THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT.

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED

AND

A DIGEST OF THE PRINCIPAL MATTERS.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

ROBERT CASSIDY, - BARRISTER-AT-LAW.

VOLUME V.

VICTORIA, B.C.
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1898.

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.

THE HON. JOHN FOSTER McCREIGHT.
THE HON. GEORGE ANTHONY WALKEM.
THE HON. MONTAGUE WILLIAM TYRWHITT DRAKE.
THE HON. ANGUS JOHN McCOLL.

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
HIS HON. JOHN ANDREW FORIN, - - - - - Kootenay

ATTORNEY-GENERAL.

THE HON. DAVID MACEWEN EBERTS.

NOTE—Paulus Æmilius Irving was sworn in as a Judge of the Supreme Court of British Columbia on the 10th day of January, 1898, as successor to the Hon. John Foster McCreight, who retired from the Bench on the 17th day of November, 1897. The Hon. Theodore Davie died on the 7th day of March, 1898.

Dated, July, 1898.

ERRATA.

PAGE.	LINE.	FOR.	READ.
40	delete note.		
110	19 from top.	E. V. Bodwell.	A. E. McPhillips
156	17 " top.	Kitchen.	Ketchum
298	8 " top.	Barbour.	2 Barbour
419	7 " bottom.	8 App. Cas. 401.	8 App. Cas. 798
457	14 " bottom.	Mortgagor.	Mortgagee
644	4 " top.	Campbell.	Christie

TABLE OF CASES REPORTED

IN THIS VOLUME.

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TABLE OF CASES CITED.

A.

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SUPREME COURT OF BRITISH COLUMBIA.

GENERAL ORDERS OF COURT.

INSTRUCTIONS TO REGISTRARS AND DEPUTY REGISTRARS:

Every Registrar, Deputy Registrar or other officer issuing a writ shall, before delivering the same to the Solicitor or Plaintiff, initial it near the affixed stamp with his own initials, and shall also initial the signed copy mentioned in G.O. 3, of 1880, with his own initials previous to fyling the same. And no such signed copy is to be received or initialled or fyled unless the sealed original writ is actually delivered out to the Plaintiff or his Solicitor or Solicitor's clerk.

MATT. B. BEGBIE, C.J.

DECEMBER 1ST, 1893.

Where judgments have been given on appeal in matters arising in other District Registries in the Supreme Court, or in County Court appeals, a copy of the judgment, *under the seal of the Appellate Court*, should be sent to the Registrars of the District where the action was instituted.

HENRY P. PELLEW CREASE, J.
GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.

DIRECTIONS TO THE REGISTRARS:

MAY 29TH, 1894.

No order is to be issued out of the Registry, or passed and entered until all the affidavits on which it is made are duly fyled,

HENRY P. PELLEW CREASE, J.
M. W. TYRWHITT DRAKE, J.

JULY 4TH, 1894.

No copy of any original will shall be made except by the Registrar or his clerks.

No original will shall be exhibited to any person except in the presence of the Registrar or his Deputy.

And no note or extract of any will shall be permitted except by the Registrar or his officers.

HENRY P. PELLEW CREASE, J.
GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.

PROVINCIAL CONTROVERTED ELECTIONS ACT.

AUGUST 4TH, 1894.

Pursuant to the powers in that behalf contained in section 60 of the above entitled Act, it is hereby ordered that the rule of the Imperial Parliamentary Election Petition Rules made 21st November, 1868, pursuant to the Parliamentary Elections Act, 1868, now in force with respect to proceedings under the above entitled Act shall be and the same is hereby amended by striking out the words "Common Pleas," and by substituting in lieu thereof the words, "Supreme Court of British Columbia," and in the event of the death or absence of the Chief Justice, by the "Senior Puisne Judge of the said Court."

And it is further ordered that whenever by the "Provincial Controverted Elections Act" or by the rules any power is given or anything is authorized or required to be done by the Chief Justice, in case of a vacancy in the office of Chief Justice, or in case of absence from the Province, such power or authority may be exercised or done by the Senior Puisne Judge, or by any other Judges of the said Court.

HENRY P. PELLEW CREASE, J.
J. F. McCREIGHT, J.
M. W. TYRWHITT DRAKE, J.

DIRECTIONS TO THE REGISTRAR :

FEBRUARY 24TH, 1896.

From and after the 2nd March, 1896, applications, properly the subject of motions in Court, before a Judge, will not be taken or heard in private Chambers, but the Judge sitting in the Chamber Court will, on Mondays, Wednesdays and Fridays of each week, hold sittings for the disposal of Court Motions (including Probate cases) immediately after the ordinary Chamber work is over.

The Registrar is directed to enter all Motions on a list for the day for which they are set down, which list is to be posted up outside his office.

THEODORE DAVIE, C.J.
M. W. TYRWHITT DRAKE, J.
GEO. A. WALKEM, J.

MARCH 23RD, 1898.

Orders of the Court may be taken out by the party in whose favour such order is pronounced, and if such party neglects or delays for a period of seven days to settle the minutes of any such order, the other party may obtain an appointment to settle the minutes and to pass and enter the order.

GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.
P. Æ. IRVING, J.

APRIL 2ND, 1898.

In future the Registrar shall not accept any Appeal Books (if type-written) unless at least two of the said Appeal Books are originals, and two are first carbon copies, and all are paged alike and indexed.

GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.
A. J. McCOLL, J.
P. Æ. IRVING, J.

January 15th, 1898.

Pursuant to the powers contained in Rule 702 of the Supreme Court Rules we hereby appoint the following as examiners in and for their respective Judicial Districts: The Registrars of the Victoria, Vancouver, Westminster, Nanaimo, Clinton, Cariboo and West Kootenay Judicial Districts and their respective Deputies, the Deputy District Registrar at Nelson and the Registrar of the sub-registry at Rossland.

GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.
A. J. McCOLL, J.
P. Æ. IRVING, J.

July 11th, 1898.

All orders made in Chambers and drawn up by the Solicitor having the carriage of the order are to be initialled by the Solicitor for the opposite party, and then left with the Registrar, who will obtain the Judge's signature thereto.

GEO. A. WALKEM, J.
M. W. TYRWHITT DRAKE, J.
P. Æ. IRVING, J.

REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA

TOGETHER WITH SOME

CASES IN ADMIRALTY.

TRASK v. PELLENT.

FULL COURT.

1896.

April 27.

TRASK v. PELLENT

Mining law—Practice—Appeal—Extending time for.

The appellant was advised by counsel, up to a period considerably beyond the time for appealing from the judgment of an inferior Court, to acquiesce in it, but he had since been advised by other counsel to appeal, and that special hardship would probably result to him if the judgment were allowed to stand:

Held, by the Full Court (Davie, C.J., McCreight and Walkem, JJ.) insufficient ground for extending the time for appealing.

APPLICATION by the plaintiffs upon notice to extend the time for appealing from the judgment of SPINKS, Co. J., at the trial dismissing an action in the County Court to enforce their adverse claim to a certain mineral claim upon the ground that their stakes were less than four inches face, as required by the Mineral Act, 1891, Sec. 2. Statement.

It appeared that the stakes of the defendant's location, which covered the same ground and was brought in contest with the plaintiff's location by the action, were open to the same objection. The plaintiff, upon the advice of counsel, did not appeal, but relying upon the correctness of the decision of SPINKS, Co. J., re-located the same ground with unobjectionable stakes, and such new location was brought

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into dispute with the defendant's location referred to, in a subsequent action now pending in the Supreme Court. Plaintiffs herein were then advised by counsel against the decision of SPINKS, Co. J., and that it would probably not be followed in the Supreme Court action, in which event the plaintiff would lose his claim although right in his contention at the trial in this action.

E. V. Bodwell, for the motion.
A. J. McColl, Q.C., contra.

Judgment of McCREIGHT, J.

McCREIGHT, J.: This was an application by Mr. *Bodwell* to extend the time to appeal from a judgment of Judge SPINKS, in the County Court of Kootenay, in a mining cause, though the time for appealing had elapsed. It appears to me that there are two serious difficulties in acceding to this application. Firstly, by the County Courts Act Amendment Act, 1896, Sec. 4, the words of section 29, C.S.B.C. 1888, Cap. 82, or of "a County Court in a mining cause," are to be struck out of the said section 29 of the Mineral Act, and the proviso at the end of such section 4 of the Act of 1896, does not help this application as it might have done if appeal proceedings from the decision of Judge SPINKS had been duly taken "within ten days from the date of his judgment." I think the case of *Dowdeswell* v. *Francis*, 30 L.T.N.S. 608, obliges me to come to this conclusion.

The second difficulty is, that the numerous English decisions on the subject of extending the time to appeal, see Annual Practice, 1896, pp. 1062–3, do not warrant us in making such extension, see especially *International Financial Society* v. *City of Moscow Gas Company*, 7 Ch. D. 241. Mistakes of counsel or attorney, or both, on points of law cannot be ground for extending the time to appeal, and I think what was said by Lord Justice LINDLEY, in *Esdaile* v. *Paine*, 40 Ch. D. 520, "that it is for the interest of the public that litigants should know as soon as possible when certainty has been reached," applies particularly in

mining cases; and I also refer to what is said by LOPES, L.J., at p. 535, where he says, "That though a strict adherence to rules as to time may sometimes produce hardship, I think that a legal adherence to them is best for the public and for litigants."

I observe from the affidavit of Mr. McLeod that after the decision of Judge SPINKS, the owners of the "Green Mountain," located under the name of the "Defender," and allowed the time for appealing to elapse, and then only took advice which appears to have been unsound, and now, seven or eight months after Judge SPINKS' decision, say they have found out their mistake and wish to appeal against that decision. Mr. *Bodwell* cited *Powell* v. *Peck et al.*, 12 Ont. Pr. 34. Now, if Judge SPINKS had a discretion by statute either to give or refuse leave to appeal, and had exercised that discretion by giving the leave, I dare say we should be reluctant to reverse his order. Such a state of circumstances would be in conformity with *Powell* v. *Peck*, but vary materially from those in the present case, and I think that having regard to section 29 of Cap. 82 C.S.B.C. 1888, and section 4 of the County Courts Act Amendment Act, 1896, in the first place, and the English decisions as to extending the time to appeal, in the second place, this application should be refused with costs.

Judgment of McCREIGHT, J.

DAVIE, C.J., and WALKEM, J., concurred.

Application refused.

WALKEM, J.

[In Chambers].

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VAN VOLKENBURG v. THE BANK OF BRITISH NORTH AMERICA.

Practice—Discovery—Inspection of documents—Privilege—Letters between principal and agent.

VAN VOLKENBURG v. BANK OF B.N.A.

