as to that which is merely constructive notice. In her evidence she says her nephew, Dr. Kendall, was paying a "royalty," and to the question, "There was also to be a royalty paid to Mrs. Clark in addition to the $5,000.00?" she answered "Yes," and to another question, "Well, all I understood was the royalty was to be paid."

In answer to a question she corrects the Court by saying that the twenty cents was not in addition to the $11,000.00; and to another question, "The $11,000.00 was made up of the $5,000.00 in cash which you advanced him?" "Yes," "And $6,000.00, to be paid at the rate of twenty cents for every cubic yard of rock that was delivered."

To the questions by the Court: "I think the only thing that we have done, as far as I understand it, is this: The purchase money was to be $11,000.00, $5,000.00 in cash, and the other $6,000.00 to be made up as follows: 'and the balance or sum of $6,000.00 to be paid to the party of the first part as follows: twenty cents for every cubic yard of rock as delivered and paid for by the said Corporation in cash, under the terms of the said contract between the party of the second part and the said Corporation, and on the basis of the City Engineer's reports of quantities, until the whole of the said sum of $6,000.00 is fully paid and satisfied.' We will call it royalty—but that is not exactly the word—of twenty cents per cubic yard, amounting to $6,000.00, that was to be paid in addition to the $5,000.00 cash? You understand that, Miss Kendall?" She answered "Yes." To a question by Mr. *A. H. Macneill*—"Then how was Mrs. Clark to collect this twenty cents a yard?"

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she replied, "Well, I know nothing about that; it was not my business." And in reply to another question, she said that she knew that an agreement had been drawn up and signed between her nephew, etc. She didn't know why her nephew left her a copy of the agreement. It was at one time in the house, about the time it was drawn up. When asked "How do you know it was this agreement?" she replied, "Because he told me it was. He told me I could read it if I liked."

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Now, in the very well known judgment of Vice-Chancellor WIGRAM, in *Jones* v. *Smith*, 1 Hare, 55, he speaks of cases of constructive notice "in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instructions to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstances affecting the property, of which he had actual notice." Now this evidence of Miss Kendall herself leaves no doubt that she knew that the "royalty," as she again and again calls it, was "to be paid to Mrs. Clark," and that any assignment she might take or took of the monies which Dr. Kendall might become entitled to receive under the contract with the city should, having regard to the rights of Mrs. Clark, be in equity subject thereto. Whether she read the instrument or not, of December, 1894, she was bound to read it, and she must be taken to have constructive notice of its contents, with the same responsibilities as if she had actually read it. She seems to me, therefore, to have had constructive notice of the Clark-Kendall agreement and herself to be bound to pay the "royalty" to Mrs. Clark, or at least that Mrs. Clark has the better equity to the money in question; upon any view of the matter Miss Kendall seems also to have constructive notice through her counsel, Mr. *Macneill*.

I may say that in preparing the assignment of Dr.

Kendall to Miss Kendall, of August, 1895, his duty was to peruse carefully all the antecedent instruments, and the Clark-Kendall agreement as one of them. It is true that at the commencement of his evidence he, Mr. *Macneill*, does not seem to have a clear recollection on the subject, but he says "at the time the agreement was drawn between Mrs. Clark and Dr. Kendall our firm was not acting in any way for Miss Kendall, and we were not asked to act for Miss Kendall until some time in August; that is, as far as I am aware, I did not give Miss Kendall any notice of any prior assignment, and she had none, as far as I am aware of, from any member of our firm, further than that the assignment—the agreement rather—executed by Mrs. Clark with Dr. Kendall has been in my possession and possession of the firm ever since the day it was executed (December, 1894, or July 1895), that is the Doctor's copy of it. After the draft was prepared by me he took it away and it was away for a day or so. Our firm holds no general retainer for Miss Kendall; when she wishes us to act in any particular matter she gives us instructions to act in that matter, that is all."

I gather from this full and frank statement that the Clark-Kendall agreement was at all events present to the mind of her counsel, as it ought to have been during his preparation of the assignment to Miss Kendall in August, 1895, from Dr. Kendall. This of course implies express notice to him on that occasion, but even if only constructive notice through him, notice must be imputed to Miss Kendall quite apart from anything which took place at the beginning of the same year, or at the end of 1894. I think, therefore, that either on the doctrine of *Gregory* v. *Williams*, 17 R.R. 136, and *In re Empress Engineering Company*, 16 Ch. D. 125 (C.A.), and *Re Flavell*, 25 Ch. D. 89 (C.A.), or on the doctrine of constructive notice to Miss Kendall herself, or to her counsel Mr. *Macneill*, in August, 1895, to be imputed to her through him, that Mrs. Clark has a better

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claim to the fund than Miss Kendall. The case of *Foster* v. *Cockerell*, 9 Bligh N.S. 332, 3 Cl. & F. 456, relied upon by Mr. *Davis*, seems, according to the above doctrines, to have but little application. I think the decision of the County Court Judge should be reversed with costs and judgment entered for Mrs. Clark, with costs of appeal.

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WALKEM, J.: The plaintiff, Mrs. Clark, contracted in May, 1894, with the Corporation of the City of Vancouver to supply it at a certain price with crushed rock for street purposes, for a period of five years. On 29th December following she relinquished her interest in the contract in favour of Dr. Kendall, under a prior arrangement, which was carried out, that she should be released by the Corporation from the contract, and a fresh one of similar import formally entered into between the Corporation and Dr. Kendall. A considerable sum of money having been, admittedly, earned by Dr. Kendall under the new contract, the plaintiff claims to be entitled to it under her agreement of 29th December with Dr. Kendall; and the defendant, Miss Kendall, also claims it under an assignment to her from Dr. Kendall, executed in August, 1895, of all his earnings under the contract mentioned. Mrs. Clark's document is thus the earlier of the two by some eight months. After reciting that she had agreed to assign some plant and all her interest in what may be called the old contract to Dr. Kendall, and to release the Corporation, in order that the new contract might be entered into between the city and Dr. Kendall, the document proceeds to state the consideration in the following words: "The said party of the second part (Dr. Kendall) agrees to pay the said party of the first part (Mrs. Clark) the sum of $11,000.00, as follows: $5,000.00 in cash on receiving from the said Corporation the contract for supplying the said crushed rock, which is to be entered into in lieu of the contract now held by the party of the first part (Mrs. Clark), and the

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balance or sum of $6,000.00, to be paid to her as follows : "Twenty cents for every cubic yard of rock as delivered and paid for by the said Corporation in cash, under the terms of the said contract between the party of the second part (Dr. Kendall) and the said Corporation, on the basis of the City Engineer's reports of quantities, until the whole of the said sum of $6,000.00 is fully paid and satisfied." It will be observed from this that as to the balance of $6,000.00, Dr. Kendall is only to pay it at the rate mentioned provided he is paid by the Corporation ; or, in other words, if the Corporation fails, or for any reason refuses to pay him, he is not to be called upon by Mrs. Clark to pay her. The price, as counsel inform us, which the Corporation agreed under the new contract to pay Dr. Kendall for the work is the same as that which Mrs. Clark was to have received under the contract which she relinquished, viz., $1.22 per cubic yard ; so that Dr. Kendall and Mrs. Clark must, at least, have understood and intended by their agreement of 29th December, and such in my opinion is the meaning of that document; it was in substance that Mrs. Clark was to be entitled to a share in Dr. Kendall's earnings under his contract with the Corporation to the extent of twenty cents out of each sum of $1.22 paid. A trust in respect of Mrs. Clark's proportion was thus created in her favour, and the case consequently comes within *Gregory* v. *Williams*, 3 Mer. 582, 17 R.R. 136. It might be contended that as the amount of money now in question never actually reached Dr. Kendall's hands but was paid into Court to abide the result of this action, no such trusteeship on his part has been created ; but the money was so paid in by order of the Court appealed from as being money admittedly due, in the first instance, by the Corporation to Dr. Kendall, or, in other words, as being money earned by him. As I understand the accounts between Dr. Kendall and Mrs. Clark, the sum in Court, if not more, is due to her as her proportion of what he has earned and received under his contract.

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In my opinion Mrs. Clark is entitled to that sum as being part of a particular fund out of which, according to the agreement of 29th December, she was to be paid. I think that this is so clearly the case that there is no occasion to discuss the other points that have been argued. The appeal therefore should be allowed, and the judgment appealed from reversed, and judgment entered for the plaintiff for the amount in dispute, with the costs of this Court and of the action.

Appeal allowed.

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Practice—Discovery—Pleading—Estoppel—Particularity required—Rule 158.

Defendants, in answer to an action for trespass to land by erecting a building thereon, set up in their statement of defence that the erection was upon land on defendants' side of boundaries fixed by agreement between the parties, and also that the plaintiff was estopped by his conduct and representations from denying that the boundaries were as claimed by the defendants.

Held, by the Divisional Court (Davie, C.J., and Drake, J.): That the specific acts and conduct causing the alleged belief relied on as an estoppel, must be pleaded, and that particulars under the general allegation were properly ordered.

The mere fact that particulars will necessarily disclose the names of witnesses is no objection if the party is otherwise entitled to them

Statement.

APPEAL by the defendant Company to the Divisional Court from an order for particulars under the statement of defence made by W. N. BOLE, Esq., sitting as local Judge of the Supreme Court. The action was for trespass to land by erecting a building thereon. The statement of defence alleged: "(3) The defendants further say that before the

defendants erected the said building, the boundaries between the plaintiff's and defendants' lots were fixed by agreement between the plaintiff and the defendants, and the defendants thereupon, on the faith of the said agreement, and also under the belief caused by the representations and conduct of the plaintiff that the said boundaries were the true boundaries between the plaintiff's and defendants' lots, erected the said building at great expense upon the defendants' lands up to and wholly within the said boundaries, and that the plaintiff is estopped from claiming any land covered by the said buildings, and from denying that the said boundaries are the true boundaries between the plaintiff's and defendants' lots." The order, made upon summons, was for the defendants to deliver particulars, stating: "(1) Whether the said agreement is verbal or written. (2) The date and terms of the said alleged agreement. (3) The names of the parties between whom the said alleged agreement was made. (4) The place and occasion where such alleged agreement was entered into, and also an account of the representations and conduct of the plaintiff mentioned in the said third paragraph, specifying the same with particulars of time, place and circumstances.

Statement.

The defendants appealed from this order to the Divisional Court, and the appeal was argued on the 27th February and 16th March, 1896, before DAVIE, C.J., and DRAKE, J.

Gordon Hunter, for the appeal, cited: *Briton Medical & General Life Association* v. *Whinney*, 59 L.T.N.S. 888; *Temperton* v. *Russel*, 9 T.L.R. 322; *Winnett* v. *Appelbe*, 16 P.R. 57; *Queen Victoria Niagara Falls Park Commissioners* v. *Howard, et al*, 13 P.R. 14; *Cave* v. *Towe*, 54 L.T.N.S. 515.

Argument.

Robert Cassidy and *Alexander Henderson, contra.*

Cur. adv. vult.

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DRAKE, J.: The defendants in the third paragraph of

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their defence say that the boundaries between the plaintiff's and defendants' lots were fixed by agreement between the parties.

This is a material fact, and it is proper if the defendants rely on it to plead it as they have done under our Rule 158. The order appealed from has been made by His Honour Judge BOLE, that the defendants should furnish particulars of time, place and circumstances of this agreement, and this I think is a proper order, but Mr. *Hunter* now alleges that this agreement which he has set up is not an agreement at all, but arises from some undisclosed act of the plaintiff, from which what he calls a conventional agreement can be deduced. If this is correct, then there is a failure to comply with the above rule, as the act should be set out, and not having been set out, the plaintiff is entitled to the particulars asked.

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The defendants further allege that under the belief caused by the representations and conduct of the plaintiff that the said boundaries were the true boundaries, the defendants did certain things.

The order requires the defendants to furnish an account of the representations and conduct of the plaintiff, with particulars of the time, place and circumstance. It appears to me that the representations constitute facts of which the plaintiff is entitled to be informed, in order to know what to be prepared to meet at the trial. With regard to the conduct of the plaintiff, which caused the defendants' belief that the boundaries alleged were the true boundaries, this also falls within the class of facts required to be pleaded. It may be that the names of witnesses would have to be given, but if the plaintiff is entitled to particulars, the mere fact that names of witnesses will appear is not sufficient to prevent the order being made. On this point Lord ESHER says, in *Zierenberg* v. *Labouchere* (1893), 2 Q.B.D. 183: "Whether the defendant can in his answer give any reasonable excuse for not answering as to some of the matters

raised is a question we do not go into," and this is the way the defendants' objection should be taken in this affidavit, and not by an appeal against the order.

BRAMWELL, L.J., in *Phillips* v. *Phillips*, 4 Q.B.D. 130, says that when the pleading is vague and indefinite an amendment should be ordered, and not merely particulars.

The object of particulars is that the parties should not be taken by surprise at the trial. The case of *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410, is an analogous case. The action was to restrain a trespass on a road. The defendants pleaded it was a highway, and they were ordered to amend their defence by shewing the mode in which it became a highway. The defendants amended by alleging a dedication by the plaintiff, and the Court of Appeal held that if the defendants relied on any specific acts of dedication, or of specific declarations of intention to dedicate, they should set out the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made. I see no reason why the defendants here should not set out the nature and dates of the act or conduct of the plaintiff by which the alleged estoppel arose. I think the appeal should be dismissed with costs to plaintiff in cause.

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DAVIE, C.J., concurred.

Appeal dismissed.

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MERIDEN BRITTANIA COMPANY *v.* BOWELL

Assignment of chose in action—Notice—C.S.B.C. 1888, Cap. 19—Illegal consideration.

Per BOLE, CO. J.: It is necessary to the validity of an assignment in writing of a chose in action under C.S.B.C. 1888, Cap. 19, that express notice thereof shall have been given to the debtor, trustee or other person, from whom the assignor would have been entitled to receive or claim the chose in action.

Per WALKEM and MCCREIGHT, JJ., on appeal (without expressing an opinion on the other point): That the assignment in question was void for illegality, it appearing that it was made in consideration of the assignee refraining from taking criminal proceedings against the assignor. That, as the question of illegality was not raised on the pleadings, a new trial should be granted on payment of costs, to give the assignee an opportunity of adducing evidence to contradict the illegality of the consideration.

Statement. APPEAL from the following judgment of BOLE, CO. J., at the trial:

BOLE, CO. J.: The action herein is brought to recover the price of certain articles alleged to have been sold to the defendants, who were members of a club. The parties who supplied the articles were a firm doing business as jewellers, etc., at Vancouver, named Mason & Peterson, but who, before action was brought, assigned for the benefit of their creditors to one Mr. McAlpine. At the time of this assignment, no specific claim for exemption under the Homestead Act was made, or any attempt at selection, except so far as it could be contended that the deed of 19th March was an exercise of that option. By this deed of 19th March, Mason & Peterson attempted to assign their homestead

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exemption rights to plaintiff, but not content with this, they subsequently procured their assignee, without any reference, as far as I can make out, to the other creditors, to make an assignment of the Mason & Peterson book debts and certain articles, with respect to which there existed liens for repairs, and the residue of the estate, but without any list or particulars thereof, to the plaintiffs, who were then unsecured creditors of Mason & Peterson, and by virtue of this document the plaintiffs now sue, without having given any notice of the assignment to the defendants. It is unnecessary at present on the motion for non-suit to discuss the question as to whether this assignment is, under all the circumstances, a nullity or not, although it is unlikely that it could be successfully sustained, nor to express an opinion as to whether there can be an exemption with respect to partnership property, save where the same is clearly divisible, as where two teamsters form a teaming partnership, each man working his own team for mutual profit—although the weight of American authority seems against the proposition—or as to whether book debts are properly within the meaning of goods and chattels under the Homestead Acts, although probably they are not: *Dundas* v. *Dutens*, 1 Ves. 196—though under the Bankruptcy Acts they would be: *Colonial Bank* v. *Whinney*, 55 L.J. Ch. 590—or the other interesting points relied on by defendants, as it seems to me that the absence of notice of the assignment sued on is fatal under C.S.B.C. 1888, Cap. 19, and as decided in *Seear* v. *Lawson*, 15 Ch. D. 426, Cap. 19; *Wallis* v. *Smith*, 51 L.J. Ch. 577; *Davis* v. *James*, 53 L.J. Ch. 523; *Bickers* v. *Speight*, 58 L.J.Q.B. 42; *Tailby* v. *Official Receiver*, 58 L.J.Q.B. 79; *Harding* v. *Harding*, 17 Q.B.D. 445. As notice of any kind was not averred or proved, I must give effect to the contention of the defendants, and non-suit the plaintiffs with costs.

Judgment of BOLE, CO. J.

From this judgment the plaintiffs appealed to the

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Supreme Court, and the appeal was argued before McCREIGHT and WALKEM, J.J., on 14th February, 1896.

E. V. Bodwell, for the appeal.

Archer Martin, contra.

March 16th, 1896.

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WALKEM, J.: This is an appeal from a non-suit granted by His Honour Judge BOLE, in the Vancouver County Court on grounds which it will be unnecessary to discuss as, in my opinion, the action is not maintainable, owing to its being founded upon an illegal agreement.

The plaintiffs' case in substance is this: Mason and Peterson, a firm of jewellers in Vancouver, made an assignment in January, 1895, to McAlpine, for the benefit of their creditors, of whom our company was one. In March following we got an assignment from them of their book debts, they having claimed them as an exemption under the Homestead Act, and afterwards had the assignment in effect confirmed by McAlpine, as trustee under the creditor's deed. One of the book debts is the debt of $137, for which the defendants, as the managing committee of the Vancouver Cycling Club, are now being sued.

Judgment of WALKEM, J.