In an action for redemption of shares in a public company deposited by plaintiff as collateral security to an over-draft, or in the alternative for damages for their improper sale by the Bank, the defendants, in answer to an order for discovery made an affidavit of documents disclosing possession of a number of letters relating to the matters in question which had passed between the manager of the Bank at Victoria and the manager of the Bank at Vancouver, which they objected to produce as being privileged.

Held, following *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, that the letters were not privileged and must be produced.

APPLICATION by the plaintiff for an order for defendant Bank to produce for inspection letters mentioned in the affidavit of documents made under an order for discovery. The action was for redemption by plaintiffs of certain shares of stock in a company, which shares had been deposited by them with the Bank as collateral security to an unpaid over-draft. The statement of claim alleged that the Bank had no right to sell the shares, and asked discovery as to whether they had been sold or not, and if so for damages. The statement of defence stated and justified a sale of the shares by the Bank to realize the over-draft. The affidavit of discovery fyled under the order was made by the manager of the Bank and admitted that the Bank had in its possession or control certain letters relating to the matters in question in the action, but objected to producing them on the ground that the same "were confidential communications between

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the officers of the Bank at Victoria and Vancouver, the said Bank of British North America at Vancouver acting as the representative of the Bank at Victoria for the purpose of making or receiving such communications.

S. Perry Mills, for the plaintiff, cited *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644.

Eberts & Taylor, contra.

WALKEM, J.: Upon the authority of the case cited I must hold that the letters in question are not privileged and must be produced.

Judgment of WALKEM, J.

Order made.

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ATKINS v. COY

ATKINS v. COY.

Mining law—Mineral Acts, 1888, Secs. 37 and 50; 1891, sections 10 and 18; 1892, section 9—Location—Record—Priorities—Whether record notice to subsequent purchasers—Appeal—Right to withdraw—Practice.

Two miners having located the same ground on different days and respectively recorded their locations within the fifteen days thereafter required by section 19 of the Mineral Act, 1891, the record of the subsequent locator being made on a day prior to the record of the first locator. In a dispute between their respective successors in title as to priority:

Held, per MCCREIGHT, WALKEM and DRAKE, JJ., over-ruling SPINKS, Co. J.: A valid location is a pre-requisite to a valid record of a mineral claim. That section 9 of the Mineral Act (1891) Amendment Act, 1892, (*a*) must be read in the light of section 10 of Mineral Act, 1891 (*b*). That the subsequent location was void as made upon ground already occupied and not upon waste lands of the Crown, and did not acquire any validity by being recorded, and the priority of its record was therefore immaterial as against the claim of the prior locator who had perfected his title by recording within the statutory time.

Sections 50 and 51 of the Mineral Act, 1891, introduce the policy of the Land Registry laws and a prior unregistered must be postponed to a subsequent but registered conveyance.

Quære (per McCreight, J.): Whether the record of a document of title under sections 50 and 51 constitutes notice of it to subsequent purchasers.

A cross motion to the appeal applying for a new trial having been served by respondent, and adjournments obtained by her to obtain affidavits in support of it, which were subsequently fyled, the Court, on objection by defendants, refused to permit the plaintiff to withdraw such application.

The "Cariboo" and "Rambler" mineral claims in part covered the same ground. *Quære*, whether the owner of the "Rambler" was affected with notice of a bill of sale affecting the title of the common ground registered only upon the "Cariboo" record of title.

APPEAL from a judgment of His Honour WILLIAM WARD SPINKS, sitting as a Judge of the County Court of Kootenay (Mining jurisdiction), in favour of the plaintiff. The

SEE NOTES (*a*) and (*b*) next page.

plaintiff's predecessor in title, one Shea, located the ground in dispute as part of the "Rambler" mineral claim on 10th June, and recorded the location on 13th June, 1893. The defendants had applied for a certificate of improvements for the purpose of obtaining a Crown grant as the successors in title of John King, alleging that he had located the ground in dispute as part of the "Cariboo" on 9th June and recorded the location on 15th June, 1893. The plaintiff's adverse claim, and statement of claim in the action, charged that in fact King had located the "Cariboo" on 15th June, and had fraudulently ante-dated his location stakes so as to cut out the "Rambler" claim. At the trial the only

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NOTE (*a*). "9. Section 25 of the said Act is hereby repealed, and in lieu thereof be it enacted: 25. In case of any dispute as to the title to a mineral claim, priority of record will determine the right, subject to any question as to the validity of the record, and subject also to a compliance by the free miner with the provisions of this Act."

NOTE (*b*). "10. Every free miner shall, during the continuance of his certificate, but not longer, have the right to enter, locate, prospect and mine upon any waste lands of the Crown for all minerals other than coal, and upon all lands the right whereon to so enter upon, prospect and mine all minerals other than coal shall have been or hereafter shall be reserved to the Crown and its licensees, and also to enter, locate, prospect and mine for gold and silver upon any lands the right whereon to so enter and mine such gold and silver shall have been, or shall be, reserved to the Crown and its licensees. Excepting out of all the above description of lands any land occupied by any building and any land falling with the curtilage of any dwelling-house, and any orchard, and any land for the time being actually under cultivation, and any land lawfully occupied for mining purposes other than placer mining, and also Indian reservations. Provided that in the event of such entry being made upon lands already lawfully occupied for other than mining purposes, such free miner previously to such entry shall give adequate security to the satisfaction of the Gold Commissioner for any loss or damages which may be caused by such entry; and provided that after such entry he shall make full compensation to the occupant or owner of such lands for any loss or damages which may be caused by reason of such entry, such compensation, in case of dispute, to be determined by the Court having jurisdiction in mining disputes, with or without a jury."

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question left to the jury was which claim was in fact located first. The jury found that the defendants' location, the "Cariboo," was first, being made on 9th June as alleged. On motion for judgment the learned County Court Judge held, in the following judgment, that the priority of location was immaterial, as priority of record determined the priority of right.

SPINKS, Co. J.: The point reserved in this action is whether the Mineral Act (1891) Amendment Act, 1892, made the record the root of title to a mineral claim in contra-distinction to the Mineral Act, 1891, which expressly made the location the root of title.

In order to fully understand the intention of the Legislature on this point it is necessary to consider the history of the law. Prior to the Act of 1891, the Courts held that the prior location gave the prior right, without reference to the date of the record. This was held notwithstanding section 50 of the Mineral Act, C.S.B.C. 1888: "In case of any dispute the title to claims will be recognized according to the priority of their registration, subject to any question as to the validity of the record itself, and subject further to the terms, conditions and privileges contained in section 41 of this Act."

Judgment of SPINKS, CO. J.

The reason for this appears in section 37 of the same Act: "Every free-miner shall, during the continuance of his certificate, but not longer, have the right to enter and mine upon any waste lands of the Crown, not for the time being lawfully occupied by any other person, and may also, during the continuance of his certificate, enter upon any Crown lands, or land covered by timber leases, to cut timber for mining purposes."

It was considered that the words "not lawfully occupied by any other person" excluded lands properly located as mineral claims, even before record, and that such lands were therefore within reservation.

The Mineral Act, 1891, set all doubts upon this point at rest, by section 18, which enacted: "In case of any dispute as to the location of a mineral claim, the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself, and subject further to the free miner having complied with all the terms and conditions of this Act.

The Mineral Act (1891) Amendment Act, 1892, Sec. 2, repeals section 18 of 1891, and in section 9 enacts "Section 25 of the said Act is hereby repealed, and in lieu thereof be it enacted: 25. In case of any dispute as to the title to a mineral claim, priority of record will determine the right, subject to any question as to the validity of the record, and subject also to a compliance by the free miner with the provisions of this Act." This section expressly changes the root of title from the location to the record.

It is possible to argue the law back to what it was prior to 1891, but it is impossible to do so without in effect re-enacting section 18 of the Mineral Act, 1891, and repealing section 9 of the Mineral Act (1891) Amendment Act, 1892. Maxwell on Statutes, 2nd Ed. p. 45, says: "Where a part of an Act has been repealed it must, although not of operative force, still be taken into consideration in construing the rest. If, for instance, an Act which imposed a duty on race-horses, cab-horses, and all other horses, were repealed as regards race-horses, the remaining words would still obviously include them, if the enactment were read as if the repealed words had never formed a part of it."

Judgment of SPINKS, CO. J.

What counsel for the defendant asks me to do is to interpret the Mineral Act as if section 18 had never formed a part of it. Although it would be very convenient to do this, I know of no law by which it may be done.

Judgment for the plaintiff.

From this judgment the defendants appealed to the Full

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Court. After the appeal was in the paper for argument, the plaintiff obtained an adjournment for the purpose of fyling affidavits in support of a cross motion for a new trial, upon the ground of discovery of fresh evidence that King's location was not the prior location, and a notice of such cross motion was given by respondents to appellant's solicitor. The affidavits in support of the motion were fyled.

Upon the appeal and motion coming on for argument:

A. J. McColl, Q.C. and *E. V. Bodwell*, for the respondent: We desire to withdraw the motion for a new trial, as it appears that the respondent has made a similar motion, now pending before the County Court Judge, who is in a better position to deal with it.

Argument.

W. J. Taylor and *Robert Cassidy, contra:* A party has no right to withdraw an appeal or motion for a new trial without the leave of the Court, and the Court will refuse the leave unless satisfied with the reasons for desiring it, and leave the motion to be dismissed, if not supported, *Tod Heatley* v. *Barnard*, W.N. 90, 130; *Re West Devon, etc., Mine*, 38 Ch. D. 51, 36 W.R. 342, 58 L.T. 61, 57 L.J. Ch. 850; *Re Downing*, 65 L.T. 665. It is necessary for the whole matter to be disposed of in this Court, otherwise it is open to the possibility that the defendants may succeed in this Court on the point of law involved in the appeal, and an appeal be taken elsewhere, subject to the whole proceedings being rendered nugatory by an order for a new trial made by the County Court.

Cur. adv. vult.

Judgment of WALKEM, J.

WALKEM, J.: The Court has upon the appeal complete jurisdiction, under section 29 of the Mineral Act, 1888, over the whole subject, and power to grant a new trial as an alternative, whether moved for or not.

It would be an anomalous position if this Court were to

decide the question of law raised on the appeal, an appeal from which judgment might be taken before a higher tribunal with the result that the whole of these proceedings and any judgment ultimately obtained thereon might be rendered abortive by the intervention of a decision by the County Court Judge granting a new trial. The policy of the Act is the same as that of the Judicature Act, and of Order LVIII. Rule 6, that a judgment of a Court of Appeal should cover the whole subject.

McCREIGHT and DRAKE, JJ., concurred.

Leave to withdraw motion refused.

The appeal and cross motion for a new trial were argued before McCREIGHT, WALKEM and DRAKE, JJ., on 23rd, 24th and 25th March, by the same counsel: Besides claiming the ground in dispute as the successor in title of Shea, under the "Rambler" location, plaintiff set up at the trial a bill of sale of the ground in dispute under the "Cariboo" location, from John King to Richard Shea, which bill of sale was not recorded until after the date of record of the bills of sale to the defendants.

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Cur. adv. vult.

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McCREIGHT, J.: This case seems to have been determined by His Honour Judge SPINKS with reference to certain sections of the Mineral Act (1891) Amendment Act, 1892, which Act, by section 2, repeals section 18 of the Mineral Act, 1891, relating to priority of location in case of disputes, and by section 9 enacts: "That in case of any dispute as to the title to a mineral claim priority of record will determine the right, subject to any question as to the validity of the record," etc.

Judgment of McCREIGHT, J.

The jury have found that the location of the "Cariboo"

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claim was on 9th June, whilst it seems to have been admitted that the location of the "Rambler" was on 10th June.

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It was agreed by counsel before Judge SPINKS at the trial, that the record of the "Rambler" was made on 13th June, and of the "Cariboo" on 15th June.

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The learned County Court Judge, on the construction of the Acts, held that the "prior record" over-rode the "prior location," and decided in favour of the "Rambler" company on that ground. The "Cariboo" company appealed to the Full Court, and the "Rambler" company, considering that though successful before Judge SPINKS, on the ground of having a prior record, their position would be materially strengthened if a new trial were granted, and a jury, on a more thorough enquiry, should conclude, not as the former jury did, viz., that the "Cariboo" location was on 9th June, but, on the contrary, that it was after (by some days) 10th June, the date of the location of the "Rambler," moved in the Full Court for an order for a new trial, and the question was argued at length and many affidavits were read on the part of the "Rambler" company, for the purpose of shewing that the "Cariboo" claim, which included a material part of the "Rambler" claim, was not located till many days after the location of the "Rambler," which was admittedly located on 10th June.

Judgment of MCCREIGHT, J.

The purport of the affidavits was that fresh evidence could be adduced which was not and could not have been produced at the jury trial, to shew the actual date of location of the "Cariboo" claim to be several days after the location of the "Rambler," which was on 10th June.

In the view I take of this case, I consider that the judgment of the learned Judge, that mere priority of record is all important, is erroneous, and that his judgment should be set aside. It is true that section 9 of the Mineral Act (1891) Amendment Act, 1892, does enact "that in case of any dispute as to the title to a mineral claim priority of

record will determine the right," but the concluding part of the section contains the following material qualification : " subject to any question as to the validity of the record, and subject also to a compliance by the free miner with the provisions of this Act." The "provisions of this Act," in this respect, I think, are mainly to be found in section 10 of the Mineral Act, 1891, and I think give no encouragement to locate on land lawfully occupied for mining purposes, but, on the contrary, practically prohibits it. In short, I do not think section 9 of the Mineral Act (1891) Amendment Act, 1892, was intended to encourage one miner to trespass on the location of another ; in other words, to do what may be known, perhaps questionably in forensic language, as "jumping." I gather the meaning of the Legislature to be that there shall be a good location, not obtained of course by trespass (see section 10 of the Mineral Act, 1891), and a good record, made of course within the time required by law.

I can, therefore, quite understand that the periods of location of the "Rambler" and "Cariboo" claims might be of much importance in case of a question arising between the original locators and recorders of those claims respectively, and, in that point of view, I can understand the strenuous effort that has been made to displace the verdict of the jury as to the location of the "Cariboo" having taken place on the 9th, and to shew that it was made several days after the location of the "Rambler," which was on 10th June admittedly.

Judgment of McCREIGHT, J.

I may add, moreover, that if it was material to justice, I think a case might be made out for a new trial, for I am by no means satisfied that the "Cariboo" claim was really located on 9th June ; but whatever might be, or rather have been, the correct course to pursue as between those companies in the summer of 1892, we are now concerned with a very different question, namely, a litigation between assignees and innocent purchasers, and arising in the year

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1895, after several intermediate assignments, especially on the part of the "Cariboo" company, and dependent not on the sections referred to by the learned County Court Judge, but on sections 50 and 51 of the Mineral Act, 1891, which seem to introduce, as might be expected, into the law relating to transfers under the above Acts of 1891 and 1892, the policy of the Land Registry laws, namely, that a prior unregistered conveyance must be postponed to that which is subsequent but duly registered.

The same policy has I believe characterized our legislation with respect to gold fields mining claims for the last thirty years or upwards.

Section 50 of the Act of 1891, still in force, is as follows: "Every conveyance, bill of sale, mortgage or other document of title relating to any mineral claim, mine held as real estate, or mining interest, shall be recorded within the time prescribed for recording mineral claims; provided always, that the failure to so record any such document shall not invalidate the same as between the parties thereto, but such documents as to third parties shall take effect from the date of record, and not from the date of such document."

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The present parties to this action, representing the "Rambler" and "Cariboo" claims respectively, are Jessie Wright Atkins, plaintiff, representing the "Rambler" company, and Belle Coy, A. L. Davenport, and L. D. Wolfard, representing the "Cariboo" company.

None of them were parties to the conveyance or bill of sale from King to Shea of June 25th, 1892, and that document, as to third parties, "must take effect from the date of record and not from the date of such document."

The date of record of the bill of sale of June 25th, 1892, was not until November 25th, 1894, and, of course, it can only take effect from that date, which was more than two years from the "time prescribed for recording mineral claims," and a considerable period after the transfers to and records by Belle Coy, A. L. Davenport and Lake D.

Wolfard, all of which took place in the years 1892 or 1893.

Jessie Atkins' claim is through a conveyance from R. Shea, dated December 5th, 1894, and recorded December 29th, 1894, but she can of course have no better claim than R. Shea had through King's conveyance to him dated 25th June, 1892, but not recorded until 28th November, 1894; and, in other words, I do not see that she can prevail against Coy, Davenport and Wolfard, or that her position could be in any way improved if a second jury should happen to find a verdict to the effect that King did not locate the "Cariboo" on 9th June, 1892, but several days afterwards, that is to say on some day subsequent to the day on which the "Rambler" was located. I think, therefore, that there should be no new trial on the proposed issue as to the date of location of the "Cariboo" claim.

I may add that a repudiation or an abandonment by Shea of the bill of sale of 25th June, 1892, to him from King, appears to have been deliberate, not only from the great delay in recording it, but from the evidence of Shea, where he says Aspinwall gave him the $3.00, the fee for the intended recording back in September, and he said he would destroy the bill of sale.

However this may be, the effect of the records is plain: Jessie Atkins is obliged to invoke the bill of sale of June 25th, 1892; and the date of the record thereof in the margin, of 28th November, 1894, puts her out of Court in a contest with Belle Coy, A. L. Davenport and Lake D. Wolfard.

This, it will be observed, is quite consistent with full effect being given to the sections of the Acts of 1891 and 1892, already referred to, and constituting the *ratio decidendi* of Judge SPINKS in favour of the "Rambler," though I think erroneously, for they deal with the subject of "location" and the primary record connected therewith, whilst sections 50 and 51 of the Act relate to subsequent transfers, and are obviously necessary for the purpose of rendering those subsequent transfers safe. Without some

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such provision we should have a repetition of frauds as to alleged location difficult and perhaps impossible to detect, and far more numerous than those which we too frequently find in the English Reports, arising in non-registry counties.

It seems to me quite clear that there is no conflict between the above sections and sections 50 and 51; and what is said in Maxwell on Statutes 3rd Ed. at p. 228, is very applicable: "Their objects are different, and the language of each is therefore restricted to its own object or subject. When their language is so confined they run in parallel lines without meeting."

The author is dealing with sections of different statutes, but of course his remarks are still more applicable to sections in the same statute; see also page 319 of the same work and same edition.

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It was argued on behalf of Coy, Davenport and Wolfard, that Jessie Atkins must have taken with notice, which she must have had by reading the records, as she probably did of the "Cariboo" claim, but I had rather not rest my judgment on this ground, because it was held in *Bushell* v. *Bushell*, 1 Sch. & Lefroy, 90, 9 R.R. 21, that the registry of deeds under the Irish Land Registry Act was not notice, and Lord REDESDALE'S reasons are given at page 23 of the Revised Reports. Now I am inclined to think that the question of whether mining records are notice should be determined by similar considerations. The case of *Bushell* v. *Bushell* has always I believe been considered to have been correctly decided, see the notes to *Le Neve* v. *Le Neve*, 2 White & Tudor, Ed. 1886, 72, and I gather Lord REDESDALE'S reasons have been generally followed.

I had written the above judgment under the impression that there was no question as to the accuracy of the records of the "Cariboo" claim, but on perusal of the Judge's notes they do not appear to have been admitted though a part of the case stated. I think the plaintiff is not entitled to a new trial on the question of the date of the location of the

"Cariboo," but on the question of title, as dependent upon the records of the respective claims, a question which was not argued at the trial, and which, we think, in view of section 50 of the Mineral Act, 1891, is one which governs the case, a new trial should take place if either party wishes to discuss the question of title as shewn on the registry. As the "Cariboo" records are *prima facie* correct, I think that if they are not successfully challenged by the plaintiffs within two months, subject to a Judge's order for extension of time, by means of a new trial, that judgment should be entered for the defendants, Coy, Davenport and Wolfard.

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As regards costs, I think the costs of the first trial should abide the event of the second, if it shall take place; if not the defendants' costs, and the costs of this appeal, should be the defendants' costs in the cause.

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WALKEM, J., concurred.

DRAKE, J.: This is an appeal by defendants from the decision of County Court Judge SPINKS, who held that priority of record gave priority of title. The Mineral Act, 1891, by section 19, compels a miner locating a claim to record the same with the proper officer within fifteen days, or such further time as the distance requires; if he fails to make his record, the claim is considered as abandoned. By section 18 of that Act priority of location was to govern in case of any dispute of title, subject however to any question as to validity of record. This section was repealed by section 2 of the Mineral Act, 1891, Amendment Act, 1892, and in lieu of section 25 of the Act of 1891 a new section was inserted making priority of record govern in cases of dispute. From a careful examination of the clause repealed and the clause substituted, it is evident that the repealed clause had reference to cases where assessment work had been done in a claim and not where it had been simply located and recorded, but as this is the only clause existing

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in the Act of 1892 respecting disputed titles, the respondents rely on the plain words of the Act, that priority of record must over-ride priority of location.

Admitting that this view is correct, it is necessary to examine the clause and find out its meaning. The section says that priority of record will determine the right, subject to any question as to the validity of the record and compliance with the provisions of the Act.