Mason, who was a witness at the trial for the plaintiff Company, after stating some facts in proof of their claim, gave the following evidence on cross and re-examination: "I never claimed my homestead exemption, nor selected any goods: all our goods were at the time of the assignment to our creditors mortgaged to Peter Larsen; and the goods were sold thereunder. Mr. McNeill thought I was entitled to an exemption. The Company, through its agent, Wylie, asked me to make an assignment of this claim against the defendants. I said I thought I had an exemption. He asked me to give him an assignment of the debt to help him out, as his firm, the plaintiffs, blamed him for giving us credit. *Russell* and *Godfrey*, plaintiffs' solicitors, drew this assignment of the book debts. Wylie had

threatened criminal proceedings against McAlpine, Peterson and I, and it was given to stop those criminal proceedings. Wylie also threatened to attack our homestead exemption. The contents of our safe disappeared while in custody of the sheriff, and the threats arose out of that, as Wylie said he was going to find out who stole those goods. I wanted to stand well with Wylie, and get more credit; and so when he said it was McAlpine, Peterson or I who stole the goods out of the safe I agreed to give him an assignment of my exemption to show him that there was no foundation for his suspicions." This last statement is too absurd to believe, for the agreement to give the assignment, so far from removing Wylie's suspicion, must have confirmed it. He knew that he was dealing with dishonest men, for he must have seen that the assignment to the creditors was worthless, as Larsen's sale had swept away all their assets except the book debts and contents of the safe, the former of which they were endeavouring to appropriate to themselves, and the latter of which had been stolen, as Wylie openly told them by one or other of them. From their conduct it seems clear that but for the threats of a criminal prosecution they would have refused to consent to Wylie's demand for the book debts, and Wylie would seem to have understood this. I therefore believe Mason's first statement, *viz.*, that it was to stop the threatened criminal proceedings that it was agreed that the assignment should be given. As a matter of fact, the assignment was given, and it is significant that criminal proceedings were not instituted. Wylie was not examined at the trial, owing, as we are informed, to his being absent at the time from the province, but if counsel for the plaintiff Company had then considered that this evidence was necessary for the purpose of refuting, if he could, what Mason had said, he should have applied for an adjournment of the trial. This was not done, and hence it was only fair to assume that he was satisfied to submit

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Mason's evidence as part of his case for the decision of the Court. I mention this matter because plaintiffs' counsel on this appeal, having had his attention drawn by the Court to the illegality of an agreement to suppress criminal proceedings, asked in the alternative for a new trial so as to enable his client to procure Wylie's evidence. But, as I have pointed out, they had that opportunity in the Court below, and did not see fit to avail themselves of it. Moreover, there is not the slightest evidence before us to show that Wylie could, if placed in the witness box, refute Mason's statement.

In *Scott* v. *Brown*, 67 L.T.N.S., at p. 783, Lord Justice LINDLEY observes: "No Court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal," and "it matters not whether the defendant has pleaded the illegality or whether he has not." This concisely expresses my views with respect to the present attempt to enforce an agreement that was illegal.

Judgment of WALKEM, J.

My brother MCCREIGHT and I, however, think that as the imputation cast by Mason upon Mr. Wylie seriously reflects upon him, and therefore upon the plaintiff Company, as his principal in this transaction, the opportunity which is asked to enable the Company to refute Mason's statements should be given; but, under the circumstances, it should be upon the Company's paying the costs of the late trial and of this appeal, and re-trying the action within three months from the date of pronouncing this judgment, otherwise this appeal is to be treated as having been disallowed. In any event, the costs of this appeal should be paid by the plaintiff Company.

MCCREIGHT, J., concurred.

Order accordingly.

IN THE MATTER OF THE BRITISH COLUMBIA POTTERY CO. AND THE WINDING UP ACT (CAN.)

DRAKE, J.

1895.

June 28.

RE B. C. POTTERY CO

Company—Winding Up Act (Can.)—Right of Liquidator to take over securities at creditor's valuation—Whether creditor entitled to withdraw original valuation.

A creditor having valued his security against a company upon a winding up cannot withdraw such valuation and enforce the security, but the liquidator is entitled to obtain an assignment and delivery thereof to himself at that valuation.

Under section 62 of the Winding Up Act (Can.) it is compulsory on the creditor to value his security, leaving it to the liquidator to take it, or allow the creditor to keep it, at that valuation.

SUMMONS by the liquidator of the Company asking for assignment and delivery to him by the Yorkshire Guarantee Company, as creditor of the Company, of certain mortgages and a promissory note, at the value placed upon them by the Corporation upon the winding up.

Statement.

Gordon Hunter, for the liquidator.

F. B. Gregory, for the Yorkshire Guarantee Association.

DRAKE, J.: This is a summons taken out by the liquidator asking the Court to require the assignment and delivery up to him of two certain indentures of mortgage, dated 5th January, 1891, and 19th May, 1891; and also a certain promissory note now overdue and unpaid, made by four persons, and payable to the said Yorkshire Guarantee Corporation.

Judgment.

The agent of the Corporation has valued all securities at $19,015.08.

The Corporation, by their agent, attended the meeting of creditors and contributories, and voted for the appointment of a liquidator, and subsequently they have filed three affidavits of their local agents confirming this valuation.

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The Corporation now wish to withdraw their valuation and enforce their securities. If they had desired to stand outside the winding up and enforce their securities they were possibly at liberty to do so, subject to section 63.

Having once valued their securities they cannot now withdraw; see *Ex parte Downes*, 18 Ves. 290, and *Grugeon* v. *Gerrard*, 4 Y. & C. 119.

The statute itself is silent on this head, but I think that section 62 is compulsory on the creditor to value his security, leaving it to the liquidator to take such security at the valuation placed on it by the creditor, or to allow the creditor to keep his security at his valuation. In the latter case, I conceive the creditor might stand very much in the position of a purchaser for value freed from the equity of redemption, at least this was the view held in *Bell* v. *Ross*, 11 O.A.R. 458, but whatever his actual rights might be, there is no doubt that all further remedy against the estate of the Company is at an end.

Judgment.

I think the liquidator is entitled to the order he asks for.

Order made.

BOSCOWITZ v. BELYEA.

CREASE, J.

1894.

April 14.

DIVISIONAL COURT.

1896.

March 16.

BOSCOWITZ *v.* BELYEA

Practice—Originating summons—Rule 591, Sub-sections (c), (d)—Multiplicity of actions—Trustees--Costs.

Trustees having received monies under a decree in one of several actions relating to the same subject-matter to which they were parties, an originating summons was obtained by other parties to the same actions calling upon the trustees for an account, not directed by the decree in question, and to pay into Court.

Held, by the Divisional Court (McCreight, Walkem and Drake, JJ.), affirming an order of CREASE, J., directing the trustees to account and personally to pay the costs of the motion: That the proceeding, by originating summons, was warranted by Rule 591, sub-sections (*c*), (*d*), and an objection that the motion should have been made in one of the pending actions, over-ruled.

Per MCCREIGHT and WALKEM, JJ., that the trustees were properly ordered personally to pay the costs of the motion, and that they should also personally pay the costs of the appeal.

Per DRAKE, J., dissenting: Trustees are entitled to their costs as a matter of right even in cases where the litigation has been unsuccessful, in the absence of misconduct, and that, as a duty had been cast upon the trustees to appear on the summons and draw the attention of the Court to the position of the litigation, they should have their costs of such attendance, and of the appeal.

APPEAL from an order of CREASE, J., making absolute an originating summons issued by Joseph Boscowitz, as *cestui que trust*, calling on A. L. Belyea, M. T. Johnson and Thos. H. Tye, as trustees under a certain trust deed, for an account of certain monies received by them thereunder and for payment into Court. The facts sufficiently appear from the judgments. Statement.

The appeal was first argued before MCCREIGHT and DRAKE, JJ., on 3rd July, 1895, but, there being a difference of opinion between the learned Judges, was, pursuant to Rule 688*a*, re-argued on 15th February, 1896, before MCCREIGHT, WALKEM and DRAKE, JJ.

H. D. Helmcken, Q.C., for the appeal.

L. P. Duff for the respondent: It would be no bar to the Argument.

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present action if the relief sought could have been obtained in the former action, *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 293; *Clutton* v. *Lee*, 7 Ch. D. 541, *n.*; *Long* v. *Storie*, 9 Hare, 542; *Dear* v. *Webster*, W.N. (67) 43; *Scott* v. *Lord Hastings*, 15 Jur. 572. But the relief sought in this action could not have been obtained in the former action, *Foster* v. *Foster*, 3 L.R. Ch. 333. Supposing the defendant entitled to any relief by reason of the former action, he should have obtained it, not by an application to dismiss, but to stay, the present action.

On the question of costs: The plaintiff is entitled to both the costs of this appeal and in the Court below, the trustees having refused accounts, *Springett* v. *Dashwood*, 2 Giff, 525–8. In any case we should get the costs of this appeal, as the trustees should have been satisfied with the judgment of the Court below, *Ex parte Russell*, 19 Ch. D. 602, *Dillon* v. *Arkins*, 17 L.R. Ir. 640.

Argument.

Cur. adv. vult.

March 16, 1896.

Judgment of McCREIGHT, J.

McCREIGHT, J.: I think the order of CREASE, J., is correct. Boscowitz is *cestui que trust* under the deed of 5th February, 1889, and under Rule 591 (*c*) is entitled to an account from the trustees by originating summons, *i.e.* summons "by which proceedings which under the old practice would have been commenced by bill in Chancery or by writ are now commenced without writ," see *Re Holloway* (1894), 2 Q.B. 163, 9 R. 384.

Surely he can *prima facie* invoke Rule 591, sub-sections (*c*) and (*d*) for the furnishing of accounts and payment into Court, respectively, of monies in the hands of the trustees, see *Nutter* v. *Holland*, 7 R. 491.

Of course, circumstances may be brought forward in the investigation which may qualify that right, as for instance such circumstances as in *Re Giles*, 43 Ch. D. 391 and 398

(C.A.) where the Court refused to decide on an originating summons the question of priority between two mortgages, but I cannot at present see why Boscowitz, as *cestui que trust* under the trust of a deed or instrumeut, may not have relief under sub-sections (*c*) and (*d*) of that order, in the shape of the furnishing of accounts and vouching of such accounts and the payment of monies in the hands of trustees. Mr. Justice CHITTY says, with reference to the corresponding English rule, Order LV., Rule 3, "the Court is not bound to have before it all the persons whose interests may be affected by the order, as in an old suit in Chancery that is one of the advantages of the order, *In re Richerson, Scales* v. *Heyhoe* (1893), 3 Ch. 150, 3 R. 643.

Rule 595 does provide for further service of the order, so that I cannot see that the order appealed from is wrong.

But there seems to be, moreover, a distinct ground upon which the order of Mr. Justice CREASE may be supported although giving the same relief on an originating summons as might perhaps have been given under the decree of 23rd December, 1890, and this is fully explained in the judgment of the late Master of the Rolls, in the *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 288 (C.A.), and of COTTON, L.J., at p. 293, where the latter says, "even if this relief could have been obtained in the old action that would not make this suit an improper suit, because there was the right antecedently to institute such a suit as this, and that, as has been pointed out by the Master of the Rolls, is not in any way taken away." In other words, he and the late Master of the Rolls shew that by Order XLII. R. 23, of the first Judicature Rules (English), and Order XLII. R. 28, of the Rules of 1883, also of the English Rules, the law is that "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever."

Judgment of McCREIGHT, J.

This Order of the B.C. Rules, 1890, is substantially the

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same as Order XLII., Rule 23, marginal Rule 329, of B.C. Rules, 1880, and therefore the law of British Columbia has agreed and does agree in substance with that of England on this point, and the doctrine of the Master of the Rolls and COTTON, L.J., as laid down in the above case of the *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 288 (C.A.), seems to me plainly to apply to British Columbia. If that is the case an action might be brought to enforce the decree of 23rd December, 1890, and in a case falling within the purview of Rule 591 as to an originating summons, that rule should be invoked for the purpose of carrying out the objects of Boscowitz under sub-sections (*c*) and (*d*) in an expeditious manner and without incurring unnecessary costs.

The judgment of CREASE, J., seems to be clearly right in this point of view as well as the former, the Court of course taking care that whilst Boscowitz may receive payment in full he shall receive no more, as in the common case of a mortgagee proceeding by foreclosure or power of sale, and at the same time on the covenant in the mortgage deed, as well as other instances which might be put.

Judgment of McCREIGHT, J.

The plaintiff is also entitled to have the monies in the hands of the trustees, that is really and not merely constructively in their hands, paid into Court, see *Nutter* v. *Holland* (1894), 3 Ch. 408 (C.A.), and 7 R. 491.

If I have referred to any point not discussed in the argument, there is the authority of Lord ESHER in *Emden* v. *Carte*, 19 Ch. D. 311 (C.A.), that it is the duty of the Judge to do so.

I think the order of CREASE, J., should be affirmed with costs, and further argument has not changed my opinion. There was no appeal as to costs, and if there were I think the order of CREASE, J., was right in that respect, and that the trustees should pay costs both in the Court below and on appeal. On the subject of trustee costs in cases of a like nature, see Lewin on Trusts, 9th Ed. (1891), pp. 388, 776,

777, 1124. 1125 and 1129; Godefroi on Trusts, 2nd Ed. pp. 640–41–42, and 813–14; *Turner* v. *Hancock*, 20 Ch. D. 303.

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WALKEM, J.: The defendants are trustees under a deed of assignment made by James D. Warren for the benefit of his creditors, and this action has been brought against them by way of originating summons for an account. An order in the terms of the summons having been made by Mr. Justice CREASE it is now appealed from—first, on the ground that he had no jurisdiction; and secondly, that if he had, the procedure by originating summons, and thus by a fresh action, was improper, inasmuch as the account might, or as counsel contended should, have been called for in one or other of the two preceding actions, viz., in that of *Hannah Warren* v. *Boscowitz & Cooper*, in which Boscowitz counter-claimed against her and James D. Warren (her husband) and the present defendants as his trustees under the above-mentioned assignment; or in that of *Boscowitz et al.* v. *James D. Warren and the Trustees*, to have the assignment set aside as fraudulent, and in that event the trustees ordered to account. Dealing with the second action first, the trustees, it will be observed, were only to be required to account in the event of the assignment being declared void; and as no such declaration has up to the present time been made, it follows that the trustees could not at any time have been ordered to account, as an order of that kind would in effect have been an order anticipating the judgment of the Court on the principal question, viz., that of fraud. The main contention, however, on behalf of the trustees, is that an application to account should have been made in the first action, on the ground of avoiding expense, and also as they ought not to be harassed by two actions in which conflicting orders might possibly be made; but that action is in no respect similar to the present one. The trustees were not called upon to account. A judgment, moreover, was given in it, which

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disposed of all the issues raised by the pleadings; and that being so, the judgment could not and cannot be extended by a subsequent direction in Chambers to the trustees to account, see *Foster* v. *Foster*, L.R. 3 Ch. 333.

The present plaintiff had, consequently, no other remedy than a separate action for account, and this he was entitled to bring as he has done, by means of an originating summons. Apart from this, the authorities clearly shew that even if the trustees could have been directed by a Judge in Chambers to account in either of the two actions referred to, the plaintiff would have been entitled to the right which he is now exercising.

As to costs, a trustee has a right to them if he has not been guilty of misconduct; and they are not a matter of judicial discretion, and therefore an appeal will lie from an order depriving him of them, see *Turner* v. *Hancock*, 20 Ch. D. 303. In the present case the trustees have been deprived of their costs, but in that respect the order has not been appealed from, and no reason whatever has been given for varying it. It should therefore be confirmed and the appeal dismissed with costs, as the trustees ought to have accepted the decision of the learned Judge on the questions which are now the subject matter of the appeal, see *Ex parte Russell*, 19 Ch. D. 602.

Judgment of WALKEM, J.

DRAKE, J.: This is an appeal from the order of Mr. Justice CREASE, directing certain moneys to be paid into Court under an originating summons, and for the defendants to pay the costs. It appears that there are three actions now pending in which the trustees, the appellants, are defendants. In the first action there has been a decree which is not yet worked out; in the second action no order has yet been made, and the third action is the originating summons in dispute. The appellants' contention was that the trustees should not be harassed with a multiplicity of actions, and that as the plaintiff could obtain what he

Judgment of DRAKE, J.

wanted under the first action this summons should be dismissed. On the first argument I was in favour of the appellants, but subsequent research has led me to the conclusion that their contention is not well founded. The case of *Scott* v. *Lord Hastings*, 15 Jurist, 572, is a very similar case to this. There a bill was fyled for the execution of a trust, and embracing a variety of objects; the plaintiff subsequently commenced another action by claim, which is equivalent to the present procedure by originating summons, and the Vice-Chancellor held that the plaintiffs were entitled to proceed by claim if they so desired.

The usual practice is, as laid down in Daniel, where two actions are brought for similar relief by the same plaintiff against the same defendants, to stay proceedings in one or to consolidate, and this seems to me the most reasonable course to pursue, and the appellants should have framed their case before the learned Judge who heard the originating summons in this way, but instead they applied to dismiss the summons.

Judgment of DRAKE, J.

Under the circumstances I think the appeal should be dismissed in part, but the order of the learned Judge should be varied by allowing the trustees their costs of appearing on the summons out of the estate.

Trustees are entitled to their costs as a matter of right even in cases when the litigation has been unsuccessful, in the absence of misconduct. There is no suggestion of improper conduct in this case. The trustees were entitled to appear and be heard on the summons, and I think they had a duty cast upon them, by bringing the attention of the learned Judge to the position of the litigation, not to allow the estate to be wasted if possible.

Therefore there should be no costs of this appeal, as it has been partially successful.

The appellants should pay the funds in hand into Court in one week.

Appeal dismissed with costs.

HOGG v. FARRELL.

DIVISIONAL COURT.

1896.

March 26.

HOGG v. FARRELL

Jury—Trial before jury of twelve instead of eight—C.S.B.C. 1888, Cap. 31, Sec. 47.

The provisions of C.S.B.C. Cap. 31, Sec. 47, providing for trial of civil cases before a jury of eight are in force in the electoral districts of Cassiar and Kootenay.

Statement.

MOTION for a new trial. At the trial of the action an issue, raised by the counter-claim, was directed to be tried at Nelson, and judgment was reserved on the main issue. Before this judgment had been rendered the defendants set down the issue for trial at Nelson, and it was tried before a special jury of twelve, who rendered a verdict now moved against. On this trial the plaintiffs were not represented. The plaintiff moved the Divisional Court for a new trial, on the ground that a jury of twelve in civil cases is contrary to law. The motion was argued before WALKEM and DRAKE, JJ., on 25th March, 1896.

E. P. Davis, Q.C., for the motion.

John Campbell, contra.

Cur. adv. vult.

March 26, 1896.

Judgment of DRAKE, J.