We find by section 10 of the Mineral Act, 1891, that a free miner, during the existence of his certificate, shall have the right to enter, locate, prospect and mine upon any waste lands of the Crown, excepting out of the above description of lands, land occupied by buildings, or in cultivation or any land lawfully occupied for mining purposes. This being the authority for a miner to enter, locate and prospect, no one else, after a proper location has been made, can enter on the same ground until the period has elapsed for recording.

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Therefore the second location of the "Rambler," as far as it infringes on the defendants' ground, was not a valid record, because the ground recorded was not then open to location; this is of course presuming that the dates of location were true.

The first lawful location has a temporary title, liable to be displaced by a failure to record or by non-compliance with other provisions of the Act, such as non-possession of a miner's licence, or for not placing the posts as required by the Act, etc.

In this case the "Cariboo" was alleged to be located on 9th June and recorded June 15th. The "Rambler" located June 10th and recorded June 13th. If the location of the "Cariboo" is right, they were in time with their record and the "Rambler" had no right to locate on the "Cariboo" ground.

In my opinion the judgment of the County Court Judge adjudging that the "Rambler" obtained a priority by

recording first, both records being made within the statutory time, is wrong, and the appeal should be allowed.

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It is true that the parties agreed to leave only one question to the jury, that was which party located first, and this the jury found in favour of the "Cariboo."

A copy of the records of the two claims was put in, which was necessary in order to shew that both the records were made in due time, but the records contain other matters shewing certain transfers had been entered on the register, but no evidence was adduced to prove the validity of these transfers, and I do not consider that the production of the copy of the records proves anything further than that the original record was made in due time. But it having been shewn that an application for a new trial was pending before the County Court, and which had been postponed until the judgment in the appeal was given, the Court (considering that they had seizin of the whole case and that it would be better for the whole matter to be decided) desired the plaintiffs, who were moving for a new trial before the County Court, to bring the evidence on which they intended to move before this Court.

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This view is in strict accordance with the statute giving an appeal, see section 29 of the Mineral Act, C.S.B.C. 1888. By that section this Court can hear *de novo*, order a new trial or enter up a new judgment for one or other of the litigants.

It would be impossible on the materials before us to hear *de novo* or to enter up judgment for either party. The affidavits brought forward by the plaintiffs shew that there is evidence now in their possession, and which I think it is sufficiently clearly shewn that they could not have and did not have at the trial, which might have materially altered the verdict.

The difficulties of obtaining evidence in a mining country, where the people are continually moving about from one camp to another, prospecting over a large area, has not

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been exaggerated; communication is very difficult, and I think if it had not been for the views held by the learned judge on the question of prior record over-riding prior location, and which drew the attention of miners all through the district to this case, this evidence would not have been obtained. It is hardly necessary to critically examine the affidavits. I think, as I stated before, they substantiate the plaintiff's contention that a new trial should be had in the interest of justice.

Whether or not the County Court has a larger power to grant new trials than the Supreme Court is an interesting question, but in the present case I do not think it is necessary to decide it. Neither do I think it necessary to decide the question as to whether the parties had such a notice of the dealings with these claims as would preclude them from litigating their rights. This question, and it is an important one, will doubtless have careful consideration when the rights of the parties are under consideration again.

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In my opinion there should be a new trial, the question of location not to be a subject of trial, and the costs of the first trial should abide the result of the second.

With regard to the costs of this appeal, I think they should be defendant's costs in the cause.

Judgment accordingly.

IN THE MATTER OF THE WINDING-UP ACT AND AMENDING ACTS, AND IN THE MATTER OF THE THUNDER HILL MINING CO., LIMITED.

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Re THE CLAIM OF JOHN SYLVESTER BOWKER AND MARY BOWKER.

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Companies' Winding-Up Act (Can.), Sec. 62—Right of one of several creditors holding joint security to value his interest therein and rank on the estate for the balance—Costs.

A mortgage had been made by the Company to a trustee, for B. and certain other of its creditors jointly, as security for their claims against it.

Upon a winding-up, B, when called upon to value his security under section 62 of the Winding-Up Act, swore that it was only of nominal value, and offered to assign his interest in the mortgage to the liquidator for nothing. The liquidator desired to have the whole security valued, so that he could take it over and rank all the creditors represented by it on the estate accordingly, and upon their being unable to agree as to the value, Mr. Justice DRAKE struck such creditors off the list and relegated them to their security.

Upon appeal to the Full Court:

Held, per DAVIE, C.J., and MCCREIGHT, J. (Walkem, J., concurring), overruling DRAKE, J.: That the principle of the Act is that of election and not forfeiture. That the appellant had the right to value his own interest in the security and to maintain his claim upon the estate, except as reduced by that valuation,

That the right of the liquidator was limited to requiring an assignment of B's interest in the security, or permitting its retention at the value placed upon it; and that the Court had no right to forfeit the claim of B upon the estate and relegate him to a security he considered valueless.

APPEAL from the following judgment of DRAKE, J. The facts fully appear from the headnote and judgments. Statement.

DRAKE, J.: On settling the claims against this company, Mary Bowker claimed to be put in the list in respect of an alleged balance due her on a note for $5,752.61; and John Judgment of DRAKE, J.

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S. Bowker for $6,858.48, in respect of three promissory notes, dated respectively, 1st September, 1893, 21st October, 1893, and 30th May, 1893, of which he was joint maker with others, and which he claims to have paid to the above amount to the Bank of Montreal. It appeared from the affidavits that Messrs. Bowker, Cochrane, Bullen, Taylor, Ker and Child, the other makers of these notes, paid in all about $25,000.00, for and on account of the Company, for which the Company gave them a mortgage over the Company's real and personal assets. The mortgage was taken in the name of Renouf.

Mr. Renouf was asked to place a value on this security, under sections 62 and 63 of the Winding-Up Act. This he was unable to do, and the matter was adjourned from time to time to see if the parties interested in the mortgage would agree to a valuation. After numerous adjournments it appears that *cestuis que trustent* had very divergent opinions on the subject, some claiming the mortgage property was worth the face value of the mortgage, and Mr. Bowker claiming it was worth only a nominal sum. After vain endeavours to reconcile the conflicting views, the liquidator fyled a memorandum declining to take over the security, and I accordingly ordered the names of those who claimed as creditors, but who were secured by the mortgage, to be struck off the list of creditors and relegated them to their security.

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In my opinion section 62 is compulsory on a creditor holding security to place a value on it, whether he estimates it worth more or less than the amount secured, the object of the section being to enable the liquidator to take it over in the interest of the estate, if he thinks it worth while. Section 63 provides that a creditor shall only retain his mortgage subject to all prior charges thereon—in this case there were none shewn—and also by securing the estate of the company against subsequent mortgages, judgments and liens. There was no evidence before me that there were

any subsequent charges, and the only course left open is to sanction the action of the liquidator in leaving the mortgagees to their rights under the deed. Mr. Bowker claimed the right to value the security in the interest of all the *cestuis que trustent*. I cannot assent to this unless all consent to Mr. Bowker's action.

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Order accordingly.

From this judgment the applicants appealed to the Full Court, and the appeal was argued before DAVIE, C.J., MCCREIGHT and WALKEM, JJ., on 27th January and 7th February, 1896.

H. D. Helmcken, Q.C., for the appeal.

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

E. V. Bodwell, for J. M. Browning and other contributories.

Cur. adv. vult.

May 11th, 1896.

DAVIE, C.J.: In the compulsory winding-up of the Thunder Hill Company it transpires that Jno. Sylvester Bowker and several other members of the Company endorsed promissory notes, at the request of and as sureties for the Company, to the amount of $25,000.00, which money was raised and used by the Company in furtherance of its enterprise. Upon the notes maturing they were dishonoured, and Bowker was alone sued upon them, and had to pay them. His co-sureties have paid him a portion of these monies, sufficient to satisfy what would be due to Bowker as between the endorsers themselves, but there still remains due to Bowker $12,591.09, between his wife and himself; to the wife who took up some of the notes $5,732.61, and

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to himself $6,858.48, and for these amounts Bowker and wife claim to prove as creditors of the Company. It appears that when the notes were made a mortgage of the Company's assets, for the purpose of securing Bowker and his co-endorsers, was taken in the name of C. E. Renouf, who was not one of the sureties, but was one of the shareholders in the Company.

The mortgage is made between the Company of the first part and Renouf, therein called the mortgagee, of the other part. It recites that Renouf has agreed to lend the Company $30,000.00, and then goes on to witness that in pursuance of such agreement and in consideration of $30,000.00 now paid by him, the Company convey the property as described in the schedule to him, covenanting to pay him the sum of $30,000.00 on demand, together with interest at ten per cent. per annum, with power to sell the mortgaged premises if default be made in payment of principal or interest on demand, and subject to a proviso for redemption if the money be paid.

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It is not suggested that Renouf was a creditor, or that in taking the mortgage he was anything more than a dry trustee for Bowker and the other endorsers. He is, however, settled upon the list of contributories for unpaid calls, and, although requested by Bowker, he refuses to place any value on the security of the mortgage held in his name, and in this he is backed up by Bowker's endorsers, who are also settled upon the list of contributories towards satisfaction of Bowker's debt for unpaid calls, and would, of course, have to contribute if Bowker is admitted to prove.

Section 62 of the Winding-Up Act, Rev. Stats. Can., Cap. 129, enacts that if a creditor holds security upon the estate of the Company he shall specify the nature and amount of such security in his claim, and shall on oath put a specified value thereon; the liquidator having the option, under authority of the Court, either to permit the creditor to retain the security at the value put upon it by him, or he

may require from the creditor an assignment of the security at the specified value.

The liquidator has decided to leave Bowker and his co-endorsers to their remedies under the mortgage, and has relinquished all claim to the security; and on application to Mr. Justice DRAKE to settle the list of creditors, His Lordship has made an order confirming the action of the liquidator and rejecting the proofs of Bowker and his wife. The matter is briefly stated by the learned Judge, as follows: "Mr. Renouf was asked to place a value upon the security under sections 62 and 63 of the Winding-Up Act. This he was unable to do, and the matter was adjourned from time to time to see if the parties interested in the mortgage would agree to a valuation. After numerous adjournments it appears that the *cestuis que trustent* had very divergent opinions on the subject, some claiming the mortgaged property was worth the face value of the mortgage, and Mr. Bowker claiming it was worth only a nominal sum. Mr. Bowker claimed the right to value the security in the interest of all the *cestuis que trustent*. After vain endeavours to reconcile the conflicting views, the liquidator fyled a memorandum declining to take over the security."

The learned Judge therefore concludes: "I accordingly ordered the names of those who claimed as creditors, but who were secured by the mortgage, to be struck off the list of creditors, and relegated them to their security."

If the learned Judge's attention had been drawn to the principles of decided cases, upon which the Courts proceed in the marshalling and adjustment of securities in the cases of insolvent companies and estates, I think he would not have arrived at this decision, which I think is contrary to natural justice. That the other parties in interest have "conflicting views" and cannot agree, affords no reason why Bowker should be deprived of the right to claim for this large amount of money and left to recover it from a security which he considers worthless. As remarked in

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the judgment of my learned brother MCCREIGHT, which I have had the advantage of reading before preparing my own, and with which I entirely concur, the principle on which the liabilities and rights of secured creditors are to be determined is not one of "forfeiture," especially in respect of causes which they cannot control, but one of "election," citing *Moor* v. *Anglo-Italian Bank*, 10 Ch. Div. 681, at p. 689; *Ex parte Schofield*, 40 L.T.N.S. 464, 823; *Re Lister* (1892), 2 Ch. 417.

In this case Bowker has announced his election in the clearest possible manner. He states the security is worth nothing, or only a nominal sum. If the liquidator thinks otherwise, he can take an assignment of Bowker's interest, which he is willing to surrender for nothing. What more can be asked of Bowker?

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The object of section 62, as I take it, is simply to deny to a creditor the unreasonable privilege of claiming for one hundred cents in the dollar upon an insolvent estate, and at the same time holding on to a security which, in order to realize his one hundred cents, or whatever the estate will pay, ought to be brought into hotch-pot and realized accordingly. Hence the Act says you must "elect;" either turn your security, or whatsoever your interest is, into the estate at such value as you put upon it, or relinquish your claim upon the remainder of the assets. You cannot have both your right to your one hundred cents out of the general *corpus* of the estate and at the same time hold on to securities without which the one hundred cents (or perhaps any other sum) cannot be raised at all. But the notion that a creditor is to forfeit his right to prove, which in this case would seem to mean his entire debt, when he is willing and elects to surrender every vestige of security in which he is interested, would, I think, be contrary to the plainest rules of justice and to those principles of equity which always lean against forfeitures.

This case has been argued in opposition to Mr. Bowker's

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proof, and the judgment of the Court below proceeds upon the principle that the creditor must turn over not only the interest to which he is entitled in common with the others, but the entire security, theirs as well as his; this is requiring him to do that which it is out of his power to accomplish, and is I think not demanded by the statute. *Smith* v. *Lucas*, 18 Ch. D. 531, is somewhat instructive on this point. There an ante-nuptial settlement, executed by the intending wife before she was of age, covenanted for the settlement of after acquired property. When of age she could, of course, elect to disaffirm this covenant, and in the absence of disaffirmance it would bind her after acquired property. She did not disaffirm, and she subsequently became entitled to property to her separate use, with a restraint on her anticipation. JESSEL, M.R., was of opinion that the doctrine of election did not apply to that case. Similarly here, it seems to me that Bowker could not be called upon to elect whether he would entirely surrender securities over which he had not the controlling power.

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But whether so or not, it is clear that he has declared his election to place no value upon the security. He is prepared to surrender it, so far as his interest is concerned, for nothing. Under these circumstances, I think he and his wife should be admitted to prove for the full amount of their claim, and that the judgment below should be reversed.

For the reasons given by Mr. Justice MCCREIGHT, I agree that the appellant should be deprived of the costs of this appeal.

MCCREIGHT, J.: In this case, as Mr. Justice DRAKE in his judgment states: "It appeared from the affidavits that Messrs. Bowker, Cochrane, Bullen, Taylor, Ker and Child, makers of certain promissory notes, paid in all about $25,000.00 for and on account of the Thunder Hill Company, for which the Company gave them a mortgage over the whole of the Company's real and personal assets. The

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mortgage was taken in the name of Renouf, and is dated 14th September, 1893." But it is to be added that the mortgage deed makes no allusion to any of the above-named gentlemen, and represents Renouf as the only person who advanced money or for whose benefit the mortgage was taken, though no doubt the surrounding circumstances fully indicate the truth.

Mr. Justice DRAKE then proceeds as follows:—"Mr. Renouf was asked to place a value on this security, under sections 62 and 63 of the Winding-Up Act. This he was unable to do, and the matter was adjourned from time to time to see if the parties interested in the mortgage would agree to a valuation. After numerous adjournments it appears that the *cestuis que trustent* had very divergent opinions on the subject, some claiming the mortgaged property was worth the face value of the mortgage, and Mr. Bowker claiming it was worth only a nominal sum. After vain endeavours to reconcile the conflicting views, the liquidator fyled a memorandum declining to take over the security, and I accordingly ordered the names of those who claimed as creditors, but who were secured by the mortgage, to be struck off the list of creditors, and relegated them to their securities."

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He then goes on to say that in his opinion section 62 of the Winding-up Act is compulsory on a creditor holding a security to place a value on it, whether he estimates it as worth more or less than the amount secured, the object of the section being to enable the liquidator to take it over in the interests of the estate, if he thinks it worth while. He also adds, that Mr. Bowker claimed the right to value the security in the interest of all the *cestuis que trustent*, but that he cannot assent to that unless all consent to Mr. Bowker's action.

Counsel for the appellants, J. S. Bowker and Mary Bowker, contend that they had not failed to prove their claim, nor had they failed to put a valuation on the securi-

ties held by Renouf, on behalf of themselves and others.

2nd. That claims having been duly fyled by Bowker and Mary Bowker, in accordance with the provisions of the Winding-up Act, the learned Judge erred in refusing to entertain the valuation placed by Bowker on the property covered by the mortgages granted by the Company in favour of Renouf.

I am unable to agree with the view of the learned Judge in ordering the names of those who claimed as creditors, but were secured by the mortgage, to be struck off the list of creditors and relegated to their security, including of course J. S. Bowker and Mary Bowker, appellants.

It is unfortunate that the English decisions relating to secured creditors in a winding-up were not brought to the learned Judge's attention, for they shew that the principle on which the liabilities and rights of such secured creditors are to be determined is not one of "forfeiture," especially in respect of causes which they cannot control, but one of "election."

In *Moor* v. *Anglo-Italian Bank*, 10 Ch. Div. 681, the late Master of the Rolls says, at page 689, "You must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy, which relate to a totally different subject." Then again, at page 690, "It is a new doctrine of forfeiture to be brought into bankrupt law, if the petitioning creditor is to lose his security without getting anything out of the bankrupt's estate; it is no longer election, it is forfeiture, and forfeiture must be discovered in some Act of Parliament or section of an Act of Parliament, and there is no such section to be found."

I may observe that section 62 of the Winding-Up Act is little more than an application *mutatis mutandis* of section 84 of the Insolvent Act of 1875, of Canada, now repealed. As an additional reason why section 62 should be construed, on the principle of election, not of forfeiture, I may call

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attention to the well-known doctrine that a Court of Bankruptcy always administered equity, and that a Court of Equity always had an aversion to forfeitures, and relieved against them whenever it was practicable to do so consistently with the rights of parties concerned.

The principle stated in the above judgment of the late Master of the Rolls has been fully maintained in more recent cases, *e.g.* in *Ex parte Schofield*, 40 L.T.N.S. at pages 465 and 466, the Chief Judge says: "I see no necessity for amending the proof, but, if there were any, I do not hesitate to say that I should have no difficulty in allowing such an amendment to be made as might be necessary to allow the true and intelligible meaning of the proof to be disclosed.

"It is not a case where a man asks for leave to amend his proof after voting for the choice of assignees, upon a proof which he says is erroneous, and upon which he wants to make a new case, relying upon a different construction of the proof, etc. I feel fully the justice of Mr. DeGex's remark, that this Court does not allow a man who has made a proof in mistake to change his front and come with a different kind of demand," etc.

Judgment of McCREIGHT, J.

Another case I refer to, as shewing that the Courts do not treat questions like the present as one of forfeiture, is *Re Henry Lister & Co.* (1892), 2 Ch. 417, a case of a secured creditor, who, through inadvertence, had made a mistake in his proof, believing his security to be collateral, and who was allowed to place a value on his security, and to amend his proof by valuing it at such value, and retain the benefit of the security, notwithstanding that he had voted on the whole debt, after hearing a statement that the security was not collateral but direct.

NORTH, J., at page 421, says: "I am told there is no rule addressed to the point, but the Court has, in years gone by, constantly, under all sorts of circumstances, allowed proofs to be varied, amended, or corrected—sometimes increased, sometimes reduced. I am satisfied that the Court has power

to deal with the proof, by way of allowing amendment or reduction, except so far as it is fettered by anything found in the Acts or Rules."

Again, at page 422, he says: "The result is that a creditor is to be relieved from the consequence of omitting to value his security, if the Court, on application, is satisfied that the omission has arisen by inadvertence."

Again, section 62 deals with the case of a creditor who holds security upon the estate of the Company; and towards the end of the section reference is made to a creditor holding a claim based upon negotiable instruments, etc., and it says that such creditor shall be considered to hold security within the meaning of the section; and I gather that the holder must be a person who can maintain an action in his own name on a bill or note, see Bills of Exchange Act (Can.) 1890, Sec. 38; and Byles on Bills, 15th Ed. p. 2; and *Blackwood* v. *The Queen*, 8 App. Cas. 94; and *Marston* v. *Allen*, 8 M. & W. 494, as to construing words in an Act.

Judgment of McCREIGHT, J.

Now, the word "holder" is intended no doubt to be used in the same sense throughout this section 62; if then, instead of this mortgage to Renouf there had been a note to him, it is obvious that Bowker could not have sued on it, indeed Renouf might perhaps have held Bowker at arm's length. However, certainly Bowker's control over this mortgage was obviously delusive, as the facts in this case shew, and I seriously doubt whether he was a creditor holding security within section 62.

Now, referring to the judgment of Mr. Justice DRAKE, he says, after numerous adjournments it appears that the *cestuis que trustent* had very divergent opinions on the subject of the value of the property in the mortgage deed, some claiming the mortgaged property was worth the face value of the mortgage, and Mr. Bowker claiming it was worth only a nominal sum.

If Mr. Bowker claimed that the whole property was worth

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only a nominal sum, it certainly must be taken that he valued his interest in the property at only a nominal sum, and valued it accordingly, "and the liquidator (see section 62), under the authority of the Court, might either consent to the retention," etc., or might require from Bowker an assignment of such security at such specified value, which, in this case, would be a fraction of a nominal sum, leaving him to prove in substance for the full amount of his claim. By somewhat clumsy drafting, the words "in either of such cases," to be found in section 84 of the Insolvent Act of 1875, are omitted in section 62, but, of course, they must have been taken as inserted, for the Legislature could not have intended that the liquidator compulsorily should take the security of the secured creditor, and at the same time confiscate his claim or proof *in toto* against the estate. See Maxwell on Statutes, Ed. 1896, page 318, as to interpolating words in an Act where absolutely required.