DRAKE, J.: In this case the learned Judge who tried the action directed an issue to be tried at Nelson on the question raised by the counter-claim of partnership and reserved his judgment on the main issue.

The defendants set down the issue for trial at Nelson before any judgment had been rendered by the trial Judge, and the plaintiffs were not represented.

The defendants obtained a special jury of twelve, and a verdict was rendered which is now appealed against, on the ground that a jury of twelve in civil cases is contrary to law.

By the Jurors' Act, 1883, Sec. 86, it was enacted that the provisions of that Act were not to extend to Cassiar or Kootenay, but the laws in force prior thereto relating to the summoning, qualification and disqualification of jurymen, should be in full force in those districts.

The laws relating to summoning and qualification of jurymen, as defined by the Jurors' Act, 1860, was the law in force prior to 1883.

The law relating to the number of jurymen requisite for the trial of a civil case are not affected by the provisions of section 86, *supra*.

What then is the law relating to the number requisite to make a lawful jury in a civil case ?

Judgment of DRAKE, J.

By Cap. 95 of the Consolidated Acts of 1877, eight jurors are to be empanelled on the trial of any civil case triable in the Supreme Court, and no more.

No distinction is drawn between special and common jury actions. This section is re-enacted by C.S.B.C. 1888, Cap. 31, Sec. 47, and is the law now.

In my opinion, therefore, the appeal must be allowed with costs, as there has been no trial before a lawfully constituted tribunal.

WALKEM, J., concurred.

Verdict set aside.

THE HUDSON'S BAY CO. v. KEARNS & ROWLING.

Land Registry Act, Sec. 35—Registered title and prior unregistered charge—Whether constructive notice of charge sufficient.

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The Registrar registered a conveyance from K. to R., as a charge, without either the title deeds or certificate of title being produced or accounted for by R. They were, in fact, outstanding in the hands of plaintiffs, as prior equitable mortgagees of the lands. Express notice to R. of the equitable mortgage was not proved, but he enquired of K. for the title deeds and certificate, and they were not accounted for. The action was for foreclosure of the equitable mortgage.

Held, per WALKEM, J.: The Act devolves upon the Registrar the duty of satisfying himself of the *prima facie* title of an applicant, as a pre-requisite to its registration, either by requiring production of the title deeds, or an affidavit satisfactorily explaining their non-production, and that the registration of R.'s conveyance was invalid, as against the plaintiffs, for want of the authorization of the Registrar upon the basis required by the Act, and that, as an unregistered purchaser, he was not protected by section 35 against the plaintiffs' prior unregistered charge.

On appeal to the Full Court (*per* Davie, C.J., Crease, J., concurring, overruling Walkem, J.): [1. The purchaser of a registered title is within the protection of section 35 whether he registers his own conveyance or not.] [2. The principle of *Lee* v. *Clutton*, 45 L.J. Ch. 43, 46 L.J. Ch. 484 is applicable to the British Columbia Land Registry Act. The policy of the Act is to free the purchaser of a registered title from the imputation of constructive notice, and in the absence of express notice such a purchaser of lands for valuable consideration will, under section 35, have priority over a prior unregistered charge, notwithstanding that he knew that the title deeds were in the possession of persons other than the vendor and abstained from enquiry.]

To take such a purchaser out of the protection of section 35, he must be guilty of conduct equivalent to fraud, and, as fraud is never presumed, it will not be imputed by inference, or in the absence of proof of express notice of the facts, the knowledge of which constitutes the fraud.

Per MCCREIGHT, J. (dissenting): The Act has not absolved a purchaser from the duty to enquire for the title deeds but accentuates it, particularly in regard to the certificate of title, and neglect to enquire indicates a design, inconsistent with *bona fides*, to avoid knowledge.

Constructive notice of a prior unregistered charge is sufficient to take

the purchaser out of the protection of section 35, and, on the facts, notice thereof must be imputed to the purchaser and his title postponed to such charge.

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APPEAL by the defendant Rowling from the judgment, upon a second trial, of WALKEM, J., in favour of the plaintiffs, in an action to foreclose an equitable mortgage made by the defendant Kearns to them by deposit with them of her title deeds of the lands in question. After the date of the mortgage Kearns sold and conveyed the land to the defendant Rowling, who registered his conveyance as a charge on the land. Rowling was made a defendant to the action and claimed that his registered conveyance took priority to the unregistered charge constituted by the equitable mortgage to the plaintiffs. The statement of claim charged that Rowling took his conveyance with notice and in fraud of the plaintiff's unregistered charge. The action was tried in the first instance before WALKEM, J., when he gave judgment in favour of the defendant Rowling, dismissing the action as against him. The defendant Rowling at that trial relied upon section 31 (*a*) of the Land Registry Act as relieving him from the necessity of proving that he was a purchaser for valuable consideration and as throwing the *onus* of proving want of valuable consideration from him to Kearns upon the plaintiffs, and called no evidence on that point. Statement.

This contention was sustained by WALKEM, J., but upon appeal the Full Court (Crease, McCreight and Drake, JJ.) granted a new trial, holding that the deed to Rowling was not a charge within the meaning of section 31, and should not have been registered as such, and that the *onus* was on him to shew that he was a purchaser for value, and (*per*

NOTE.—(*a*) "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."

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McCreight, J.) that in the absence of the title deeds he would have to prove enquiries for them, etc., and that constructive notice of the mortgage might be implied, which would constitute fraud on his part, taking him out of the protection which section 35 of the Act gives to a registered as against an unregistered title. (The judgment of Walkem, J., upon the first trial, and of the Full Court, are reported in 3 B.C. 330).

The facts proved at the second trial fully appear from the following judgment of WALKEM, J., thereon.

E. P. Davis, Q.C., for the plaintiff.

L. G. McPhillips, Q.C., for the defendant Rowling.

Judgment of WALKEM, J.

WALKEM, J.: In July, 1891, Miss Kearns being indebted to the plaintiffs agreed to secure them by a mortgage of certain lots belonging to her in Vancouver. She, accordingly, deposited her title deeds and certificate of title with the plaintiffs to enable their solicitor to prepare the mortgage, but owing to inadvertence on his part this was not done. However, as a matter of law, the deposit of the deeds with the plaintiffs for the purpose mentioned constituted an equitable mortgage. About fifteen months afterwards, namely, on 22nd October, 1892, Miss Kearns conveyed the fee of the same lots to Rowling for the sum of $300.00, which was subsequently paid. Rowling registered the deed the same day in the Vancouver land registry, not, however, as a deed in fee, but as a charge. The question to be decided is whether, under the circumstances which I am about to state, Rowling's registered charge is to be postponed to the plaintiffs' prior unregistered equitable security; for by section 35 of the Land Registry Act "No purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice, express, 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."

Rowling's account of the transaction is that about 19th October, 1892, Foster, a former partner of his, met him in Vancouver and told him that he had the lots for sale on behalf of Miss Kearns, and that as she was much in need of money he could have them for $300.00, although they were worth double that amount. Rowling being also of that opinion at once searched the title, and finding that Miss Kearns was registered as the owner in fee and that a certificate of title had been issued to her, accepted the offer verbally. No arrangement was made about payment of the purchase money, but next day, the 20th, Rowling gave Foster a three months' note for half of it.

The following extracts from the notes of Rowling's cross-examination will best explain what occurred at the time with respect to the title deeds:

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"Q. Did you ask about the title deeds before you signed the note? A. Yes.

"Q. Did not the fact of the lots being so cheap, together with the fact of there being no title deeds, arouse your suspicion? A. They told me they had them, but in the office.

Some hours later Rowling called upon Miss Kearns and again asked her and Foster, who happened to be present, for the deeds and certificate, and was told that they had not got them; and, to quote from his evidence, "Miss Kearns said that night that she had no papers."

"Q. What did she say about the certificate of title? A. I said there must be one in existence; she said she would get it for me.

"Q, You know the full value of a certificate and what it imports? A. Yes, sir.

"Q, Then you went and saw them together and the promise was made to you? A. Yes, that they would get the papers.

"Q. Nothing was said about where they were? A. No; they would not tell me where they were.

"Q. They said they could not give you the papers, and did not account for not having them, and you didn't ask them to? A. Yes, I asked them to.

"Q. What did they say? A. I said some one must have them; that the certificate must be in existence. 'Did you have it,' I said, 'in the Land Registry Office?' 'No,' they said, 'it was not there.' I said

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someone must have them; I said to Miss Kearns, when could she have them; she said, 'in a few days.'

"Q. How did you come to sign the second note of November 1 for the balance of the purchase money before she did get the certificate? A. I had agreed to give that for the lots anyway. I went and saw Mr. McPhillips after I signed the first note. He said he thought the claim was all right.

"Q. He thought you were safe in signing the notes? A. No. He did not know whether I had paid the whole or not.

"Q. I ask you why did you sign the second note without getting the title deeds? A. I had promised to pay that amount of money for the land.

"Q. And it made no difference about the title? A. Mr. McPhillips thought it was all right.

"Q. Did you tell him it was not forthcoming? A. Yes.

"Q. Do you mean to say you did not know there was something wrong? A. No.

"Q. And did you not get suspicious? A. I did not like not getting the things as they promised.

"Q. Then why did you not refuse to sign the second note? (No answer.)

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"Q. Why didn't you? You knew that would save the Hudson's Bay Company. Even if you were right it would save them the amount of the second note. Why did you not refuse to sign the second note until you got those papers? A. I was advised by Mr. McPhillips.

"Q. Did Mr. McPhillips advise you to sign the second note before getting those papers? A. He didn't know anything about the second note.

"Q. Why did you not ask for advice as to whether you were safe in signing the second note or not? What is your answer? (No answer.)

"Q. Have you any answer to make? A. I don't know why I didn't ask him."

Further evidence shews that Rowling paid the notes, and that he did not know of the plaintiffs' claim until some time afterwards.

The above interview with Mr. *McPhillips* took place in his office on 21st October, seemingly when Rowling gave instructions for the preparation of the deed from Miss Kearns to himself. Next day the deed was executed there by Miss Kearns, Rowling being present. Not a word was said at the time about the missing deeds and certificate. In short, according to Rowling's evidence, the last occasion on which either Miss Kearns or Foster was spoken to about

them was on the evening of the 20th. The deed, as I have already stated, was registered as a charge immediately after its execution.

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Twelve days afterwards, viz., on 1st November, Rowling gave the second note to Miss Kearns for the balance of the purchase money. It is manifest that he could not have been compelled to do so; and further, that he would have been justified in taking steps to stop payment of the first note the day after he had given it, as he then knew from his vendor that the title deeds and certificate were not forthcoming. But he abstained from taking any such steps; and it would seem from this and other circumstances which I shall refer to presently, that he deliberately took the risk of purchasing what he knew was a bad title in the hope that he would, in some way or other, realize the profit which he must have expected from having got the lots at half their value. When giving his evidence he seemed to me to be shrewd and intelligent, but I had occasionally to call his attention to his unsatisfactory answers. He, personally, searched the title, and would, as he states, have completed the purchase without the aid of a solicitor, but for his failure to obtain "the certificate of title." He knew the value of that document, and was fully alive, as he states, to the importance of getting possession of both it and the title deeds, from having had previous land speculations. His case, therefore, is neither that of a purchaser ignorant of the requirements of the law—though ignorance might not excuse him—nor of one negligently overlooking them, but, in my opinion, is the case of a purchaser deliberately ignoring them. It is idle for him to say, as he has done, that during his negotiations with Miss Kearns and Foster he had no reason for doubting their honesty, for at the outset he detected them in a falsehood. For instance, before giving his first promissory note he inquired for the title deeds, and was told that "they had them, but not in the office;" whereas only a few hours later, at Miss Kearns

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house, they told him "they hadn't them;" and when he naturally remarked "someone must have them," they did not deny it.

Moreover, Miss Kearns' promise that she would get them "in a few days" must have convinced him that she had not then the control of them, and have at least caused him to suspect that they were possibly in the hands of the unnamed person who had first offered, as Foster had told him, to give $300.00 for the lots. He must, consequently, have distrusted both of them from the beginning, and placed no reliance on Miss Kearns' promise; and his actions shew that this was so, for, without waiting the "few days" mentioned by her, he went next day to the solicitor who eventually prepared his conveyance and told him that the title deeds "were not forthcoming," and thereupon asked if he was safe in carrying out his agreement with her. He withheld the fact from the solicitor that he had just given a note for part of the $300.00, and might soon give another for the balance, and now states that he can give no reason for having done so. Indeed, he seems to have confided as little as possible about the transaction to the solicitor, and to have been content with his answer that "he thought the claim was all right;" but why the solicitor so advised him has not been explained. The explanation, however, lies in what occurred immediately afterwards; and I venture to think that that advice was, for it was precisely followed, that a deed in fee should at once be procured from Miss Kearns, and that as it could not, in the absence of the title deeds, be registered in the fee register, an application should be made to have it registered as a charge to the extent of $300.00, with a view of at least protecting Rowling against the possible loss of that amount (if he ever paid it) through a prior equity being discovered or a deed in fee from Miss Kearns to the person who had made the offer of $300.00 suddenly turning up. The application was accordingly made in the name of Mr. *McPhillips'* partner, in Form D.

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given by the statute. The charge having been registered, the plaintiffs contend that the registration was illegal. That question I shall deal with presently when considering the provisions of the Registry Act, for I am now dealing with Rowling's case as if the Act had not been passed.

Worthington v. *Morgan*, 16 Sim. 547, was a case of the foreclosure of an equitable mortgage created by a deposit of title deeds. Morgan, unaware of the deposit, took a legal mortgage, and from ignorance of the law of real property omitted to ask for the deeds. In giving judgment, which was for the plaintiff, the Court remarked: "In this country the title of chattels, as was observed by Lord ELDON, is evidenced by possession, but the title to land is evidenced by written instruments. Therefore it was the duty of Morgan, before he took his mortgage, to ask for the deeds; and if he had asked for them he would have learnt that they were in the possession of persons who claimed a lien or charge upon the tenements for unpaid purchase money. And I think he must be taken to have had notice of those circumstances which, if he had not neglected his duty, would have come to his knowledge."

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The present case is a much stronger one as against Rowling, for, as I have pointed out, he was not like Morgan, ignorant of the requirements of the law. Nor did he neglect to ask for the title deeds, but he abstained, and as I think wilfully so, after being distinctly told by the vendor at the outset that she had not got them, from insisting on their delivery or a reasonable excuse being given for their non-delivery; and he must have done so lest his prospective purchase should be jeopardized by his learning that the person who had the deeds was entitled to hold them.

In *Hewitt* v. *Loosemore*, 9 Hare, 449, at p. 458, the Vice-Chancellor thus summarizes the law: "1st. That a legal mortgagee is not to be postponed to a prior equitable one upon the ground of his not having got in the title deeds,

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unless there be fraud or gross and wilful negligence on his part. 2nd. That the Court will not impute fraud or gross and wilful negligence to the mortgagee if he has *bona fide* enquired for the title deeds and a reasonable excuse had been given for the non-delivery of them; but 3rd, that the Court will impute fraud and gross and wilful negligence to the mortgagee if he omits all inquiry as to the deeds." Rowling's very limited inquiry cannot be considered an honest one or a fulfilment of his duty. It ceased, if I may so express myself, just where it should have begun, and was, in view of all the circumstances, inconsistent with *bona fide* dealing or a desire to know the true state of the title, see *Agra Bank* v. *Barry*, *per* Lord SELBORNE, L.R. 7 H.L. at p. 157. Such conduct is always regarded by the Court as evidence of a fraudulent intent to escape notice of a prior equity; and it matters not that Rowling had no particular person in view, see *per* FRY, L.J., when commenting on *Worthington* v. *Morgan*, in *Northern Counties of England Ins. Co.* v. *Whipp*, 26 C.D. at pp. 490–92. Such being the case, if we had no Registry Act the plaintiffs would now be entitled to a judgment in their favour. Whether that Act warrants a different result is the next question.

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One of the objects of the Act "is," to use Lord CAIRNS' language when referring, in the *Agra Bank* case, to the Irish Register Act, "to give a premium to diligence in registration." Another and not less important one is that the registry books shall give intending purchasers and others correct information as to the state of any given registered title; and to promote that result as far as possible, certain definitions and rules are stated in the Act for the guidance of the registrar as well as of the public.

Section 2 of the Land Registry Act, after defining the term "absolute fee," as used in the Act, defines a "charge" to be "any less estate than an absolute fee, or any equitable interest whatever in real estate," or "any incumbrance,

crown debt, judgment, mortgage or claim to or upon any real estate."

Section 13 empowers the registrar to register the fee simple of any real estate in the name of the owner in the "register of absolute fees," but subject to this important qualification, namely—"upon his being satisfied, after the examination of the title deeds produced, that a *prima facie* title has been established."

Section 19 applies to the registration of a charge, and is, *mutatis mutandis*, to the same effect, the words "upon being satisfied after the examination of the title deeds produced that a *prima facie* title has been established," being repeated.

Section 54, which is as follows, is supplementary to both of these sections: "Upon every registration of title in favour of an owner in fee simple, mortgagee or other person by right entitled to the possession of documents of title the Registrar shall"—not "may"—"require the person requiring to be registered as owner in fee, mortgagee or otherwise"—that is to say as an incumbrancer—"to produce the title deeds of the property to which such registration may be intended to refer, unless the non-production of such title deeds or any of them be satisfactorily explained to the registrar on affidavit." Thus, all the deeds must be produced, for if "any of them" be missing, the section says that their absence must be satisfactorily accounted for on oath.

Section 55 is in the same direction, for it provides that if a missing document required for the proof of an applicant's title be accounted for, but be not produced "by reason of its being in the possession of a mortgagee or other person who refuses to produce it, the registrar shall first give notice in writing to the holder or owner of such document of his intention to register the same at the expiration of a time to be specified in the notice."

The obvious inference from all these sections is that sequence of title is still to be "evidenced," as Lord ELDON

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expressed it, "by written instruments," and not by the official register only. The Act, in this respect, recognizes and adopts the old law, and merely shifts the duty of requiring the production of the deeds from, for instance, an intending purchaser to the registrar. Of course, these observations were not meant to apply to "indefeasible titles," which are dealt with separately in another part of the Act.