Judgment of McCREIGHT, J.

It seems to me plain, therefore, that even on the theory of forfeiture, if I may use the expression, Bowker might prove for the full amount of his claim. But as the above cases distinctly shew that the theory of "election," not "forfeiture," is the law in bankruptcy, and his election has been admittedly in favour of surrender of his interest at a nominal sum, there can be no excuse for what, on examination, seems to me to operate as an unwarrantable forfeiture of his claim.

There is much useful information as to election in *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex., at pp. 34 and 35.

Mr. Bowker's rights, whatever they may be, must be determined by the same consideration.

Once establish that the principle in bankruptcy is "election," not "forfeiture," then Bowker (see judgment of Drake, J.) has elected decidedly to value his security, or his fractional interest in the mortgage, at a nominal sum, for he values the whole mortgage at a nominal sum. If he has any interest in the mortgage at all, the liquidator

must either take it at such nominal value, or tell Bowker to keep such interest at the nominal value, and, in either case, Bowker is entitled to prove for the full amount of his claim.

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The only remaining question is as to costs. Now, if the attention of Mr. Justice DRAKE had been drawn to the cases and matters I have discussed, I do not think he would have treated the claim of Bowker and other creditors as forfeited, and that they were to be relegated to a security which Bowker at all events looked upon and treated throughout as worthless. These points were certainly not brought up or discussed in the Full Court, and could not have been brought to Mr. Justice DRAKE's attention.

Now, in the Annual Practice for 1896, at page 1050, it is said there is a discretion in the Court to deprive a successful appellant of costs where he succeeds on a point not raised in the Court below, and I think no costs of this appeal should be allowed, though Bowker has a right to have the decision of DRAKE, J., reversed. Bowker, of course, by insisting on proof for the full amount of his claim, will be surrendering, or electing to surrender, all claim under the mortgage deed, and I do not see that any difficulty can arise in the winding-up by his action accordingly.

Judgment of McCREIGHT J

WALKEM, J., concurred.

Appeal allowed.

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EDISON v. BANK OF B.C

EDISON GENERAL ELECTRIC COMPANY v. WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, THE BANK OF BRITISH COLUMBIA *ET AL.*

Practice—Appeal--Time not extended as of course—Costs—Taxation.

Where there are no special equitable circumstances calling for the intervention of the Court the time for appealing from an order will not at the hearing be extended to cure an objection that the appeal is out of time.

The appearance of counsel to take such an objection is not an appearance upon the appeal so as to waive the objection, *Forster* v. *Davis*, 25 Ch. D. 16, distinguished.

Although there is no allowance in terms in the tariff for the costs of making briefs on appeal, they may be allowed under the heading of "copies of pleadings, briefs and other documents, where no other provision is made," and though there is no allowance for fees paid to the official stenographer, his transcript may be taxed as a copy.

Statement.

APPEAL from an order of WALKEM, J., which was issued and served on 26th February, 1896, dismissing a summons to review the taxation by the District Registrar at Vancouver, of the costs of the defendants as respondents, upon an appeal by the plaintiff to the Full Court, from the judgment at the trial. The notice of appeal was dated and served on 6th March.

The appeal was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on 11th March, 1896.

Argument.

E. P. Davis, Q.C., for the respondents, the Bank of British Columbia, took the preliminary objection that the appeal was out of time, under Rule 684. There is no suggestion of special grounds for now extending the time, and the Court does not encourage appeals on questions of taxation of costs.

A. E. McPhillips, contra: The objection is waived by the appearance of counsel for the respondents, *Re McRae, Forster* v. *Davis*, 25 Ch. D. 16, 49 L.T.N.S. 544, 32 W.R. 304; *Fletcher* v. *McGillivray*, 3 B.C. 40.

Cur. adv. vult.

DRAKE, J.: The question in this case is shortly this: The appellants gave their notice of appeal out of time. The respondent, on the appeal coming on to be heard, objected that the appeal was too late, and that there were no special circumstances which ought to induce the Court to waive the objection. To this the appellants cite *Re McRae, Forster* v. *Davis*, 25 Ch. D. 16. At first sight this may seem an authority for the proposition urged by the appellant, that appearance waives the irregularity. What are our rules? Rule 673 says the appeal from an interlocutory order must be brought on within eight days from the date of refusal of the order. Rule 684 says no appeal from any interlocutory order shall be brought after the expiration of eight days. Rule 690 allows the appeal to be heard on or at the first Court sitting after the expiration of the eight days. Rule 690 says the eight days may be enlarged by the Court or a Judge. The effect of these rules is that notice of appeal must be given within eight days, and the motion set down. If the proper notice has been given the Court will not allow a mere technical objection to stand in the way of the hearing, but if no notice has been given within the time, and the time has not been extended, the appeal cannot be heard. In *Re McRae, supra*, the notice of appeal was given in time, but the motion was one day short of the authorized time, owing to the intervention of a Sunday, and the Court then heard the appeal and held that the appearance of counsel was a waiver.

Judgment of DRAKE, J.

Here the notice is out of time. The Court, in *Steedman*

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v. *Hakim*, 22 Q.B.D. 16, allowed the objection as to the appeal being out of time, and it was decided by five Judges.

If the objection is not taken by counsel for the respondent, the Court does not take it, and taking an objection is not a waiver of it. In *New Callao Co.*, 22 Ch. D. 484, the objection was taken and sustained. In *Re Crosley*, 34 Ch. D. 664, notice of appeal was given in time, but informally, and the Court extended the time. In my opinion the objection of the respondents is well founded, and there is no reason why the strict rule should be departed from. The object of appeal is one of *quantum* of costs only, and does not involve any principle of general importance. But as the merits were heard, I think the grounds of appeal are not well taken. Instructions were properly allowed for brief on appeal, and sundry briefs are set out in various heads of practice. The general words that allow for "copies of pleadings, briefs and other documents when no other provision is made," amply cover these objections to the brief on appeal. As the stenographer's fees, they are not in the schedule, but if the stenographer copies the documents which are necessary to make up the brief, the solicitor is entitled to charge for such copies; he should not be allowed for two copies or enter it up as for stenographer's fees, but this is a question for the taxing officer, and the Courts leave the *quantum* to be decided by that officer, as having a great deal more experience in such matters than the Judge. I think then, on the merits, the appellants have no case, and the appeal should be dismissed with costs.

Judgment of DRAKE, J.

DAVIE, J., and MCCREIGHT, J., concurred.

Appeal dismissed with costs.

RE MARQUIS OF BIDDLE COPE AND THE ASSESSMENT ACT.

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RE BIDDLE COPE

Provincial taxation—"Assessment Act," B.C., Sec. 3, Sub-sec. 16, "income."

The "income" made liable to taxation *eo nomine* by the Assessment Act, C.S.B.C. 1888. Cap. 111, Sec. 3, means net income.

APPEAL to the Full Court by the Marquis de Biddle Cope, from the Court of Revision, confirming his assessment of the amount of his income from real property in Vancouver, for the purpose of taxation thereof, at the amount of gross revenue derived by him therefrom without deducting outgoings in respect thereof. The grounds of appeal appear from the judgment of DAVIE, C.J. Statement.

The appeal was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on 10th and 11th March, 1896.

E. P. Davis, Q.C., for the appeal: If the outgoings in respect of the property are deducted the amount of the net income is less than $1,500.00, and within the exemption by sub-section 16 of section 3 (*a*). It was contended below that the exemption only applied to persons *ejusdem generis* with merchants and mechanics. The purpose of the statute must be considered. Endlich-Maxwell on Statutes, Ed. Argument.

NOTE (*a*). "3. All land and personal property and income in the Province of British Columbia shall be liable to taxation, subject to the following exceptions, that is to say: . . . (16) The income of a farmer derived from his farm, and the income of merchants, mechanics or other persons, derived from capital liable to assesssment."

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1888, 408–11; *Regina* v. *Payne*, L.R. 1 C.C.R. 27; *Regina* v. *Mee Wah*, 3 B.C. 403. Income means net income, *Lawless* v. *Sullivan*, 6 App. Cas. 373; *Kingston* v. *Canadian Life Assurance Co.*, 19 Ont. 453.

Gordon Hunter, for the Crown: "Income," in section 3, means gross income. *Lawless* v. *Sullivan*, 6 App. Cas. 373, is a decision on a statute which deals solely with the assessment of mercantile business, and does not decide that "income," wherever used in any general taxing Act, means "net income." *Kingston* v. *Canada Life*, 19 Ont. 453, which attempts to apply the above decision to the word "income" as used in a general taxing Act, is wrong, and can only be upheld on the ground that the word "income" as applied to a mercantile business means net income, while with respect to taxpayers generally it means gross income. The objection that the same word should be similarly construed in the same statute is not insurmountable, *e.g.* "personal property" obviously has different meanings throughout the B. C. Act. The decision might be upheld also on the ground that the assessment should have been made on personal property rather than on income. It is submitted that the decision of FERGUSON, J., who took into account the word "gross" in the schedule, is correct, *Attorney-General* v. *Lamplough*, 3 Ex. D. 214; *Reg.* v. *Epsom*, 4 E. & B. 1008; *Truax* v. *Dixon*, 17 Ont. 366. The argument that dual taxation would result is futile, *e.g.* the Act plainly taxed both a corporation and its shareholders. Convenience is in favour of holding that income means "gross income," as the assessor would find difficulties in verifying the outgoings of a landlord. It would have been simple for the Legislature to say "net income," if that was what it meant, see *The Henrich Bjorn*, 11 App. Cas. 270, Lord BRAMWELL, at p. 281. The burden is on him who claims exemption from a general Act, see Hardcastle on Statutes, 2nd Ed. 132; Harrison's Municipal Manual, 5th Ed. 712, and cases cited: *Speak* v. *Powell*, L.R.

Argument.

9 Ex. 25; *Reg.* v. *Payne*, cited by appellant, has no application, see per WILLES, J., in *Fenwick* v. *Schmale*, L.R. 3 C.P. 315.

Cur. adv. vult.

May 11th, 1896.

DAVIE, C.J.: The only point necessary for decision in this case is whether an owner of real estate situate within a municipality is liable to income tax in respect of such real estate when his annual returns therefrom are reduced by necessary disbursements, such as taxes, insurance and so on, to below $1,500.00.

The appellant, the Marquis de Biddle Cope, who resides at Salop, in England, is owner of real estate in the city of Vancouver, which returns a gross rental of $3,400.00. His necessary outgoings for municipal rates, taxes and insurance in respect of such property amount to $2,389.00, leaving him a profit of about $1,100.00. He has no other property in British Columbia from which he gains an income. He was assessed by the Government as upon an income of $3,000.00, from which he appealed to the Court of Revision, which held that he must pay upon the gross return.