Rowling's application was one which, on its face, demanded critical investigation on the part of the registrar. His deed was a deed in fee; hence, to quote from section 54, he was "by right entitled to the possession of the documents of title." That being so, the registrar was bound to require, for the words are "shall require," their production or a satisfactory explanation on affidavit for their non-production. But the deeds were not produced or even asked for; and the same was the case with respect to the certificate of title. Had the registrar complied with the section, he must have learned on affidavit what Rowling has now stated, namely, that Miss Kearns had parted with the deeds, and had declined to state who held them; and it would be unjust to the registrar to assume that such a lame explanation would have been satisfactory to him. The explanation contemplated by the Act is, obviously, one that is calculated to shew that the deeds are in proper hands, say, for instance, in the hands of a prior mortgagee; and whether the mortgagee be an equitable or legal one matters not, for, although the Act prohibits the registration of equitable mortgages created by a deposit of title deeds, it does not prohibit their being taken.

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Again, section 13, which relates to the registration of a fee, and section 19 to the registration of a charge, both require the registrar, before registering, to satisfy himself that a *prima facie* title has been established by an applicant, not, be it observed, by merely inspecting the official registers and the document sought to be registered, but "after the

examination of the title deeds produced." Language could not be plainer. If some, or all of them, be missing, he must call for their production, as directed by section 54. In other words, the title deeds are to be the evidence, I don't say exclusively, upon which the registrar is to form his opinion as to whether the applicant has a *prima facie* title or not. As Miss Kearns' deeds were not produced it follows that the registrar formed no opinion, in the statutory sense, as to whether Rowling had such a title or not.

When the language of an Act is clear, as it is here, it must be obeyed without more. Had the registrar observed this rule of construction this litigation would not have occurred, for, in view of what he would have learnt from the explanatory affidavit as to the missing deeds, he would unquestionably have refused to register Rowling's conveyance. Rowling, and certainly his solicitor, must be taken to have known this. The registration having been made in contravention of imperative requirements of the Act must be cancelled. The breach of the Act by the registrar has practically facilitated Rowling's object in endeavouring to escape notice of a prior equity, although the Act, like the Statute of Frauds, is meant, not to facilitate, but to prevent fraud.

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As the impeached registration is to be cancelled, it follows that this case must be decided independently of the Registry Act—with the result that the plaintiffs are, in my opinion, entitled to an order directing the registrar to cancel the entry complained of; to a declaration that their security is unaffected by Rowling's deed; and to an order of foreclosure with costs, which will include those of the first trial, as against Rowling. The costs of appeal, as I understand it, have been dealt with by the Full Court.

Statement.

Rowling's deed might have been "recorded," as distinguished from "registered," without reference to any title deeds, by having it transcribed in the "record of conveyances," as provided in section 38. But this, obviously,

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would not have suited his purpose, as he would not have thereby gained the advantage of priority over unregistered securities, which a proper registration of his deed might have assured to him under section 33.

Judgment accordingly.

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From this judgment the defendant Rowling appealed to the Full Court, and the appeal was argued before DAVIE, C.J., CREASE and MCCREIGHT, JJ., on 17th and 18th December, 1895.

E. V. Bodwell for the appellant.

E. P. Davis, Q.C., for the respondents.

Cur. adv. vult.

January 17th, 1896.

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DAVIE, C.J.: The question for decision in this case is whether an equitable mortgagee by deposit of title deeds can acquire a better title to registered real estate than a purchaser for valuable consideration, who, without actual fraud or express notice of the equitable mortgage, takes a conveyance unaccompanied by delivery of title deeds.

The facts are these: Miss Kearns, the owner in fee of the land in question, whose title was registered under the Land Registry Act, being indebted to the Hudson's Bay Company in the sum of $800.00 agreed to execute a mortgage to secure such indebtedness, and, in pursuance of such agreement, deposited with them her title deeds, including certificate of title, so that the company's solicitor might draw the mortgage. The preparation of the mortgage was delayed about fifteen months, and in the meantime Miss Kearns, through her agent J. R. Foster, offered the property for sale to the defendant Rowling, who, having searched in the Land Registry Office and found that Miss Kearns' title was registered free from incumbrances, purchased the property for $300.00, which he paid (*plus* interest) by two promissory notes for $155.00 each, one made and delivered

on 20th October, 1892, before the execution, and the other made and delivered on 1st November, after a conveyance of the property had been prepared by the defendant Rowling's solicitor, executed by Miss Kearns and registered in the Land Registry Office as a charge.

The notes, which were both drawn at three months, were discounted by Miss Kearns, and were duly paid by the defendant Rowling at maturity, and Rowling did not know of the Hudson's Bay Company's claim to the property until after the notes had been paid.

Section 35 of the Land Registry Act provides that: "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 to the contrary notwithstanding," but in this case, which is a suit brought by the Hudson's Bay Company as plaintiffs against Rowling and Miss Kearns to enforce the equitable charge and to have the registration of the conveyance to Rowling set aside and cancelled, the Court below has ordered such registration to be cancelled, and has decreed specific performance of Miss Kearns' agreement to give a mortgage, the effect of which decree, of course, is to postpone Rowling's conveyance to the Hudson's Bay Company's equitable mortgage. From this judgment the present appeal has been brought.

In his reasons, the learned Judge in the Court below reviews the evidence given by Rowling, shewing that Foster, Miss Kearns' agent, met Rowling on 19th October, 1892, telling him that he had the lots for sale and that as Miss Kearns was much in need of money, he, Rowling, could have them for $300.00, although they were worth double that amount, and that Rowling being of the same opinion searched the title and finding all clear accepted the offer

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verbally. The next day Rowling gave Foster a three months' note payable to his order for half the purchase money, with current interest; that before signing the first note Rowling asked for the title deeds, but was told first that they had them but not in the office, and afterwards (presumably subsequent to the signing of the notes) by Miss Kearns that she had no papers, but to Rowling's remark that there must be a certificate of title in existence and someone must have it, both Foster and Miss Kearns said that they would get it for him, and Miss Kearns said that he should have them in a few days. Then, asked how he came to sign the second note, dated November 1st, for the balance of the purchase money, before the production of the deeds, Rowling says that after signing the first note he consulted Mr. *McPhillips*, his solicitor, who said he "thought the claim was all right," and that being advised by Mr. *McPhillips* that the title was all right he signed the second note although he did not tell Mr. *McPhillips* that he had the second note to sign, and nothing further was said about the title deeds after 20th October. The deed was executed by Miss Kearns on 21st October, and on the same day application to register it was made by Mr. *Williams*, Mr. *McPhillips*' partner.

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The learned Judge remarks that it is manifest that Rowling could not have been compelled to give the second note, which he did on 1st November, and that he would have been justified in taking steps to stop payment of the first note the day after he had given it, as he then knew from his vendor that the title deeds and certificate of title were not forthcoming, but that he deliberately took the risk of purchasing when he well knew, as his evidence shews, that it was an imperfect title, in the hope that he would in some way or other realize the profit which he must have expected from having got the lots at half their value.

But assuming all this, and everything else which the

learned Judge finds as proving that Rowling was careless and bent only on completing a profitable purchase, the question is whether in the absence of express notice, which is nowhere alleged much less proved, Rowling's title could be affected. Nay more, after having given the first note, which no one suggests was not given in the most perfect good faith, when he found the promises of production of the deeds broken and detected them in falsehood, was it incumbent, as the learned Judge seems to think it was, upon Rowling to refuse to give the remaining note and take steps to stop payment of the first note?

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Leaving out of consideration the fact that the first note was already probably beyond control, I cannot see that any such duty was imposed upon the defendant. The law distinctly says that, as purchaser for valuable consideration of registered real estate, which he undoubtedly was, he shall be unaffected by notice of any unregistered title whether expressed, implied or constructive, and although I am fully prepared to hold that an intending purchaser who enters upon and proceeds with his purchase after *express notice* of an unregistered title or equity might be estopped from claiming the benefit of section 35, I am not prepared to hold that a purchaser whose only fault is a failure to procure the title deeds, or to insist upon their non-production being accounted for, and whose *bona fides* otherwise are unassailed, is to be deprived of the protection intended to be extended by section 35 to *bona fide* purchasers. To deprive a purchaser of the benefit of section 35, or rather to hold that section inapplicable to him, he must, I think, be guilty of conduct equivalent to fraud.

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The principle which has repeatedly been held to apply to the different Register Acts of England and some of the colonies, applies equally I take it to our Act, and that is that a person who purchases with notice of the title of another is guilty of fraud, and that a Court of Equity will not permit a party so committing a fraud to avail himself

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of the provisions of a statute itself enacted for the prevention of fraud. As pointed out by Chief Justice STRONG, in *Rose* v. *Peterkin*, 13 S.C.R. at p. 706, this principle is applied by Courts of Equity not merely in cases arising under the Registry Acts, but to cases under the Statute of Frauds, the Wills Act, and in many other cases ; one of the reasons of the principle being laid down by Lord WESTBURY, in *McCormick* v. *Grogan*, L.R. 4 H.L. 97 : "The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud ; and if in the machinery of perpetrating a fraud an Act of Parliament intervened, the Court of Equity it is true does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud."

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In other words, if B., with knowledge of facts which would render a purchase a fraud upon A., deliberately carries out the purchase, which without the aid of a statute aimed at the suppression of fraud would be null and void, a Court of Equity will hold B. estopped from setting up the provisions of such statute when to permit him to set it up would be to enable him to commit a fraud. As remarked in the case above quoted, the Court does not set aside the statute ; it merely, acting in equity and good conscience, enjoins a person from perpetrating a fraud by means of a statute aimed at the prevention of fraud.

As fraud is never presumed, it is perfectly clear that it will not be imputed in the absence of express notice, see *Ross* v. *Hunter*, T.S.C.R. 289. As remarked by Lord WESTBURY, in *McCormick* v. *Grogan*, *supra*, "Now being a jurisdiction founded on personal fraud it is incumbent on the Court to see that a fraud (a *malus animus*) is proved by the clearest and most indisputable evidence. It is impossible to supply presumption to the place of proof, nor are you warranted in deriving those conclusions in the absence of

direct proof for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract."

But as more nearly resembling this case, and in fact decisive of it, if the same principles are to be held to govern section 35 as apply to the English Registry Acts, in the case of *Lee* v. *Clutton*, 45 L.J. Ch. 43 (affirmed on appeal at 46 L.J. Ch. 48), where it was held that the policy of the Registration Acts is to free a purchaser from the imputation of constructive notice, and that in the absence of actual notice to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from enquiry. That was a decision under 7 Anne, Cap. 20, which enacted that a memorial of all deeds and conveyances, and of all wills and devises in writing . . . . of or concerning and whereby any houses, manors, lands, tenements or hereditaments in the county may be in any way affected in law or in equity "may be registered," and that every such deed or conveyance . . . and any and every such devise by will should be adjudged fraudulent and void against subsequent purchasers or mortgagees for valuable consideration, unless such memorial should be registered.

The Irish Registry Act, 6 Anne, Cap. 2, enacted that "a memorial of all deeds" shall be registered, and that "every deed not registered shall be deemed and adjudged as fraudulent and void," etc. Under this Act it was held, in *Agra Bank* v. *Barry*, L.R. 7 H.L. 157, by Lord SELBORNE, that although it was inconsistent with the policy of the law to impose on a mortgagee or purchaser the duty of enquiry with a view to the discovery of previous unregistered interests, yet that it was quite inconsistent with such policy, if he knew of the existence of such interests, to estop him

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from contending that as to him they are void merely because they are unregistered.

The policy of the English and Irish Registry Acts and of our statutes are I think identical, and are, as expressed in the preamble of 7 Anne, Cap. 20, to protect purchasers from prior and secret conveyances and encumbrances. The English and Irish statutes effect this purpose by declaring the unregistered title to be fraudulent and void; our statute effects the same object by section 35, declaring that no purchaser for valuable consideration of registered real estate, or registered interest in real estate, shall be affected by notice of any unregistered title, and then, going further than the Imperial statutes upon the subject, says "whether such notice be expressed, implied or constructive."

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It has been contended that the Land Registry Act assumes the existence of an obligation on the part of a purchaser to obtain the deed with a view to register, and reference was made to sections 13, 19, 54–55, shewing the necessity of production of title deeds upon applications to register. But the obvious answer to this contention is that there is no obligation whatever on a purchaser to register his title under the Act; it is merely optional with him whether he registers or not, and his title, so far as the Act is concerned, is as valid when he does not register as when he does. Admitting, then, that in registering he must produce title deeds, what is there in the Act to deprive him of the absolute provisions of section 35 when he does not contemplate registering at all? To support the respondent's contention you would have, instead of reading section 35 as it stands, "no purchaser for valuable consideration," to read it "no registered purchaser for valuable consideration." This would be doing violence, I think, to the plain words of the statute.

I am altogether unable to accept the very narrow construction sought to be put on section 35 by counsel for the respondent, who argued that the scope of the statute was

limited to protection against unregistered titles which were capable of being registered under the Act.

A somewhat similar contention to this was set up in *Copland* v. *Davies*, L.R. 5 H.L. 358, which was a case under 33 Geo. II. Cap. 14 (Ir.), and in the words of the Lord Chancellor, Lord HATHERLEY, in that case, I would say in this, "If it cannot be registered, so much the worse for the person who takes the security," and in the words of Lord WESTBURY, at p. 393, "It is no answer to the words of that statute (33 Geo. II.) to say that there was an incapacity to register, because there was merely the act of depositing deeds. . . . If that be so we cannot help it, because the Act does not recognize encumbrances so created. So, under section 35 of the Land Registry Act, it is no answer to the words of our statute to say there was an incapacity to register. It would be reducing the Act to a nullity to say that whilst its provisions protected a purchaser from a registrable charge unregistered, yet that as regards non-registrable charges the purchaser has no more protection than if the Act had not been passed.

The protection which was meant to be afforded was a protection against secret incumbrances, and, as remarked by JESSEL, M.R., in *Greaves* v. *Tofield*, 14 Ch. D. 563, at p. 565, "The object was to enable a purchaser of land to ascertain by a single search what incumbrances there were on the land; and if the register searched did not disclose any, he was not to trouble himself any more;" subject of course to this limitation, adopted by the Court of Appeal, that if he already had notice the Act would not aid him.

I do not lose sight of the decision of the Privy Council in *White* v. *Neaylon*, 11 App. Cas. 171, under the South Australian Registry Act, 5 Vic. No. 8, which enacts that "all contracts in writing concerning any lands may be registered, and every contract shall be adjudged fraudulent and void at law and in equity against any subsequent purchaser unless registered, and that although such subse-

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quent purchaser had notice of such prior contract before or at the making of such subsequent conveyance." In that case it was held under that Act that a prior document of a registrable nature, unregistered, cannot convey a good title against a subsequent document of a registrable nature, registered; but that there is nothing in the Act to exclude a claim upon an unwritten equity of which the subsequent registered purchaser had notice. But no one doubts, on the contrary it is conceded on all hands, that if the appellant in this case had had notice, that is actual notice such as existed in the case of *White* v. *Neaylon*, of the Hudson's Bay Company's title, he would have been postponed. It seems therefore idle to quote as an authority to guide us here, a case which proceeded upon actual notice. Moreover, the section of the South Australian Act is expressly limited to written contracts; ours is as wide as language can express it: "No purchaser shall be affected by any notice expressed, implied or constructive, of any unregistered title, interest or disposition." In *White* v. *Neaylon* the Court could not, without doing violence to the Act of Parliament, hold it to apply to any but written contracts. Here, without reading into the section words which do not appear there, the effect of which would be to place a construction upon the Act at variance with the policy of registration Acts generally, and, as it seems to me, of the Land Registry Act in particular, you can arrive at no conclusion but that, except in cases of express fraud, as against a purchaser for valuable consideration of registered real estate, no unregistered title, interest or disposition whatever is to prevail. I do not think that *White* v. *Neaylon* affords any guide in this case.

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In conclusion, therefore, I am of opinion that the effect of section 35 of the Land Registry Act must be taken as absolutely protecting a purchaser for value against attack on the ground of notice of any character or nature whatsoever; but its otherwise absolute effect must be held to be subject to this qualification, that a man who in consequence

of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment, under the inflexible rule that an Act of Parliament shall not be used as an instrument of, or in defence of, actual fraud.

As nothing of that kind has been shewn here, I am of opinion that the respondent's action failed and should have been dismissed, and that therefore this appeal should be allowed, and judgment in the original action entered for the appellant. The appellant will be entitled to his costs, both of this appeal and in the Court below.

Judgment of DAVIE, C.J.

CREASE, J., concurred with the Chief Justice.

McCREIGHT, J. : Mr. *Bodwell*, for the appellant Rowling, has argued as if the Land Registry Act had put an end to the duty or rather the necessity, with a view to shewing *bona fides, etc.*, which before that Act existed here as well as in England, requiring an intending purchaser or mortgagee to make proper inquiries as to the title deeds, and if possible to obtain possession of them, *Agra Bank* v. *Barry*, L.R. T. & L. 157.

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I think this view is not correct, but the point is very important, and I shall make some observations on the Act and its amendments with a view to shew that this contention is not warranted. Sections 13 and 19, as regards registrations of fee simple and lesser estates, respectively, point out the duty of the Registrar to register after the examination "of the title deeds produced," etc. These sections having regard to the then existing law and practice evidently contemplate the duty in a claimant of such estates to have the

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deeds for the purpose of *prima facie* proof of such rights, and that the Registrar shall refuse to register in their absence, subject to the subsequent provisions of the Act dealing with exceptional cases. Section 21 says that the Registrar shall after registration endorse on every deed or instrument produced by the applicant for proof of his title, memorandum in the form marked G., etc.

These provisions, and I shall refer to others, seem to emphasize, not to qualify, the necessity or usual practice of the applicant having his deeds on such occasions with a view to prove his title. It is remarkable that in addition to sections 13 and 19 the Legislature should have further dealt with the "production of documents" in sections 54–5, and section 89. Section 54 again directs that the Registrar shall require the person requiring to be registered as owner in fee, mortgagee or otherwise, to produce the title deeds, etc., unless the non-production, etc., be satisfactorily explained, etc. Section 55 evidently pre-supposes that the applicant, if he is unable to produce the document required for the proof of title, at least has made inquiries and ascertained that it is in the possession of a mortgagee or other person who refuses to produce the same, see *Agra Bank* v. *Barry*, *supra*.

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The Land Registry Act Amendment Act, 1892, Sec. 2, makes important alterations as regards the "certificate of title," a document which forms a striking feature of the Land Registry Act. It first appears in section 17 of that Act (and see sections 61 and 89), and has received the attention of the Legislature, not only in the Act of 1892 above referred to, but in the Land Registry Act Amendment Act, 1893, see sections 2, 3, 4 and 15. I shall refer to the legislation with reference to this important document to shew that the Legislature has treated it throughout as an important muniment of title and given every reasonable facility for its being acquired and safely kept by the person really entitled, as good evidence of his ownership, and to be

used by him on every important dealing with his land. Section 17 of the Land Registry Act, after directing that it shall be issued to the person who effects registration of the absolute fee, provides for renewal in case of its loss or destruction, with proper safeguards, and directs that it shall be received as *prima facie* evidence, etc., of the particulars therein set forth. Section 55, coupled with the amendment to it by section 2 of the Land Registry Act Amendment Act, 1892, inserting the words "or any certificate of title" in the first line of that section after the word title, also distinctly recognizes it as a muniment of title. The further words in that section 2 to be added to the end of the same section 55 are significant: "and thereupon any certificate of title outstanding in the name of the grantor shall be deemed to be cancelled as to the whole of the lands therein mentioned, or as to the portion thereof registered in the name of the purchaser, notwithstanding anything to the contrary contained in section 61 of this Act." Section 61 has provided for an endorsement of a memorandum of the transfer of such portion on the certificate of title.

Sections 2, 3, 4 and 15 of the Land Registry Act Amendment Act, 1893, deal with the grant separately of certificates of title for separate portions of the same parcel of land. I am aware that this last Act was passed after Rowling's purchase, but I refer to it as shewing the continued disposition of the Legislature to treat the certificate of title as an important muniment of title, and contemplating no doubt that it may in due time lead to a certificate of indefeasible title. I have quoted these passages from the Land Registry Act and its amendments to shew that the policy of the law as respects the importance of title deeds in the transfer of land was by no means changed by that measure. The reports in England had shewn only too often that no amount of legal care and skill could wholly prevent fraud in such cases, but that resort must be had to some additional assistance by a system of land registration, not as a substi-

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tute for the possession of deeds, far from it, but as an auxiliary to the safe transfer of land, and the measure in force in this Province, if I may say so, is well calculated to fulfil its purpose. The two trials and two appeals which have unfortunately occurred in the present case are due in no way to the system of the law. In truth, now, after the event, it would be difficult to frame provisions better calculated to prevent the expensive proceedings occasioned by the conduct of Kearns, Foster and Rowling. I must say also that Rowling was to blame for not having the deeds for the purpose of registration of his interest, see the Land Registry Act, Secs. 18, 19, 54 and 55. Section 61 also of Land Registry Act and its amendments by the Land Registry Act Amendment Act, 1892, Sec. 2, already quoted, clearly pre-suppose that the purchaser should have the certificate of title with him at the time of registration of the fee, which Rowling attempted immediately on getting his conveyance from Miss Kearns.

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He should also have known the law, whatever the practice might be, that the conveyance of an estate in fee simple could not be registered as a charge; also, that in registering a charge, section 19 as to title deeds should be attended to; the interpretation clause and sections 13 and 19 of the Land Registry Act carefully maintained the distinction between an "absolute fee" and a "charge."

I had rather express no opinion as to whether the registrar's omission to require the deeds and certificate of title vitiated the registration by Rowling. Rowling himself was in default, according to the obvious intention of the Act, in not having those documents, there being no sufficient excuse for such default. I think he cannot in any view rely on section 35, which must be taken or read in connection with his duty to have those instruments as well as *bona fides*, and it must be read along with sections 54 and 61, and amendments. The Act seems to emphasize and not qualify the necessity for the purchaser obtaining or at

least inquiring duly for them, and that irrespective of the necessity for him to shew his *bona fides* so as to invoke section 35, which must not be construed to cover cases of fraud aud fraudulent preference, and those referred to in the Statutes of Elizabeth, and the like. On this point I would refer to my former judgment in the Full Court.

Mr. Justice WALKEM observes upon the contradictory answers given to the inquiries about the deeds, and from these answers and other suspicious circumstances finds that the facts of this case bring Rowling within the doctrine of *Worthington* v. *Morgan*, 16 Sim. 547 ; *Hewitt* v. *Loosemore*, 9 Hare, 449, and *Agra Bank* v. *Barry*, L.R. 7 H.L., per Lord SELBORNE, at p. 157, where His Lordship refers to evidence of a design inconsistent with *bona fide* dealing to avoid knowledge of the true state of the title ; and WALKEM, J., says that on these grounds, if there was no Land Registry Act, the plaintiffs would be entitled to judgment. I agree in this, but I add that Rowling's default in respect of the deeds makes it unimportant to consider that of the registrar, and whether his diligence was a condition precedent to valid registration. I certainly cannot say that the trial Judge, who had the great advantage of seeing the demeanour of the witness Rowling, is wrong. I may refer also to what is said by Lord CAIRNS in the case of *Agra Bank* v. *Barry*, *supra* : "Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy* v. *Green*, 3 M. and Keen, 699, commented on in case of *Jones* v. *Smith*, 1 Hare, 43, conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that by reason of a suspicion entertained by the person whose conduct you are examining that there was a registered (*qu.* unregistered) deed before his, he will abstain from inquiring into the fact, because he is so satisfied that the fact exists that he feels persuaded that if he did inquire he must find it out." Lord CAIRNS expressed no decided opinion upon a case of that kind even

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under the Irish Registry Act, where I gather (see per Lord HATHERLEY at p. 155) there is a provision that "everything that is not upon the register is as against him (*i.e.* the party registering his deed) fraudulent and void." Of course, as I have pointed out, the Land Registry Act is far different and assumes the existence of a duty on the part of the purchaser to obtain the deeds, and especially the certificate of title, with a view to register his deed, and I quote the opinions of these eminent Law Lords because I have no doubt as to what would have been their views as to a case like the present under our Land Registry Act, and they would have dealt with Rowling according to the doctrines laid down in *Worthington* v. *Morgan*; *Hewitt* v. *Loosemore*, and *Jones* v. *Smith*, before quoted.

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I am not going to discuss the evidence at length, as the trial Judge has done that, and I think his remarks are fully warranted. I will merely observe that Rowling's evidence shews that he asked for the deeds before signing the second note, and "they said they hadn't them." Miss Kearns said "that night she had no papers." To a question: "What did she say about the certificate of title?" He answered, "I said there must be one in existence, she said she would get it for me." And when asked "What did they say?" he replied, "I said someone must have them, it must be in existence, did you leave it at the Land Registry Office? No, they said, it was not there. I said someone must have them. I said to Miss Kearns, when could she have them? She said in a few days." As a shrewd man accustomed to dealing in real estate he evidently must have expected it was deposited with some creditor, and the word "it" no doubt referred to the certificate of title, the value of which he appears to have well known. To a question: "He (Foster) told you she was in difficulties?" he answered, "He told me she was pressed for money and said she had pledged her jewels for money." It was at least probable she had made all she could out of her real

estate before pledging her jewels, and she was conveying the land to Rowling for half its value. The first note was signed without making inquiries after searching the title and before getting the deed, and the second after knowing that "she ought to have the deeds and certificate and yet hadn't them or any of them." I must here observe that a deposit of title deeds for the purpose of the legal mortgage being drawn up and executed (and that is an equitable mortgage, see *Edge* v. *Worthington*, 1 Cox Ch. 211) is a very common transaction. There is frequently delay in preparing the mortgage, owing to the state of the title or other causes. The intending mortgagee can take no further precautions against fraud than by getting the deeds and certificate of title as the plaintiffs did in this case, but if the appellant's contention prevails that will be often useless for the mortgagor; frequently a needy person, and sometimes unscrupulous, can find a purchaser who will buy cheap, as in the present case, and make no effectual inquiries as to the deeds and certificate, and the mortgagee will find the Land Registry Act not a safeguard but a delusion and a snare, not even affording the protection which the doctrine of "constructive notice" used to supply.

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The framers of the Act certainly contemplated no such pernicious system, and the sections as to the productions of the deeds, etc., to the registrar, were obviously meant to provide against such frauds as this of Kearns. The case of *Moore* v. *Bank of British North America*, 15 Gr. pp. 309 and 312, shews that as an equitable mortgage cannot, under section 25 of the Land Registry Act, be registered, constructive notice is sufficient notice against a subsequent registered conveyance, and section 35 must be considered as restricted to unregistered titles which are capable, not which are incapable of registration—any other construction would greatly assist in frauds such as this of the Kearns,' and would be most unjust, and moreover the point seems to be covered by the English cases referred to. I cannot

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read section 25 as stating that "no unregistered equitable interest shall be valid against a registered instrument executed by the same party, his heirs or assigns," or like the Irish Registry Act referred to in the *Agra Bank* case, L.R. 7 H.L. at p. 157, as "telling a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, and see per Lord HATHERLEY, at p. 155; on the contrary, section 25 affords a warning to the purchaser or mortgagee to be careful to get in the deeds and certificate, as non-registration is of course no proof or indication that a deposit has not been made of the deeds, etc., and for the purpose of preparing a mortgage. I must say in conclusion that I think Mr. *Davis*' criticisms on the whole transaction are well warranted.

Judgment of McCREIGHT, J.

Rowling, if an honest purchaser, must have thought it singular that half of the proposed purchase money of $300.00, *i.e.*, $150.00, should be paid by note to Foster, in contradistinction to the second note to be given to Miss Kearns for an equal amount. Foster could not be entitled to more than a trifling sum by way of commission, and no explanation can be given of the first note being made payable to him and discounted by him immediately. It is not suggested that he had any interest or estate in the land, yet receives $150.00, whilst she the supposed owner in fee parts with $500.00 or $600.00 worth of land for $150.00, and Rowling buys the land for $300.00. If an action had been brought to set aside the deed as a fraud upon creditors, I think a jury, especially considering the way Rowling gave his evidence, would have come to only one conclusion. One would have expected Rowling to exercise at least usual caution under these circumstances, especially as he appears to have been accustomed to selling and buying land. I remarked already on Foster telling Rowling that Miss Kearns had pledged her jewels, as calculated to make him suspect she had previously parted with her real estate. On the whole I think he had good

ground to suspect that Foster and Miss Kearns were acting fraudulently, and should have taken at least usual precautions. But his conduct in connection with the two trials places him further in bad light. He was buying, admittedly, from persons who were committing a fraud. Foster was a particular friend of Miss Kearns, and the transaction shews they understood each other. Now, when an honest purchaser finds himself in a position of having been deceived and so having unintentionally injured someone else, he is expected to give a full, fair and frank account of the transaction, so as to rebut any inference of deceit on his part. And the fraud generally casts the *onus probandi* upon him, especially where as here the plaintiffs cannot of course have the evidence of Foster and Miss Kearns, and whilst he Rowling knows the whole so far as he is concerned with it, the plaintiffs have no information or means of obtaining any. Under these circumstances one would have expected him to appear as a witness on the first trial if he had an honest case, and I think his experienced counsel would have produced him for the purpose of shewing *bona fides* if it had been prudent to do so. The second trial was occasioned by his not being a witness on the first, and his evidence there given has not left a good impression on my mind, and did not on that of the trial Judge, who evidently thinks and indeed finds that his conduct subjects him to the penalty of buying with notice, according to doctrine of the cases cited.

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The conduct of Rowling between 26th October, when he gave the first note to Foster, and 2nd November, when he gave the second note to Miss Kearns, is worthy of attention.

After giving the first note on the assurance that they had the deeds and certificate of title, he finds the same evening that they have neither, and without suggesting that they are lost or destroyed will not say where they are. This gross contradiction and the obtaining of the first note under such circumstances was calculated to make a purchaser angry

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and demand the return of the first note or the money, with threats perhaps of criminal proceedings, but not so with Rowling. Without any complaint or interruption of friendly intercourse, and after full opportunity for verifying the suspicions he must have entertained as to the deeds and certificate being held by some creditor, he gives Miss Kearns the second note for $155.00 on first November. He appears to have well understood the value of searches, and the registry of bills of sales, if nothing else, should have disclosed that the Hudson's Bay Company had long been creditors to a large amount.

His conduct is difficult to reconcile with the theory of his being an honest purchaser. Further, he appears not to be sure whether he has had dealings with Foster since that time; an injured purchaser should surely remember whether he had or not. I don't think his consulting Mr. *McPhillips* on a cut and dried question as to purchasing a registered title improves his position. I believe the experience of the profession to be that a client with a plain honest case is generally very communicative.

Judgment of McCREIGHT, J.

Of course, WALKEM, J., had the great advantage of observing the demeanour of Rowling as a witness, which does not appear to have been satisfactory, according to the stenographer's notes, and probably appeared worse to a personal observer. Under all the circumstances, I cannot say the decision was wrong. Indeed I think it was correct, and the appeal should be dismissed with costs.

Appeal allowed.

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HOLMES v. THE CORPORATION OF VICTORIA.

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Practice—Right of defendant to add joint tort feasors as co-defendants—Third party practice—Order X. and Order XVII., Rule 12, of County Court—Municipal Act Amendment Act, 1893, Sec. 22, Sub-sec. 108 f.

A defendant in an action of *tort* has no right to an order to add other parties as co-defendants upon the ground that they are also responsible to the plaintiff.

Such persons might be added as third parties under Sec. 22, Sub-sec. 108 *f.* of the Municipal Act Amendment Act, *supra*.

SUMMONS by defendants to add certain persons as co-defendants. The action was brought to recover damages for injuries alleged to have been caused by the defendants to the plaintiff by a defective sidewalk. The defendants claimed that the defect, if any, was attributable to the action of the persons in question by interfering with the sidewalk in question in course of the erection by them of a building near the line of the street. Statement.

W. J. Taylor and *C. D. Mason*, for the application, referred to the Municipal Act Amendment Act, 1895, Sec. 22, Sub-sec. 108 *f.*, C.C. Rules, Order X. and Order XVII., Rule 12. Argument.

Denis Murphy, for the plaintiff, offered no objection.

F. B. Gregory, for those persons sought to be added, *contra*: This is not a case to which County Court Rules, Order X., applies; neither is the application within Order XVII., Rule 12, *Norris* v. *Beazley*, L.R. 2 C.P.D. 80; Pitt-Lewis County Court Practice, 2nd Ed. (1884), 360–4.

DRAKE, J: In this case the defendants desire that a number of persons, owners of certain land and premises, should be added as defendants, on the ground that the defendants may have a cause of action against them in case the plaintiff is successful in the present action. Judgment of DRAKE, J.

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The action is one of *tort*, and the defendants contend that unless they can bring these persons before the Court the Corporation will lose all remedy against them under section 22, sub-section 108 *f.* of the Municipal Act Amendment Act, 1893.

I am clear that they cannot be added as defendants, see *Horwell* v. *London General Omnibus Company*, 2 Ex. D. 365.

There is no contribution amongst wrong-doers, and it would be manifestly unfair to compel a plaintiff to sue persons against whom, rightly or wrongly, she considers she has no claim, and to whom she might have to pay costs in case the jury decided that the Corporation alone were to blame.

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On the other hand, the section of the statute says that the Corporation can add these persons (against whom they consider they have a remedy over in case of an adverse verdict) as third parties, and I think that under the Act they should be so added. The summons is dismissed with costs.

Summons dismissed.

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DIVISIONAL COURT.

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CRANSTOUN v. BIRD

International law—Justification of trespass as act of State—Territorial limitation of—Pleading—Admission.

In an action against the captain and owner of a steamship for trespass and false imprisonment in taking the plaintiff on board their steamship at Honolulu and conveying him to Vancouver, B.C., against his will, the statement of defence of each defendant alleged that "in receiving the said plaintiff on board the said steamship Warrimoo and conveying him to Vancouver aforesaid he was acting as the agent for the Hawaiian Government, being a responsible Government, and carrying out the lawful order of that Government, given in the said City of Honolulu and Island of Oahu, which were at that time under martial law." The plaintiff in his reply admitted the above paragraph.

DRAKE, J., at the trial non-suited the plaintiff, on the ground that the scope of the allegation was that the act of State, and agency of the defendants for the Hawaiian Government in carrying it out, covered the conduct complained of outside as well as within the territorial limits of Hawaii, and that the admission was fatal to the cause of action.

Held by the Full Court *per* MCCREIGHT, J. (Davie, C.J., and Walkem, J., concurring), over-ruling DRAKE, J., and granting a new trial:

That the scope of the admission had reference to the substantive facts alleged in the defence and not the extent of the agency as alleged, which was a matter of legal deduction from the facts not susceptible of being concluded by admission.

That the justification afforded by a defence of agency for a responsible Government in the execution of an act of State, only extends to acts done within the territorial jurisdiction of that State.

APPEAL from a judgment of DRAKE, J., at the trial non-suiting the plaintiff. The action was against C. E. Bird, the captain, and James Huddart, the owner, of the British steamship Warrimoo, for assault and false imprisonment, in seizing the plaintiff at the Port of Honolulu and taking him against his will on board the steamship and carrying him across the high seas to the Port of Vancouver, B.C.

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The defendants *inter alia* pleaded in their statement of defence: "(11). Some time prior to the alleged trespasses a rebellion had broken out in the said City of Honolulu and in the Island of Oahu in which the said city is situated, against the constitution and government by law established in the said island, and accordingly the Hawaiian Government, which was the established government in the said city of Honolulu and in the island of Oahu, and which was a responsible government and was recognized as such by nations, had some three weeks prior to the time of the alleged trespasses suspended the writ of habeas corpus and instituted and established martial law in the said city of Honolulu and throughout the whole island of Oahu, and the said city of Honolulu and the island of Oahu were under martial law at the time of the alleged trespasses and for some time thereafter. (12). By virtue of the written constitution of the Republic of Hawaii, of which the island of Oahu forms part, one Sanford B. Dole, the then President of the said Republic, became Commander-in-chief under the martial law so established as aforesaid, and the said Sanford B. Dole being of the opinion that the plaintiff was a person dangerous to the peace of the community, and the said Republic accordingly directed the plaintiff to be removed from the said city of Honolulu and from Hawaiian territory and to be conveyed to the said Port of Vancouver, in the Province of British Columbia. (13). Accordingly, under the instructions and orders of the said Sanford B. Dole, an armed escort, on or about 2nd February, 1895, took the plaintiff, who was at that time imprisoned in gaol in the said city of Honolulu on a charge of conspiracy against the Republic of Hawaii, on board of the said steamship Warrimoo. (15). Alternatively, this defendant says that in receiving the said plaintiff on board the said steamship Warrimoo and conveying him to Vancouver aforesaid he was acting as the agent for the Hawaiian Government, being a responsible government and carrying

out the lawful order of that government given at the said city of Honolulu and island of Oahu, which were at that time under martial law as aforesaid." The defendant Huddart pleaded that the defendant Bird had no authority either express, implied or constructive, from him to commit the acts complained of. The plaintiff in his reply admitted the paragraphs 11, 12, 13 and 15 as set out above.