Judgment of DAVIE, C.J.

From this decision the Marquis de Biddle Cope has appealed, on the grounds: (1) That his income is under $1,500.00, and therefore exempt under sub-section 15 of section 3 of the Assessment Act. (2) That being a resident in England where he is likewise assessed for income, he is exempt here. (3) That the income is derived from the real estate which is already assessed by the city of Vancouver, and is therefore exempt under the statute. As in my opinion the first point disposes of the case, it is unnecessary to discuss grounds two and three. By the Assessment Act, C.S.B.C. 1888, Cap. 3, Sec. 3, Sub-sec. 16, all yearly income is liable to taxation, except when under $1,500.00.

"Income" means the balance of gain over loss, *Lawless* v.

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Sullivan, 6 App. Cas. 373; and where there is no such balance of gain there is no income which is capable of being assessed. The gross returns which an owner received from his property do not denote his income, which means what he has for himself, what he can spend after satisfying all just outgoings in respect of the property which yields the return. It not unfrequently happens that the outgoings in respect of property exceed the returns. It would be absurd to say that a man reaped an income from such property, when in fact it was a subject of loss to him. What the law aims to do is to tax a man according to his means, not to tax him when he has no means at all, or when his means do not exceed $1,500.00 a year. The appeal must be allowed with costs, if the law permits us to give costs.

Judgment of DAVIE, C.J.

McCREIGHT, J.: I agree with the judgment of the Chief Justice which has been read in this case, and have only in addition to quote a passage in the judgment of the Judicial Committee, delivered in *Lawless* v. *Sullivan*, 6 App. Cas. at p. 384, where it is said as follows: "It is clear that under the English Act losses connected with or arising out of any business during the year would form a deduction from the profits, and in the very case referred to (see *Forder* v. *Handiside*, 1 Ex D. 233), the repairs of buildings and machinery were allowed, as being a proper deduction from the net profits."

Judgment of McCREIGHT, J.

If repairs are to be allowed, I do not see how it can be contended that insurance and such like expenses should not also be allowed.

DRAKE, J., concurred.

Appeal allowed.

NOTE—The question of costs was afterwards spoken to by counsel, when the Court held that it had power to and did award costs.

CANADA SETTLERS' LOAN COMPANY v. NICHOLLES *ET AL.*

DAVIE, C.J.

[In Chambers.]

1896.

March 20.

Mortgage—Default of interest—Foreclosure though no proviso that principal should become due on default of payment of interest.

Upon default in payment by a mortgagor of any instalment of interest the mortgagee has a right, independently of any express proviso in the mortgage to that effect, to call in the whole principal and interest, and foreclose.

CANADA SETTLERS' LOAN CO. *v.* NICHOLLES

MOTION by the plaintiff for order for foreclosure of a mortgage. An instalment of interest was unpaid and the mortgagee had called in the whole principal and interest. The mortgage did not contain any proviso that on non-payment of interest the principal and interest should become due, but only the ordinary covenant by the mortgagee to pay the instalment of interest at the days and times mentioned.

Statement.

W. J. Taylor, for the plaintiffs: The estate has been conveyed subject to a condition which has not been fulfilled. The mortgagee is entitled to call in or foreclose. The estate is forfeited at law, Coote on Mortgages, 5th Ed. 1100; *Lamb* v. *McCormack*, 6 Gr. 240; *Cameron* v. *McRae*, *Sparks* v. *Redhead*, 3 Gr. 311; *Bennett* v. *Foreman*, 15 Gr. 117; *Stanhope* v. *Manners*, 2 Eden, 197.

Argument.

P. Æ. Irving, *contra.*

DAVIE, C.J.: The action is upon a mortgage dated 30th April, 1893, from the defendant, John Nicholles, to J. H. Turner, and by him assigned to the plaintiffs, for $12,500.00, payable on 30th April, 1898, with interest in the meantime at eight per cent. per annum, payable quarterly. The defendant, Clara Louise Nicholles, is a second mortgagee, and the defendants, Yates and Beaven, have registered

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judgments against Nicholles. Default having been made in payment of interest, defendants have brought this action for foreclosure, to which no defence has been made by John Nicholles or Clara Nicholles; but on the part of the defendants, Yates and Beaven, who have disclaimed any personal interest and have submitted their rights to the judgment of the Court, it is argued that as there is no clause in the mortgage providing that in default of the payment of interest the principal shall thereupon become due, the plaintiff cannot foreclose until the time mentioned in the mortgage for the payment of the principal, *i.e.* 30th April, 1898.

I am of opinion that the objection is not well taken.

The property here has been conveyed to the plaintiffs, subject to a condition for the payment of interest, and there having been a breach of that condition the estate of the mortgagee has become absolute at law, and as a consequence he has thereby acquired the right to foreclose the mortgagor's equity of redemption. In Coote on Mortgages, 5th Ed. 1100, the rule is laid down that "a default in payment of a half year's interest on the appointed day will be a sufficient breach of condition to enable the mortgagee to foreclose." The case of *Cameron* v. *McRae*, *Sparks* v. *Redhead*, 3 Gr. 311, is I think conclusive on the point.

Judgment of DAVIE, C.J.

The usual decree of foreclosure will therefore be made.

Decree of foreclosure made.

WALKEM, J.

1896.

May 5.

FULL COURT.

May 30.

BULLEN v. TEMPLEMAN.

Libel—Pleading—Practice—Discovery.

Held, by the Full Court (Davie, C.J., McCreight and Drake, JJ.,), overruling WALKEM, J., that in an action of libel a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff.

BULLEN *v.* TEMPLEMAN

APPEAL by the plaintiff from so much of an order of WALKEM, J., as gave the defendant liberty to proceed with the examination of the plaintiff for discovery before delivering to the plaintiff particulars under a general defence of justification, which were directed to be delivered by a previous order, but for the delivery of which the defendant had obtained an extension of time. Statement.

The appeal was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on 11th May, 1896.

Robert Cassidy, for the appeal.
E. V. Bodwell, contra.

Cur. adv. vult.

MCCREIGHT, J.: I think *Zierenberg* v. *Labouchere* (1893), 2 Q.B. 183 (C.A.), is a plain authority to the effect that the defendant is bound to give particulars of his justification before he is entitled to discovery, and that he must state in his particulars the facts on which he relies in support of his justification; Lord ESHER says, at page 188: "The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well pleaded defence, and until there is such a defence Judgment of MCCREIGHT, J.

WALKEM, J.

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the defendant has no right to discovery." The particulars must of course be sufficient particulars. As in this case there is not yet a well pleaded defence, the defendant cannot have discovery, or invoke Rule 705, and so much of Mr. Justice WALKEM'S, order as directs the examination of the plaintiff before the particulars of justification are furnished should be set aside.

DAVIE, C.J., and DRAKE, J., concurred.

Appeal allowed.

BAKER v. THE "PROVINCE."

DRAKE J.

[In Chambers].

1895.

Dec. 3.

BAKER v. PROVINCE

Practice—Order in Chambers—Delay in issuing—Abandonment.

An application to settle the minutes of an order was made fifteen days after it was pronounced in Chambers.

Held, That the delay was not sufficient to constitute an abandonment of the order.

AN order was made on 18th November. On 3rd December following *Crease* (*Bodwell & Irving*) applied before DRAKE, J., to settle the minutes thereof, pursuant to appointment of the Registrar. Statement.

Archer Martin, for the defendant: The order must be taken as abandoned, Archbold's Prac. 14th Ed., 1414; *Hopton* v. *Robertson*, W.N. (84) 77, quoted in *Farden* v. *Richter*, 23 Q.B.D. 124, at p. 126. Argument.

DRAKE, J.: While an order may be treated as abandoned if there is unreasonable delay in taking it out, I cannot say that the delay in this case, two weeks, is of that nature. Judgment of DRAKE, J.

Order made.

GIRARD v. CYRS.

DAVIE, C.J.

1896.

Feb. 4.

GIRARD v. CYRS

BURKE (Garnishee). ROBERTS (Claimant).

Attachment of debts—Rule 497.

A promissory note not yet due constitutes a debt owing and accruing and is attachable to answer a judgment debt within the meaning of Rule 497.

MOTION by the judgment creditor for the garnishee to Statement.

DAVIE, C.J.

1896.

Feb. 4.

GIRARD v. CYRS

pay over monies attached by garnishing order *nisi*. The claim sought to be attached was at the time of the service of the order *nisi* represented by a promissory note made by the garnishee to the judgment debtor and not yet due. The promissory note was cancelled after the service of the order *nisi* and a promissory note of the same exigency given to the claimant, who upon notice appeared to support his claim.

H. C. Shaw, for the judgment creditor.

W. J. Bowser, for the claimant.

Argument.

J. J. Godfrey, for the garnishee, contended that, independently of any rights of the claimant, monies were not attachable as being a debt then owing and accruing within the meaning of Rule 495, as the period for payment was postponed by the promissory note, citing Cababe on Attachment, p. 33; *Pyne* v. *Kinna*, 11 Ir. R.C.L. 40.

Judgment.

DAVIE, C.J.: Upon the facts of this case I gave my decision at the conclusion of the argument, that the debt for which a promissory note had been given by the garnishee, payable to Cyrs or order, was due actually to Cyrs, the judgment debtor, and not to Roberts, the claimant, and that the garnishee process could not be defeated by the cancellation of the note after service of the process, and the giving of a new note to Roberts merely (as I am satisfied was the case) so as to avoid the effect of the garnishee order; but I reserved judgment on the point whether the fact of a negotiable promissory note having been given for the debt by the garnishee to the judgment debtor, which was not yet due at the time of service of the garnishee order, was an answer to the attachment; not that I had any previous doubt upon the subject, for it has been settled by numerous authorities that a *debitum in presenti solvendum in futuro* may be attached (*Tapp* v. *Jones*, L.R. 10 Q.B. 591; *Ex parte Joselyne, In re Watt*, 8 C.D. 327); but because I was referred to a passage in Cababe on Attachment, p. 33, citing

Pyne v. *Kinna*, 11 Ir. R.C.L. 40, to the effect that monies to become due under a promissory note not yet due cannot be attached, and I wished to consult the authority so quoted before delivering judgment. I have done so, and, so far as I can see, all that *Pyne* v. *Kinna* is a direct authority for, is that no order of the Court can prevent a promissory note or other negotiable instrument being endorsed over. That is all I think *Pyne* v. *Kinna* decides, although the head note to the case goes much further, stating that "a promissory note not yet due does not constitute a debt which can be attached to answer a judgment debt."