The case was tried at Vancouver before DRAKE, J., and a common jury, on 10th and 11th January, 1896.

The evidence shewed that the plaintiff was confined in gaol at Honolulu as a political prisoner, that the Government of Hawaii asked the defendant Bird to arrange for his deportation to Vancouver on the Warrimoo, that he stated he would only carry the plaintiff on an ordinary passage ticket, that such a ticket was purchased from the ticket agent of the owner, the defendant Huddart, at Honolulu, and that Captain Bird and the plaintiff saw the American Consul at Honolulu, who advised the plaintiff to submit to the deportation.

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It appeared also that the plaintiff was taken on board the Warrimoo by armed guards, that he did not see or notify Captain Bird of any objection on his part until the steamer was five days out at sea, when he sent him a formal written protest.

The learned judge withdrew the case from the jury and non-suited the plaintiff, delivering an oral judgment, which was reported by the stenographer as follows :

DRAKE, J. : The defendants move for a non-suit on three grounds here : First, that Captain Bird had no authority to commit the acts complained of, and if so he was exceeding his authority as servant of the defendant Huddart, because Huddart himself could not have lawfully taken the plaintiff to sea by force against his will. A good many cases were cited which it is hardly necessary for me to go through in detail, in fact I have not had the opportunity to read them ;

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but the action here is against the master as well as the owner of the vessel, and the owner of the vessel is only concerned, I may say vicariously, in an action of this character, because he was not there himself, gave no authority whatsoever, and it can hardly be treated as a joint tort; but if this act of the captain was illegal altogether, it may be that he does not thereby make his principal liable. The point is urged that Captain Bird exceeded his authority as master in taking these passengers who were not voluntary passengers. That may be so, but the real underlying question is not so much whether this was a joint tort or not, or whether the act done by the captain was within the scope of his authority, and done without his employer's or with his employer's knowledge.

The chief point involved is the second point, which is raised by virtue of admissions in the pleadings that the acts done by Captain Bird were done as agent of the Government of Hawaii, and therefore no cause of action will lie.

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"Alternatively, this defendant says that in receiving the said plaintiff on board the said steamship Warrimoo, and conveying him to Vancouver aforesaid, he was acting as the agent of the Hawaiian Government, being a responsible government, in carrying out the lawful orders of that government, given in the said city of Honolulu and island of Oahu, which were at that time under martial law as aforesaid." That is admitted. Now, what is the admission that the plaintiff makes? That these defendants—without separating them—received the plaintiff on board to convey him to Vancouver, that in so doing Captain Bird was the agent of the Hawaiian Government, and he was carrying out the lawful order of that government. That appears to me practically to put an end to the case, see Foote on International law, 140-42. There is no liability either in the nature of contract or of *tort* for acts done by agents of foreign governments, either with express authority or

without prior authority, with subsequent ratification, *Buron* v. *Denman*, 2 Ex. 167. The plaintiff was brought on board there by the lawful act of a lawfully constituted authority, and in charge of the agent of that Government. The admissions are not limited to the acts which took place in the harbour of Honolulu, but they go to the extent of carrying the plaintiff to Vancouver. No Court here is entitled to discuss the acts of state of any foreign power. It has no jurisdiction to do so; it would be a mere presumption on the part of the Court here to discuss the validity of the acts or anything of the sort.

Foreign states are entitled to carry out their own laws in their own way, and neither this Court nor any other has any jurisdiction to say anything with regard to them. But the plaintiff having admitted the facts I do not see how he has any cause of action. Practically, by his pleadings no cause of action arises at all.

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With regard to the question as to the act of indemnity, I do not know how far that may extend. Of course, as it is admitted that there was one, the presumption is that there was. It was not produced though admitted in the pleadings, and being so therefore the presumption is that there was indemnity, not only as against President Dole but against all acts done by him on his authority or by agents under him in respect of that authority, for anything that they did. How far that indemnity would extend in a Court here I am not prepared to say, neither am I prepared to give any opinion in the matter. In the case of *Phillips* v. *Eyre*, L.R. 4 Q.B. 225, affirmed on appeal, L.R. 6 Q.B. 1, the act of indemnity was an act of indemnity for British Dominions, and when the question came before a British Court it was in respect of acts done entirely in British Dominions, and the act of indemnity was sufficient to protect Governor Eyre as to all causes of action against him.

Mr. *Wilson* seeks not to distinguish the case of *Reg.* v. *Lesley*, Bell C.C.R. 220, from the present case, but argues they are

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identical. I think when he looks at it he will see there was a contract entered into by the Governor of Chili, which he might enter into with anybody. By entering into a contract he does not establish agency with the person with whom he enters into that contract but with the captain as an individual. The Court says, as far as that is concerned, it was a valid contract within the scope of Chilian authority—that is, within the waters of Chili—but beyond that it had no avail. But there is a great distinction between the two cases here. Call it a contract if you like, but it was not made with a stranger here, but with an agent of the Government. He chose to accept the agency, and that agency having been admitted he was, during the whole time he was acting under that agency, so far a representative of the Hawaiian Government. Such being the case, there is a very great difference between that case of *Lesley*, where the captain of the vessel, simply for the purpose of making money, undertook the deportation of certain individuals, and it was held that the contract was of no avail against an action for false imprisonment. Under the circumstances I must accede to Mr. *Davis*, and decide that there is no case made out, and enter a non-suit.

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Plaintiff non-suited.

The plaintiff moved the Divisional Court to set aside the non-suit and for a new trial, and the motion was heard before DAVIE, C.J., MCCREIGHT and WALKEM, JJ., on 20th, 21st and 22nd April, 1896.

Statement.

John Campbell, for the plaintiff: The defendants being the captain and owner of a British ship, their justification as being agents or mandatories of the Hawaiian Government in what they did only extends to acts done within the territorial jurisdiction of that government, *Regina* v. *Lesley*, Bell C.C.R. 220; *Doree* v. *Napier*, 2 Bing. N.C. 781; *Regina*

Argument.

v. *Anderson*, L.R. 1, C.C.R., BYLES, J., at 168; *Regina* v. *Carr*, 10 Q.B.D. 76; *Phillips* v. *Eyre*, L.R. 4 Q.B. 225, affirmed on appeal, L.R. 6 Q.B. 1; *Secretary of State for India* v. *Kamachee*, 13 Moo. P.C. 75. For acts done on the high seas the defendants are as much responsible as if done on British soil. The defendant Huddart is responsible for the act of his captain, Bird, *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; *Walker* v. *Baird*, L.R. (1892) A.C. 491; Pollock on Torts, 3rd Ed. 99, 101; *Joel* v. *Morison*, 6 C. & P. 501. The statement of defence never intended to admit the agency of the defendants beyond the scope to which such agency would by law extend on the facts. [MCCREIGHT, J.: If the plaintiff had replied to the defence of agency for the Hawaiian Government that such agency, or engagement in an act of state, for and on command of the Hawaiian Government, only extended to acts done by the defendants under that authority within the territorial limits of Hawaii, it would have been pleading a conclusion or inference of law, and was at least unnecessary.] The allegation in paragraph 15, that in receiving the plaintiff on board and conveying him to Vancouver Captain Bird was acting as agent of the Hawaiian Government, is not necessarily an allegation that Bird was employed in an act of state, or that the agency or employment was anything more than as an ordinary carrier of passengers for hire. At most the admitted agency must be taken distributively and understood as admitting an act of state and agency for the government therein only in regard to things done within Hawaiian territory, and not to imprisonment on the high seas and in British waters, which could not in law be contemplated as acts of state, and as to the latter admitting only the agency which would arise from the facts namely the the relationship of carriers by water for the Hawaiian Government for hire. [WALKEM, J.: The captain may have a right to justify making a gaol of his ship within the three mile limit of Hawaiian waters, but not outside].

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Argument.

E. P. Davis, Q.C., for the defendants: An act authorized by a sovereign power against a subject of another power is an act of war, and not to be enquired into by civil courts. The remedy is by one Government against the other. The American consul advised Captain Bird to proceed as directed by the Hawaiian Government [McCREIGHT, J.: *Conway* v. *Gray*, 10 East. 536, shews that consuls do not represent their Governments for such purposes]. To constitute an act of state the act must be authorized by an independent state or one of its agents, *Walker* v. *Baird* (1892), A.C. 491; Pollock on Torts, 3rd Ed. 101. A trespass on the high seas or in foreign territory against a subject of a foreign state committed by any authorized agent of the offending state is an act of state and is not the subject of judicial cognizance in any civil action, but a matter of international dispute. In committing acts of state or of war upon foreign subjects or territory the nationality of the agent is immaterial. A state is not limited in the choice of its agents, and the immunity of the agent under the rule invoked is governed by the character of the act and not by his personal circumstances. The ordinary rule governing the liability for *torts*, that both the principal and the agent are liable, is departed from in cases where the principal is an independent government, and the act one of state; then the agent is treated as the mere mandatory of the foreign government, with no individual responsibility. The question of "act of state" only arises as a defence to what otherwise would be a *tort*, namely in regard to an act done by the authority of an independent government outside its territorial limits, for with regard to an act done within its limits the question of such a defence could not arise, as the act would there be *prima facie* and *ab initio* a lawful act. In *Buron* v. *Denman*, 2 Ex. 167, the acts complained of were not done in the territory of the power which authorized them, for Captain Denman went ashore from his ship, which represented English territory, into the foreign state

and burnt the barracoons in question, and it was held that the act was justified as an act or state, though committed by the defendant in the foreign territory, because he was therein the agent of the government of England. It is submitted that the non-liability of the agent is not dependent upon his nationality. *Regina* v. *Lesley*, *supra*, does not conflict with *Buron* v. *Denman*, *supra*. In the former case, there was a mere contract to carry, and the act was not one of state. The counsel for the Crown in that case say the "defendant cannot justify his conduct by any warrant of the Chilian Government, *i.e.*, he had no warrant for it." [DAVIE, C.J.: No, the meaning is that no warrant the Chilian Government could give would justify the defendant, not that *de facto* there was no warrant.] The captain here was an arm of the Hawaiian Government, *King* v. *Walker*, 33 L.J. Exch. 325.

There was no trespass by Bird. The evidence shewed that the plaintiff was brought on board having an ordinary passenger ticket. That he made no complaint until several days out from port. As to the employee of the defendant Huddart, the man who sold the ticket, there is no evidence that he was aware of any special circumstances relating to the carriage of the person to travel thereon namely the plaintiff. It was purchased in the ordinary way. When Bird was informed of the circumstances, several days out from port, he was not in a position to release the plaintiff. It was evidently to plaintiff's advantage from the first to be deported from Hawaii, where he was a prisoner in gaol, and to reach Vancouver and thence his own country. If Bird, not having been a trespasser *de facto* in Hawaiian waters, became a trespasser *ab initio* as soon as he was notified by the plaintiff of the position of affairs, it cannot be said that the plaintiff suffered any damage.

Argument.

The defendant Huddart, the owner, is not liable for the acts of his captain or ticket agent, in what was done, as having been done beyond their implied authority from

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him. Their implied authority was to command the steamer and arrange for the carriage of ordinary passengers for hire, and not to undertake the custody of political prisoners. There was no implied authority from him to do the acts charged, nor any ratification by him, *Edwards* v. *L & N. W. Ry. Co.*, L.R. 5 C.P. 445; *Bayley* v. *Manchester Ry. Co.*, L.R. 8 C.P. 148; *Emerson* v. *Niagara Navigation Co.*, 2 Ont. 528; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; *Ashton* v. *Spiers*, 9 L.R. 606; *Bolingbroke* v. *Swindon Local Board*, L.R. 9 C.P. 575; *Mackay* v. *Commercial Bank of New Brunswick*, L.R. 5 P.C. 394. The authority of the captain of a ship in regard to contracts for the preservation of the ship, etc., is wider than that of an ordinary agent, *Grant* v. *Norway*, 20 L.J.C.P. 93; *Cox* v. *Bruce*, 18 Q.B.D. 147; but in relation to *torts* there is no implication of authority against the master.

Argument.

Campbell, in reply: The defence of act of state is one of justification. How far did the justification extend? To the limits of the territorial jurisdiction of Hawaii. It is no answer for Bird to say his contract was to carry the plaintiff beyond that. No power could have compelled him to enter into such a contract. It is questionable whether the act is one of state, *i.e.*, by Bird as an arm of the Government and as their mandatory. It is rather the mere case of a person voluntarily undertaking for hire to commit a trespass.

As to the liability of Huddart, decisions in actions against corporations for trespasses committed by their servants are not in point. There the question of *ultra vires* intervenes, and it is conceded for the purposes of this argument that a company is only liable for an act of its servant done within the scope of the corporate powers of the company. Here the widest discretion was committed to the captain of the steamer and all the employees, in the absence of personal control of the owner, and the making and execution of any contract for carriage by water to the benefit of the master was within their implied authority for him *ex necessitate rei*,

Limpus v. *London General Omnibus Co.*, 1 H. & C. 526; *Harris* v. *Brunette Sawmill Co.*, 3 B.C. 172; *Adams* v. *N.E. T. & L. Co.*, *ibid*, 199; *Dyer* v. *Munday*, 14 R. 306 (1895), 1 Q.B. 742; *Ferguson* v. *Roblin*, 17 Ont. 167; *Whatman* v. *Pearson*, L.R. 3 C.P. 422; *Swift* v. *Winterbotham*, L.R. 8 Q.B. 244. It was a question for the jury to decide whether the captain was acting within the scope of his employment, *Fenton* v. *Dublin Steam Packet Co.*, 8 L.J.Q.B. 28. A master is liable for the wilful and deliberate trespass of his servant where it is done for the master's benefit, *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270.

Cur. adv. vult.

McCREIGHT, J.: The plaintiff is a citizen of the United States and was carrying on business at Honolulu in the Sandwich Islands at the time when a rebellion had broken out there and the writ of *habeas corpus* was suspended and martial law established. The Government seems to have thought that the plaintiff, Cranstoun, was a person dangerous to the peace of the community, and accordingly directed that he should be banished and conveyed to the port of Vancouver in the Province of British Columbia. Accordingly the plaintiff was taken by an armed escort, he at the time being a prisoner in jail, on a charge of conspiring against the Government, on board the steamer Warrimoo, a British vessel, the captain of which, the defendant Bird, was a British subject.

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The defendant, Captain Bird, had communication with the Government and consented to the carrying of Cranstoun to Vancouver, taking a letter of indemnity from the authorities, and consulted with Mr. Swansea, the agent of the steamship company.

The plaintiff Cranstoun was put on board by force and against his will, and the captain saw him along with two other prisoners on the deck in charge of the Honolulu

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police before the sailing of the steamer. The police accompanied the steamer for some distance and returned to Honolulu in the pilot boat. The steamer proceeded on her voyage to Vancouver. The plaintiff Cranstoun protested to the captain verbally and afterwards in writing during the voyage.

The Government wanted to pay the passage money on board the Warrimoo, but the captain would not allow that, and told the authorities they would have to go to the office of the agent and book in the usual way, which they did, and the captain saw the ticket was issued by the agent, with the name of Cranstoun and two others on it.

This I think is a sufficient statement of the facts, for the non-suit granted by the trial Judge was in consequence, as he says, of paragraph 15 of the statement of defence, and the supposed admission of its contents by the omission to traverse it, and the admission in paragraph 2 of the reply.

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[The learned Judge here quoted the paragraph.]

The learned trial Judge in his judgment says that the "admissions are not limited to the acts which took place in the harbour of Honolulu, but they go the extent of carrying the plaintiff to Vancouver."

I do not understand the learned Judge to imply that the plaintiff has admitted anything more than the facts stated in paragraph 15, including of course the law of Hawaii or foreign law as a fact. He in no way suggests that the omission to deny, or admission, operates as between the plaintiff and defendants, to displace the undoubted English law as it is succintly stated in the judgment in *Reg.* v. *Lesley*, Bell's C.C.R. at pages 234–35: "It may be that transportation to England is lawful by the law of Chili and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili out of the State are powerless and the lawfulness of the acts must be tried by English law." Substituting Hawaii for Chili we have the present case.

Supreme Court Rules 158 and 167 deal only with allegations and admissions of fact, and seem in no way, as might be expected, to affect the former law that a traverse must not be taken on a matter of law. In Odgers on Pleading it is stated at page 41 that: "It is unnecessary for either party to plead to any matter of law set out in his opponent's pleading. This may be treated as mere surplusage." Again at page 67 it is said a traverse must not be taken upon a matter of law.

The English law must therefore determine the case, *Lesley's* case, Bell's C.C.R. page 235, decides that: "For an English ship the laws of Chili out of the State are powerless and the lawfulness of the acts must be tried by English law."

The ruling of the learned Judge then appears to be "that the defendant Bird received the plaintiff on board to convey him to Vancouver; that in so doing, Captain Bird was the agent of the Hawaiian Government and he was carrying out the lawful order of that Government." Again he says: "The admissions are not limited to the acts which took place in the harbour of Honolulu, but they go to the extent of carrying the plaintiff to Vancouver." This may be true, but the authorities which I have quoted shew that the English law, in spite of supposed admissions, remains unaffected and are to the effect that for an English ship the laws of Hawaii out of the island and past the line of Hawaiian jurisdiction, are powerless, and the lawfulness of the acts must be determined by English law.

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The admission can mean no more than this, that a lawful order was made in Hawaii to carry the plaintiff in a lawful manner to Vancouver, and in an Hawaiian ship the order might probably have been lawfully carried out.

No international law, as it seems to me, has any operation on the case. An English captain of an English ship outside Hawaiian jurisdiction commits a trespass, and Hawaiian law or acts of that Government cannot justify the trespass

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in an English court. No doubt in an Hawaiian court it would or might be otherwise, and this shews that *Buron* v. *Denman*, 2 Ex. 167, has no application. There Commander Denman committed a trespass in Africa by destroying the property of a slave trader, though not expressly authorized to do so in the first instance by the English Government. They afterwards ratified and approved of his action, and when he was sued by the slave trader, this approval was treated as equivalent to a prior command. It is observable that though *Buron* v. *Denman* is a celebrated case, and was a trial at bar before four barons of the Court of Exchequer, no allusion is made to it by counsel or the Court in *Reg.* v. *Lesley*, which I have referred to, and which seems to be a case identical with the present in all its features. *Buron* v. *Denman* was decided in 1848, and *Reg.* v. *Lesley*, in 1860.

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The captain in the last-mentioned case, as in the present case, made a contract of agency with the foreign government to take persons to an English port against their will; and in the judgment of the Court delivered by ERLE, C.J., which expresses my meaning a great deal better than any language I could find, it is said: "Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment."

I think the non-suit must be set aside and a new trial granted. I think the same order applies to Huddart, the owner of the ship. Even supposing he is not legally responsible for the acts and conduct of his captain in this transaction, I think he is liable *prima facie* for that of his agent, Swansea, in issuing the tickets for the conveyance of Cranstoun by the steamer, at the instance of and to the

Hawaiian Government. Swansea was employed to do that class of acts, see *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 266, the law there laid down being: "It is true he (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 the agent has conducted himself in doing the business which it was the act of his master to place him in."

Again, Huddart must have received the passage money paid by the Hawaiian Government, thus receiving a benefit from the conduct of Swansea, the ticket agent, see *Weir* v. *Barnett*, 3 Ex. Div. 42, and *Mackay* v. *Commercial Bank of New Brunswick*, L.R. 5 P.C. 412–13.

Mr. *Davis*, for the defendants, further argued that the interference or action of the United States Minister bound the plaintiff, as a subject of the United States of America, although repudiated by the plaintiff, who was forcibly put on board the Warrimoo; and this might perhaps have been at one time contended for, according to the case of *Conway* v. *Gray*, 10 East. 536, in the time of Lord ELLENBOROUGH, but that case has been, it seems, over-ruled by *Aubert* v. *Gray*, 3 B. & S. 170, where it is stated in the judgment of the Exchequer Chamber, at page 179: "The assertion that the act of the Government is the act of each subject of that government is never really true. In representative governments it may have a partial semblance of truth, but in despotic governments it is without that semblance."

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I think the non-suit must be set aside and a new trial granted.

DAVIE, C.J., and WALKEM, J., concurred.

Non-suit set aside and new trial granted.

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RE BOSSI

RE THE ESTATE OF GIACOMO BOSSI (DECEASED.)

Will—Trustees and executors—Practice—Vesting order.

The survivor of two trustees under a will, in his lifetime refused to convey the realty into the joint names of himself and a new trustee resident outside the jurisdiction who was duly appointed by the widow in place of the deceased trustee under power contained in the will, and died intestate as to the trust estate, leaving heirs many of whom were resident in distant places outside the jurisdiction.

Upon petition by the beneficiaries and the new trustee, DAVIE, C.J., made an order appointing a second trustee who was resident within the jurisdiction, and vested the realty in him and the trustee appointed by the widow.

Statement.

APPLICATION by the beneficiaries under the will of the late Giacomo Bossi and Frederick William Wald, a trustee thereunder, appointed by the widow in the place of one of the two trustees named in the will who had died, for an order vesting the trust property in him. The facts fully appear from the head note and judgment.

S. Perry Mills, for the petitioner.

Thornton Fell, for three of the heirs of Carlo Bossi resident within the jurisdiction.

H. B. W. Aikman, for the widow of Carlo Bossi.

Judgment.

DAVIE, C.J. : Giacomo Bossi, who died on 20th November, 1893, has by will, dated 21st May, 1891, devised all his real estate to his brother Carlo Bossi, and his nephew Achille Bossi, upon trust for his wife for life, with remainder to his son Americo Bossi (since deceased and without issue), and his daughters, Emma Caterina (now the wife of Frederick William Wald), and Anglica, in equal shares and propor-

tions. Achille Bossi having disclaimed the office of trustee, the widow, pursuant to power conferred on her by the will, appointed Frederick William Wald, the husband of her daughter Emma, to be trustee in the place of Achille Bossi, and thereafter Carlo Bossi and Frederick William Wald continued to act as trustees until Carlo Bossi's death, which occurred on 1st November 1895, but no conveyance of the trust estate was made by Carlo Bossi into the joint names of himself and the new trustee, or otherwise. In consequence of Achille Bossi's disclaimer no legal estate vested in him, but has all along been vested in Carlo Bossi alone. Carlo Bossi, by his will dated 26th May, 1876, devised his real estate to his wife for her absolute use and benefit, but he made no devise of the trust estate; consequently, as to such trust estate he died intestate, and the legal estate in the trust premises passes to his heirs. The case now comes before me upon petition presented by Frederick William Wald, the surviving trustee, his wife Caterina, Rosa Bossi, the widow of Giacomo, and Anglica P. Bossi, praying for an order vesting the trust estate of Giacomo Bossi in the said Frederick William Wald, who is shewn by the petition to be a resident of Seattle, Washington, out of the jurisdiction of this Court. It is shewn that many of Carlo Bossi's heirs are resident in foreign countries and their whereabouts unknown to the petitioners, and that the only heirs of Carlo Bossi (besides the two petitioners Caterina Wald and Anglica P. Bossi) resident within the jurisdiction and known to the petitioners are Americo Vincenzo Bossi, Andrea Calvine Bossi and Vincent Bossi, who have been served with this petition, and have appeared hereon by counsel, Mr. *Fell*. It would be competent for the widow Rosa Bossi herself to appoint a trustee in place of Carlo Bossi, but it would, I think, be inexpedient to do so on account of the legal estate outstanding in Carlo Bossi's heirs, and the difficulty in locating those of them who are resident abroad. I could, of course, make an order under section 10 of the Trustee Act,

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1850 [13 & 14 Vic. (Imp.) Cap. 60], vesting the title of the absent heirs in those resident within the jurisdiction, but as the names of the absentees are not known, and for other reasons, there would be difficulty in this course. The case, I think, falls within section 32 of the Trustee Act, 1850, *supra*, and section 9 of the Trustee Extension Act, 1852 [15 & 16 Vic. (Imp.) Cap. 55], which enacts that whenever it shall be expedient to appoint a new trustee and it shall be found inexpedient, difficult or impracticable to do so without the assistance of the Court, it shall be lawful for the Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order. I can then, under section 34 of the Trustee Act, 1850, *supra*, make an order vesting the lands in the persons who upon the appointment shall be the trustees for all the estate of Carlo Bossi's estate in the lands. This order under the statute will have the same effect as if Carlo Bossi's heirs had duly executed all proper conveyances. It will therefore be necessary to appoint another trustee besides Wald, and I think this is on other grounds desirable, for, as pointed out by Mr. *Fell*, the Court would hesitate to vest a large property, such as that now being dealt with, in one trustee, and particularly when that one trustee is resident abroad.

Judgment.

I shall be pleased if the parties suggest the name of a new trustee, as, if a suitable person, I shall be governed by their wishes, and will then make an order appointing him and vesting the estate in such trustee and Mr. Wald.

February 20, 1896.

The matter coming again before me upon a supplementary petition presented by all parties interested praying for the appointment of Mr. Frederick Carne, Jr., to be a trustee jointly with Mr. Wald, and, affidavits having been read establishing the fitness of Mr. Carne to be a trustee, I appoint him and vest the estate accordingly.

On settlement of this order the Chief Justice held that the facts as appearing on the application should be set forth, so as to be on record and for convenience of search hereafter.

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Order accordingly.

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Certiorari—Summary conviction—Minute and conviction returned to County Court imposing penalty (hard labour) in excess of jurisdiction—Right of convicting Justice to amend after such return.

A minute of conviction for an offence under a by-law, and summary conviction drawn up in accordance therewith by the convicting Magistrate, and returned by him to the County Court, directed the accused to be imprisoned with hard labour, in default of payment of the fine imposed or sufficient distress to meet it. The Magistrate had no jurisdiction to impose hard labour.

In answer to a rule *nisi* to shew cause why a *certiorari* should not issue to bring up the conviction and why it should not be quashed without the writ actually issuing, the Magistrate brought in on affidavit a copy of the conviction altered by him after it was returned to the County Court by cutting out the sentence of hard labour.

Held, dismissing the rule *nisi*, on the authority of *Regina* v. *Hartley*, 20 Ont. 481, that the Magistrate had a right so to amend the conviction and that the Court would not look behind it.

Quære, per McCREIGHT, J.: Whether the *certiorari*, if issued, should not be directed both to the County Court Judge and convicting Justice.

Certiorari is not taken away by section 80 of the Summary Conviction Act, 1889, (B.C.) in regard to objections going to the jurisdiction of the convicting Justices, by an appeal from the convicting to the County Court

Statement.

RULE *nisi* for a writ of *certiorari* calling upon A. M. Whiteley, the prosecutor, and Arthur William Wright, the convicting Justice, to shew cause why a writ of *certiorari*

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should not issue to remove into the Supreme Court a conviction of the applicant for having, at the City of Kaslo, discharged a firearm contrary to a by-law of the said city, the adjudication of sentence contained in the conviction being: "And I adjudge the said C. W. McAnn for his said offence to forfeit and pay the sum of $20.00 and costs, and if the said sums are not paid forthwith I order that the same be levied by distress and sale of the goods and chattels of the said C. W. McAnn, and, in default of sufficient distress, I adjudge the said C. W. McAnn to be imprisoned in the common gaol of the said district, there to be kept at hard labour for the term of ten days unless the said several sums are sooner paid;" and why, upon the return of the rule the said conviction should not be quashed without the said writ of *certiorari* actually issuing, upon the ground that the said magistrate had no power under the said by-law or otherwise to impose imprisonment with hard labour for the said offence.

Statement.

The defendant had appealed to the County Court, and the appeal came on to be heard and was adjourned, but was abandoned before it finally came on for hearing, and the present proceedings instituted.

The rule *nisi* was argued before DAVIE, C.J., on the 13th January, 1896.

Robert Cassidy, for the applicant.

A. E. McPhillips, contra.

Cur. adv. vult.

January 27, 1896.

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DAVIE, C.J.: The only question necessary to be decided in this case is whether a magistrate, who, in fining a person for an offence against a civic by-law, has directed imprisonment at hard labour in default of the penalty, can properly, in answer to a rule to quash the proceedings, send in a conviction omitting the hard labour.

Charles Whitfield McAnn was convicted before A. W. Wright, Esq., Police Magistrate for Kaslo (setting forth the conviction), of having discharged a firearm contrary to a by-law of the said city, and as appears by the minute made at the time by the magistrate, fined $20 and costs, to be levied by distress, and in default of distress to be imprisoned at hard labour.

Having obtained a rule *nisi* for *certiorari* to quash the conviction on the ground of want of jurisdiction to award hard labour in default of the penalty, it was shewn that he had also given notice of appeal to the County Court, which he had abandoned. The abandoned appeal would seem to present no obstacle to a *certiorari* based upon an excess of jurisdiction, *Reg.* v. *Starkey*, 7 Man. 43.

It was admitted upon the argument that the adjudication at hard labour could not be supported, but in answer to the rule the magistrate has returned a conviction which omits all mention of hard labour, and is otherwise upon its face properly drawn up. It is argued that the magistrate cannot do this ; that although magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction or drawn up in a formal manner (in this case it was only the note), but are at liberty, when called upon by *certiorari*, to draw up and return a formal conviction, correcting any errors which may have existed in that first drawn up, yet such amendments can be but of formal defects (*Houghton's case*, 1 B.C. Pt. I., 92), and in any event must be exercised according to the truth and facts of the case, and would not justify a magistrate, after his conviction had been attacked for an excess of authority, to return a conviction omitting all mention of the very excess upon which the conviction was attacked, *Chaney* v. *Payne*, 1 Q.B. 712 ; *Reg.* v. *Bennett*, 3 Ont. 45.

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On the other hand, in *Regina* v. *Hartley*, 20 Ont., where the magistrate had ordered a penalty to be levied by distress, when he had no jurisdiction to do so, a conviction returned

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to a rule for a *certiorari* omitting the distress was held to be unobjectionable. In *Rex.* v. *Elwell*, 2 Lord RAYMOND, 1514, the defendants were committed to Maidstone gaol "until they should pay a fine to the King." No fine having been set, or means provided by which the imprisonment would terminate, the conviction was quashed, and the Court remarked that the Justices "if a *certiorari* came to them might proceed to set a fine and complete their judgment, and it would be no contempt."

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If this be so after the Justice had drawn up a formal conviction *a fortiori*, would it be so when no formal conviction at all had been signed, up to which time (*Jones* v. *Williams*, 36 L.T.N.S. 559) the Justices have a *locus penitentiæ* and may change their minds. Possibly they could not give any effect to a change of intention, as regards the adjudication of guilt or the penalty, without hearing the defendant, as pointed out in *Reg.* v. *Brady*, 12 Ont. 363, and *Reg.* v. *Hartley*, 20 Ont. 485; but it seems to be otherwise as regards the consequences which follow the infliction of the penalty, *Reg.* v. *Hartley*, 20 Ont., at page 486. If the penalty appears to be properly ascertained by the conviction, the Court will not enquire when it was fixed, for, if determined at any time before the conviction is formally drawn up and returned, that is sufficient, *Reg.* v. *Smith*, 46 U.C. Q.B. 445, quoting Paley on Summary Convictions, 5th Ed., pages 271 and 424. It is not denied that the magistrate may by a fresh conviction remedy mere formal defects, and the unauthorized imprisonment with hard labour, as a method of raising the penalty, can hardly be looked upon as more than a formal defect.

An excess of jurisdiction quite as grave was treated as a formal matter only by COLERIDGE, WIGHTMAN and ERLE, JJ., in *Barton* v. *Bricknell*, 13 Q.B. 393. There the defendant in default of sufficient distress for costs amounting to 11s. was to sit publicly in the stocks for two hours, a method of raising the 11s. which the law in no way permitted.

The defendant, after the conviction had been upset upon *certiorari*, brought an action for trespass against the magistrates, who set up 11 and 12 Vic. Cap. 44, Sec. 1, which provides that in the absence of express malice no action shall lie for anything done by a magistrate in the execution of his duty as a Justice, with respect to any matter within his jurisdiction. COLERIDGE, J., remarked: "The facts are these: There is an information laid before the Justice; he convicts; he awards a penalty and costs, and orders them to be levied by distress. All this was right, and the Justice, so far, pursued his jurisdiction. But he added an alternative, that the plaintiff should be put in the stocks in case the penalty and costs were not paid, or raised by distress; that was beyond his jurisdiction. But the plaintiff was not in fact put in the stocks. His goods were seized under a distress, and afterwards the conviction was quashed. Now it cannot be doubted that the Justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form." And WIGHTMAN, J., remarks that the Justice had a general jurisdiction in everything he did "down to the very moment of drawing up the conviction; but in drawing up the conviction he adds an illegal alternative, that if the costs are not levied the offender shall be put in the stocks. The matter in which he exceeded his jurisdiction was ordering the plaintiff to be put in the stocks; had he acted on that and caused the plaintiff to be put in the stocks, trespass might have lain; as it is, I think the action is not brought for a matter in which he exceeded his jurisdiction, and the case is within section 1."

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And ERLE, J., adds: "If anything had been done in respect of the wrongful order, it would have been an act beyond his jurisdiction, but there was nothing of the sort. It was a mere error as to the manner in which the convic-

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tion should be framed which caused the Justice to draw it up in wrong form, and on account of the formal defect the conviction was quashed."

I cannot distinguish the present case from the principle of *Barton* v. *Bricknell*. Had the magistrate, when the proceedings were brought up on *certiorari*, done as the magistrate has done here—that is to say, had he returned an amended conviction, as he was at full liberty to do (*Reg.* v. *Hartley*, 20 Ont. 482, the reasons for judgment of ROSE, J., in which case I think are unassailable), omitting the sitting in the stocks, which he had no jurisdiction to order, there can I think be no doubt that the conviction would have been affirmed; but the conviction in that case, as returned, shewing an admitted excess of jurisdiction in part, it vitiated the conviction as a whole (*Rex.* v. *Catherall*, 2 Str. 900), and there was no alternative but to quash it. In *Reg.* v. *Walsh*, 2 Ont. 211, the same mistake of ordering imprisonment at hard labour in default of the penalty happened, and the Court (CAMERON, J.) whilst quashing the conviction on account of its not following the actual adjudication of the magistrate as to the *quantum* of costs, assumed that the second conviction in that case properly omitted the wrongful adjudication as to costs.

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If the defendant had gone on with his appeal to the County Court, that Court would have amended the conviction by striking out the hard labour. The right to substitute a fresh commitment when an admittedly bad one was attacked upon *certiorari* proceedings, was upheld by DRAKE, J., in this Court, *Re Plunkett*, 3 B.C. 484. In discharging the rule in that case it was without costs, as the proceedings were justified when launched. The same reason applies here, and I think the rule should be discharged without costs.

Rule nisi discharged without costs.

Statement.

There being some doubt as to whether an appeal to the

Full Court lies in this Province from an order refusing a writ of *certiorari* (see *Regina* v. *Starkey*, 7 Man. 268 ; *Reg.* v. *Rice*, 20 N.S. 294, 437, 8 Can. L.J. 448), and in view of the fact that he had not given full consideration to the question of the effect of the return of the conviction to the County Court upon the right of the convicting Justice afterwards to amend, the Chief Justice stated a case for the opinion of the Supreme Court sitting in *banc*, and the application was re-heard *de novo* before McCREIGHT, WALKEM and DRAKE, JJ., on 27th and 28th March, 1896.

Robert Cassidy, for the application : The adjudication and sentence to hard labour is a matter of substance and not of form. It is a material part of the judgment and appears in the minute of conviction. To cut it out of the conviction was not at any stage after the hearing (*Reg.* v. *Hellingley*, 1 El. & El. 749), an amendment open to the Justice to make, and could not be made under colour of curing an error in drawing up the conviction, which must in material respects follow the judgment; and an amendment cannot be made so as to create a variance between the minute and conviction, *Reg.* v. *Elliott*, 12 Ont. at p. 531. The only course open would have been to retract that part of the adjudication in the presence of the accused before the Justices' Court rose. The right of the County Court to amend on appeal, under the Summary Convictions Act, 1889, Sec. 76, is wider than the common law right of amendment by the magistrate, yet the County Court could not so amend, *McLennan* v. *McKinnon*, 1 Ont. 219 ; HAGARTY, C.J.O. at p. 237 ; ARMOUR, J., at pp. 238, 240.

Argument.

Upon the return of the conviction to the County Court it passed beyond the control of the magistrate for all purposes and he became *functus officio*. The writ of *certiorari*, if it were necessary to issue it, which it is not, would have to be directed to the Judge of the County Court as the present legal custodian of the conviction, *Regina* v. *Starkey*, 6

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Man. L.R. 588, and not to the convicting magistrate, and the magistrate had no more right than any other person to meddle with or alter the record in the County Court. If a *certiorari* comes to him in respect of any record in his custody and control, his right to amend it will be arguable. It was questioned in *Chaney* v. *Payne*, 1 Q.B. 712, whether a magistrate could amend after a return to the sessions, and it was decided in *Ex parte Austin*, 44 L.T.N.S. 102, that he could not; although the amendments in both those cases were formal to cure errors in drawing up the convictions and make them conform to the adjudications. *Reg.* v. *McKenzie*, 23 N.S. 6, and *Reg.* v. *Learmont*, *ibid.* 24, follow *Reg.* v. *Austin*, upon circumstances similar to the present. *Reg.* v. *Hartley* 20 Ont. 481, is distinguishable; there the conviction had not been returned to the County Court. The discussion was in reality academic on the question of right to amend, and the judgment on that point *obiter dictum*, as the right to the *certiorari* was there governed (see p. 486) by section 105 of the Liquor Licence Act providing that no conviction under that Act should be held invalid for any defect either in form or substance, and therefore no amendment was required, but the conviction was good as it stood.

A. E. McPhillips, *contra*: We rely on *Reg.* v. *Hartley*, 20 Ont. 481, ROSE, J., at p. 485. The conviction here has not been executed, and the magistrate has the right to amend even after return to the sessions, Clarke's Magistrates' Manual, 3rd Ed. pp. 184 to 194; *Wilson* v. *Graybiel*, 5 U.C.Q.B. 227; and at any time up to the return of the *certiorari*, *Reg.* v. *McKenzie*, 6 Ont. 165; *Charter* v. *Greame*, 13 Q.B. 216; *Re Houghton*, 1 B.C. Pt. I, 89, BEGBIE, C.J., at p. 92. A conviction may be good in part and only the part that is bad quashed, if divisible, *Reg.* v. *Over*, 14 Q.B. 425; *Rex.* v. *Fox*, 6 T.R. 148n.; *Reg.* v. *Green*, 20 L.J.M.C.

168 ; *Reg.* v. *Robinson*, 17 Q.B. 466 ; Paley on Convictions, 7th Ed. pp. 171 and 379.

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McCREIGHT, J. : As the learned Chief Justice observes in his proposed judgment, the only question necessary to be decided in this case, is whether a magistrate who, in fining a person for an offence against a civic by-law has directed imprisonment with "hard labour" in default of payment of the penalty, and of no sufficient distress, can properly, in answer to a rule to quash the proceedings, send in a conviction omitting the provision as to the "hard labour."

He further states the facts in the judgment which he had prepared before referring the case to the Full Court. They are very brief and not in dispute as I understand the case, and I refer to his statement of them to avoid repetition.

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It seems to me that the case of *Regina* v. *Hartley*, 20 Ont. 481, is, if correct, quite in point, as fully warranting the return of an amended conviction leaving out that part of the sentence which inflicts "hard labour" in default of sufficient distress. There, as here, I gather there was a minute containing something illegal ; in that case a provision that a fine might be levied by distress, and Mr. Justice ROSE, in his judgment at page 482, says : "The minute of conviction and first formal conviction drawn up thereon therefore clearly contains a provision in excess of the jurisdiction of the magistrates, and such conviction could not be upheld," and he adds, "the sole question for consideration is whether the second conviction returned with the *certiorari* can be sustained without an amendment of the adjudication or minute of conviction," and he and the other Judges thought it could. The facts of that case seem precisely similar to these now before us, and the

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ratio decidendi in *Regina* v. *Hartley* appears to be strictly applicable to the present case. The objection that the adjudication contained a provision which was not found in the conviction appears to have been urged there as well as here, but it seems a good distinction applicable to both, that that is a very different matter from the conviction containing a substantial provision not found in the adjudication. The latter position is illustrated by *Regina* v. *Brady*, 12 Ont. at p. 363 (referred to in *Regina* v. *Hartley*), where WILSON, C.J., says: "I have no doubt the magistrate could himself have amended the adjudication, but that should have been done in the presence of the defendant, which would have been in effect the real, because substituted, judgment; such a course is taken if from any cause at the Assizes a change is made in the sentence by bringing up the prisoner and pronouncing the new judgment." I have referred to the case of *Regina* v. *Brady*, and the remarks upon it in *Regina* v. *Hartley*, because they illustrate the case of *Houghton*, reported 1 B.C. Pt. I. p. 89, and referred to in the argument before us, and seem to be quite in conformity with it, or at least with the *ratio decidendi* of that case. At page 92 the judgment points out that the magistrate had convicted Houghton of "cutting," and drawn up and sealed a conviction accordingly, and then subsequently "sent in not an amended" but a quite "altered conviction, omitting all reference to the cutting but maintaining the charge of wilfully and maliciously inflicting grievous bodily harm, etc. The magistrate cannot be allowed to convict a man of one offence and on *certiorari* inform the Court that he convicted him of another." This, it will be observed, is quite in conformity with *Regina* v. *Brady*, and by no means inconsistent with *Regina* v. *Hartley*, see the judgment at page 485. The judgment in *Regina* v. *Hartley*, seems to have received a great deal of consideration (see pp. 485–6 of the judgment), and a period of seven months appears to have elapsed between the argument

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and the decision of the Court; and I think I ought to act upon it, as I find no English decision to the contrary, though expressions may be found which look the other way. The learned Chief Justice says, in his judgment before referring the case to the Full Court, that in answer to the rule the magistrate returned a conviction which omits all mention of hard labour, and is otherwise upon its face properly drawn up, and so it appears from the appeal book. Now, in Paley on Convictions, 7th Ed. page 234, it is said that even after the magistrate has delivered to the defendant a copy of the conviction, etc., he is not thereby precluded from drawing up and returning a conviction in a formal shape, which is to be taken as the only authentic record of the proceedings; for the conviction returned to the sessions or the Queen's Bench Division is the only one of which those Courts respectively can take notice, and it is further said, at page 235, that as the Court gives credit to the magistrates for the truth of the facts recorded in the conviction, it will hold them punishable for making a false statement, referring to *Rex* v. *Allen*, 15 East. 346, and *Regina* v. *Simpson*, 10 Mod. 382; and at page 378 it is stated that the only remedy for a false return is by action on the case at the suit of the party aggrieved, or by criminal information, and Hawkins' P.C. Cap. 27, Sec. 74, is referred to as shewing that the Queen's Bench Division will not usually stop the filing of the return upon affidavits of its falsity. This makes an additional difficulty in making the rule absolute to quash the conviction. I may add, though the question was not, in my view, necessary for the decision, that as the Summary Convictions Act, 1889 (B.C.), Sec. 81, requires the convicting Justice to transmit the conviction to the Court to which the appeal is given before the time when appeal from such conviction may be heard, there to be kept by the proper officer among the records of the Court, etc. (and as this must be presumed to have been done and I understand was done), that perhaps

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the writ of *certiorari* should properly be addressed to the persons having charge of such conviction, so as to be able to get a good and true return of the same. It is stated in Short and Mellor's Crown Practice, pp. 125–6, that where the order of sessions is made upon an appeal against a conviction, notice of the intended application should be given to the convicting Justices as well as to the Justices present at the sessions, and I gather from the forms Nos. 12, 13, 14, 15, 16 and 17, page 592, that the same principle should be attended to as regards the issue and service of the writ. I have formed no opinion as to how this is to be done, or whether it is essential under the Summary Convictions Act, *supra*, but I only remark that the Supreme Court should be satisfied that it really has the true conviction before it when it undertakes to discharge or make absolute the rule. The remarks of the Judges in *McLennan* v. *McKinnon*, 1 Ont., see pp. 219, 237 and 238, may have a bearing on this point. I think the rule should be discharged without costs. The proceedings I gather were justified when launched, see *Re Plunkett*, 3 B.C. 484; and see the conclusion of the proposed judgment of the Chief Justice; and *Reg.* v. *Highan*, 26 L.J.M.C. 116; and 7 El. and Bl. 557.

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WALKEM, J., concurred with McCREIGHT, J.

DRAKE, J.: The magistrate in this case having convicted the defendant of an infraction of a by-law adjudged a penalty which was in excess of the penalty allowed by law.

The conviction was drawn up and transmitted to the County Court in accordance with section 81 of Cap. 26, 1889, of Provincial Statutes. On 17th December, 1895, a rule *nisi* to quash the conviction was obtained. In pursuance of the rule the magistrate returned an amended conviction omitting the hard labour which had been imposed in the first instance. The point was raised that after the conviction had been returned to the County Court and there fyled, that no amendment could be made. On

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this point *Ex parte Austin*, 44 L.T.N.S. 102, was cited, and Lord COLERIDGE says that no authority exists which supports the doctrine that once a bad conviction has been fyled in the records of the Quarter Sessions the magistrates, in answer to a rule to set it aside, may return a good one.

I don't think that Lord COLERIDGE means that after a conviction has once been returned to the Quarter Sessions it cannot be altered in any respect, as the contrary has been held in many cases, see *Selwood* v. *Mount*, 9 C. & P. 75, and *Charter* v. *Greame*, 13 Q.B. 216; but a conviction imperfect from some error or omission in drawing it up, although returned to the County Court, can be cured by returning a good conviction in answer to a writ of *certiorari*.

The Statute 12 and 13 Vic. (Imp.) Cap. 45, Sec. 7, was passed in order to remedy the frequent failure of justice owing to convictions being set aside on objections to the form of the order or judgment irrespective of the truth and merits of the matters in question, and it enacts that if upon return of a writ of *certiorari* any objection shall be made on account of any omission or mistake, the Court, on proof, can correct the same, and until the conviction is formally settled the magistrates can return a good conviction without the errors and mistakes complained of, *Chaney* v. *Payne*, 1 Q.B. 712.

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The question then arises whether the adjudication which inflicted hard labour can, when the magistrates return a conviction omitting the hard labour, be treated as bad. The case of *Reg.* v. *Hartley*, 20 Ont. 481, seems very much in point and the case of *Reg.* v. *Brady*, 12 Ont. at page 363, in which the Court held that the adjudication was varied by a change in the infliction of a fine or imprisonment, and that such a step could only be taken in the presence of the defendant, being in fact a new judgment, was over-ruled.

The Court can only look at the conviction returned, and that conviction is valid on its face. The original adjudication imposing hard labour was not acted on; if it had

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been, I think the defect could not be cured by returning a valid conviction.

I abstain from laying down any general rule as to what errors and mistakes in a conviction where the magistrate had jurisdiction over the subject-matter can or cannot be cured by returning a proper conviction.

I think the rule should be refused without costs, as the original conviction was undoubtedly bad.

Rule nisi discharged without costs.

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each day of the week, excepting Saturdays, and then not before four o'clock in the afternoon, except at the market-place; and no such dealer, huckster, etc., shall sell or offer for sale any of the before-mentioned goods at any place other than the market or from a recognized store without first having paid the market fees payable by him or her, the amount of which fees and where payable may from time to time be fixed and regulated by resolution of the Council." The defendant was convicted of offering vegetables, which appeared to have been grown in the Province, for sale between the hours of seven and eight o'clock, a.m. *Held, per* Drake, J., on appeal, quashing the conviction: (1) That the power to fix the license fee by by-law did not authorize a by-law relegating it to the Council to fix the fees by resolution. (2) That the imposition of a fee, in effect a license fee, "to be fixed," etc., was bad for uncertainty. (3) That the partial prohibition and regulation by the by-law as to sales by hawkers in effect involved the imposition of a license tax upon them in the exercise of the calling, and that the case of the defendant as hawker of vegetables grown in the Province was within the exception provided by sub-section (b). (4) A by-law may be good in part and bad in part, but the part that is good must be clearly distinguished from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete by-law capable of being enforced. REG. v. JIM SING. - 338

5. ——*Vancouver Incorporation Act — Money by-laws—Statutory recitals imperative —Municipal Act, Sec. 113, Sub-sec. 4—Submission to electors—"On which the voters' lists are based"—Vancouver Incorporation Act, 1886, Sec. 127—Conflict between general Municipal and special Act.*] By the (general) Municipal Act, 1892, Sec. 113, Sub-sec. 4, by-laws for contracting debts not required for ordinary expenditure, and not payable within the same municipal year, "shall recite (2) The total amount required by this Act to be raised annually by special rate for paying the new debt and interest; and (4) The annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the new debt." By section 4 of the same Act, "This Act shall be construed as applying to the Cities of New Westminster and Vancouver only so far as is is not repugnant to or

inconsistent with their Acts of Incorporation." By the Vancouver Incorporation Act (private) 1886, Cap. 32, Sec. 128, as amended by Cap. 62 of 1892, section 5, each of such by-laws "(1) shall name a day in the financial year in which the same is passed, when the by-law shall take effect," and "(3) the amount of the debt which such new by-law is intended to create, and, in some brief and general terms, the object for which it is to be created." *Held*, by the Divisional Court (Begbie, C.J., Crease and Walkem, JJ., overruling the judgment of McCreight, J., ante page 219): (1) That the provisions of section 113 of the (general) Municipal Act, *supra*, are not repugnant to or inconsistent with the provisions of section 128 of the Vancouver Incorporation Act, *supra*, and that By-law 159 of Vancouver is invalid for non-compliance with section 113. (2) That section 127 of the Vancouver Incorporation Act, 1886, providing that "the right of voting on by-laws requiring the assent of the electors shall belong to . . persons . . rated, etc., on the revised assessment roll on which the voters' lists of the city are based," confers the right to vote only upon persons on the revised assessment roll upon which the existing voters' lists are based, and the description is not satisfied by persons upon the last revised assessment roll, upon the basis of which the voters' lists for the current year have not yet been made up. *Re* BELL-IRVING AND CITY OF VANCOUVER. - - - - 300

6. ——*Vancouver Incorporation Act—Statutes—Construction of--Conflict between special and general Acts.*] An amendment to the special Act of the City of Vancouver required a three-fifths majority of votes to pass a certain class of by-laws requiring submission to the electors. An amendment to the (general) Municipal Act passed on the same day authorized such by-laws to be passed by a majority only of the electors, and gave the same power to the Cities of Vancouver and New Westminster, notwithstanding anything in the special Acts relating to said cities inconsistent with or repugnant thereto. Upon a rule *nisi* to quash such a by-law upon the ground that it received the assent of a majority only of the electors: *Held*, by the Divisional Court (McCreight and Walkem, JJ., overruling Drake, J.): Wherever there is a particular enactment and also a general enactment, and the latter, taken in its most

2. ——*By-laws requiring assent of the electors—Ratepayers entitled to vote on.*] Section 127 of the Vancouver Incorporation Act gives the right to vote on by-laws requiring the assent of the electors to certain persons rated to the amount of $500.00 of real property on the Revised Assessment Roll "on which the voters' lists of the city are based." The by-law in question was submitted to the electors upon the Assessment Rolls for the current year, which had not then been finally revised. *Held*, That the words *supra*, "on which the voters' lists are based," are descriptive merely, and do not mean the voters' lists which must at that time be used in an election for Councillor. *Re* BELL-IRVING AND VANCOUVER. - **219**

VENDOR AND PURCHASER—*Time essence of contract—Right to rescind—Title to lands—Lis pendens—Whether a cloud.*] Vendor had a good title to the lands at the time of the contract, which made punctual payment of the instalments of purchase money of the essence of the contract, and in default the vendor to have a right to re-sell. It also gave the vendee the right to pay the whole of the purchase money at any time and demand a deed. The lands were of speculative value. After the date of the contract and payment of deposit an action was brought against the vendor involving her title to the lands, and a *lis pendens* registered. Vendor and vendee then agreed that no further payments should be made until it was removed. After the original period for completion, and before the *lis pendens* was removed, the vendee tendered the whole amount of the purchase money, and a conveyance for execution to the vendor, who asked time to see her solicitor. No further tender was made. The *lis pendens* was afterwards removed. The action was brought by the vendee for rescission of the contract and

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return of the deposit, and the vendor counter-claimed, demanding specific performance. *Held*, *per* McCreight, J., ordering rescission, refusing return of the deposit, and dismissing the counter-claim: 1. That time was of the essence on both sides. That the avowedly speculative character of a purchase makes time of the essence, even where not so provided in the contract. 2. That, on the facts, the vendee had not waived his right to rescind. 3. *Quære*, whether the existence of the registered *lis pendens* was a good ground for refusal of the title. 4. The Court may refuse to order return of the deposit where the vendor had a good title at the time of the contract. Upon appeal to the Full Court: Crease and Walkem, JJ., affirmed McCreight, J. *Per* Drake, J. (dissenting), dismissing the plaintiff's claim, and ordering specific performance by him: 1. Where a purchaser has a right to rescind for want of title, time being of the essence of the contract, the effect of his giving further time to the vendor to cure the defect is not to waive that right, but he must, after default upon the extended period, give the vendor a reasonable time to complete. 2. That the purchaser had no right to rescind at the time he offered the money and deed for execution, and in any case the tender and refusal proved were insufficient. 3. That the purchaser having originally had a right to rescind, which he did not exercise, could not complain that the property had afterwards considerably depreciated, and such depreciation and the fluctuating value of the property were not therefore grounds for refusing the vendor specific performance. 4. *Quære*, whether the existence of the registered *lis pendens* was a good ground for the refusal of the title. MANSON v. HOWISON. - - - - - **404**