If the case is really to be considered an authority to the extent of the head note, I must decline to follow it as being contrary to decisions which are binding upon me. I cannot distinguish this case in principle from *Tapp* v. *Jones*, L.R. 10 Q.B. 591, deciding that the garnishee clauses apply not only to an accruing debt in the hands of a garnishee, but also to an accruing debt when it shall become payable by the garnishee to the judgment debtor. As remarked in that case by BLACKBURN, J., the garnishee cannot of course be made to pay the debt before it is due, but we cannot read the expression "the debt due" as meaning either the debt when due or the debt then due. The question of negotiability presents no difficulty here, for the note had not been endorsed over. This is not a case where monies will neither become due or payable until a further date, in which case (*Webb* v. *Stenton*, 11 Q.B.D. 518; *Booth* v. *Trail*, 12 Q.B.D. 8) there would be no attachable debt at all, but is the case of the present debt but payable at a future date. That date is now past.

Judgment.

The order must be made absolute, with costs against the claimant.

Order made.

GRIFFITHS v. CANONICA.

DRAKE, J.
[In Chambers].
1896.

Practice—Judgment for costs only—Examination of Judgment debtor—Whether applicable to—Execution Act, C.S.B.C. 1888, Cap. 42—Order, when ex parte.

April 23.

GRIFFITHS v. CANONICA

Section 11 of the Execution Act, C.S.B.C. 1888, Cap. 42, providing for the examination of a judgment debtor "as to the means or property he had when the debt or liability was incurred," refers to the debt or liability to recover which the action was brought and does not apply to a judgment for costs only.

When an order is made after service of a summons upon which the opposite party does not attend it will be treated as an *ex parte* order and may be re-heard in Chambers and rescinded.

SUMMONS to rescind an order for the examination of the defendant as a judgment debtor made upon summons upon which the defendant did not attend. By the judgment, the only payment ordered was of the costs of the action.

Statement.

J. J. Godfrey, for the plaintiff.

J. H. Senkler, for the defendant.

DRAKE, J.: In this case the plaintiff recovered a judgment against a defendant with costs. The judgment was entered up for costs and a *fi. fa.* issued, which has not yet been returned. In the meanwhile the plaintiff obtained an order for the examination of the judgment debtor under section 11 of the Execution Act, C.S.B.C. 1888, Cap. 42.

The defendant did not attend on the summons in pursuance of which the order was made, and, under the authority of *Ex parte Williscraft*, decided in December, 1895, the order should be treated as an *ex parte* order, and open to rehearing before the Chamber Judge. After the order was made, the defendant did not attend on the appointment for examination, and a motion for his committal was made, which is still pending.

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The defendant now claims that the original order for examination should be set aside, on the ground that the judgment entered up against him being merely for costs is not a judgment for payment of money, which will entitle the plaintiff to obtain an order for examination under section 11, *supra*.

The section is in effect as follows: "In case any party has obtained a judgment or decree for the payment of money, any person entitled to enforce such judgment may apply for a rule or order that the judgment debtor shall be orally examined, etc., as to the means or property he had when the debt or liability, which was the subject of the action in which the judgment has been obtained against him was incurred, and as to the disposal of his property since contracting the debt or incurring the liability."

This section is similar to the provisions of Rule 366, Ontario, which says: "Where the judgment is for the recovery or payment to any person of money, the party entitled" etc., etc. OSLER, J., in *Meyers* v. *Kendrick*, 9 P. Rep. 363, held that the words "and as to the property and means he had when the debt or liability which was the subject of the action," which is the language of our Act, meant the debt to enforce which the action was brought and for which judgment had been recovered, and, therefore, could only refer to the cause of action existing when the action was commenced, and did not apply to the costs of obtaining the judgment; and *Frontman* v. *Fusken*, 13 P.R. 153, which was heard before three Judges, followed that decision.

Judgment of DRAKE, J.

I am of opinion that the judgment of OSLER, J., is entirely applicable to our Act, and that when a judgment is, as this is, only entered for costs the plaintiff cannot invoke section 11 of the Execution Act. The order of 24th March, 1896, will, therefore, be rescinded with costs.

Order for examination rescinded.

BOLE, L.J.S.C.

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RE TRYTHALL

IN RE W. J. TRYTHALL, HENRY MARSDEN, EDWARD NICOLLS AND EDWARD COSTELLO.

IN THE MATTER OF THE ARBITRATION ACT, 1893.

Arbitration—Improper conduct of arbitrators—Referring back award.

On an application to set aside an award made upon an arbitration to ascertain the value of certain property for the purposes of assessment, it appeared that certain of the arbitrators respectively heard evidence in the absence of each other and of the witnesses, and that they took into consideration the financial ability of the owners as an element in their determination.

Held, That such conduct invalidated the award, but that same should not be set aside but referred back for reconsideration under section 10 of the Arbitration Act, 1893.

MOTION to set aside an award. The facts fully appear from the headnote and judgment.

Statement.

J. A. Russell, for motion.

E. A. Magee, contra.

BOLE, L.J.S.C.: This is a motion to set aside an award, on the following grounds :

1. That the said award is irregular, bad, and insufficient on its face, in that it is not made within the times or in accordance with the terms, nor does it deal fully with the subject matters of the submission herein.

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2. That the said arbitrators before making their award misconducted themselves in that they : (*a*) Improperly admitted evidence in no way bearing upon the subject matter of the arbitration. (*b*) Improperly overlooked matters of controversy specially referred to them. (*c*) Two of said arbitrators, namely, William Blackmore and Henry Mutrie, while said arbitration was pending and before said award was made, in the absence of their fellow-arbitrator,

Thomas E. Julien, and of the parties to said submission, obtained evidence having material bearing on a question of fact in said arbitration and on the question of construction of the agreement of submission herein. (*d*) The said arbitrator, Thomas E. Julien, obtained evidence bearing on the matters of dispute herein in the absence of his fellow-arbitrators and of the parties to said submission before said award was made, and misrepresented said evidence to arbitrators Henry Mutrie and William Blackmore, and was otherwise unfair and partial and wholly misconceived his duties as arbitrator between the parties to said submission.

Affidavits have been made by all the arbitrators and Mr. Costello and Mr. Nicolls.

While the form of the award might well be somewhat more formal I would not be prepared to interfere with it solely for that reason, as it deals with the material points in dispute between the parties. Neither can I say that the allegations of misconduct on the part of the arbitrators have been sustained. But it is evident that two of the arbitrators, Mr. Blackmore and Mr. Mutrie, heard some statement of Mr. Nicholls in the nature of evidence, in the absence of Mr. Julien and the other parties and their agents, and that Mr. Julien did the same thing in the absence of Blackmore and Mutrie and all the parties except Mr. Costello, who made certain statements to Mr. Julien. To set aside the award would be to throw away all the expense already incurred, and although that consideration would not be allowed to weigh where the arbitrators had been guilty of such misconduct as would justify the Court in setting aside the award, it may well be considered as an element in the present case. From the affidavits fyled I gather that the arbitrators consider the question of Messrs. Marsden and Nicolls' financial ability to pay the taxes is an element to be taken into consideration in assessing the value of the building in question. I must point out such is not the case; they are bound by their oaths to

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ascertain the true value of this building as it now stands on Cordova street, bearing in mind the terms of the original lease and of taxes due up to 30th June, 1896, then to deduct from that value the amount; the balance, if any, will represent what Marsden and Nicholls are entitled to receive.

Pursuant to section 10 of the Arbitration Act, 1893 (see also *Anning* v. *Hartley*, 27 L.J. Ex. 145), it is ordered that the matter of the said award be referred back and remitted to the said arbitrators for their reconsideration and determination, and that they do make their award within twenty-one days from the date of this order. All question of costs reserved.

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Award referred back.

THE WILLIAM HAMILTON MANUFACTURING COMPANY v. THE VICTORIA LUMBER COMPANY.

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HAMILTON MFG. CO. v. VICTORIA LUMBER CO

Costs—Taxation—Costs thrown away owing to absence of trial Judge—Counsel fees—Quantum—Review.

The costs to which a party is entitled on a party and party taxation are such costs as have been incurred by the act of the opposite party, and costs of the day of a trial thrown away by reason of the absence of the trial Judge, disallowed upon review, overruling the taxing officer.

The *quantum* of counsel fees reviewed and reduced.

APPLICATION to review a taxation. The questions involved fully appear from the judgment.

Statement.

B. P. Wintemute (*Russell & Godfrey*), for plaintiff.

C. B. Macneill, for defendant.

BOLE, L.J.S.C.: In this matter certain bills of costs came up on an application to review the taxation, the details of which are set out in the two summonses taken out herein, one by the defendant company to disallow or reduce certain items allowed against them by the taxing officer, the other by the plaintiffs objecting to certain disallowances made on their bill. In the first place, I am of opinion that either party may ask for review of the whole bill, as there is no rule in British Columbia requiring an itemised list of objections to be put in before the *allocatur* is signed, as is the case in England. There, after the Taxing Master reviews, there may be a further review by the Judge, which is confined to the items complained of unless a question of principle is at stake. With respect to items Nos. 1, 2, 3 and 4, which relate to the costs incurred by reason of a trial set down for Vancouver in July, 1893, not taking place owing to the absence of any Judge, I am of opinion

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that these must be disallowed. No authority has been cited to me on the subject, and the only case I can recollect, *Ferguson* v. *The Earl of Kinnoull*, 9 C. & Fin. 251, does not assist one much, as there the trial fell through because the Peers who were to try the case did not attend, and the question of costs does not appear to have been raised. It is certainly unfortunate that the plaintiff should have to bear these costs, but I cannot see any authority for the proposition that the defendant company should pay them. The plaintiff is not to blame, neither is the defendant responsible for the trial not taking place upon the date first fixed. If there were an independent available fund subject to a Judge's order, out of which costs could be awarded in cases like the present, there would be no difficulty in obtaining an order in favour of the plaintiff with respect to the costs of the abortive trial, but unfortunately or otherwise there is no such fund in existence, and the question is can the defendants be ordered to pay them as part of the costs to which the plaintiff is entitled by virtue of his judgment? "Judgment for the plaintiff with costs is not that the plaintiff has all the costs that he has incurred, but all the costs that he has incurred by the act of the defendant," *Stumm* v. *Dixon*, 58 L.J.Q.B. 183, per Lord ESHER, M.R., and in the present case the defendant company cannot be said to have caused the costs of the abortive trial to be incurred by the plaintiff. The defendant is in no wise to blame for an occurrence which might be described as "the law's delay," and for this the defendant would not be liable, *Peruvian Guano Co.* v. *Dreyfus Bros.* (1892), App. Cas. 187, so that it appears to me that the Taxing Master acted on an erroneous principle in allowing these costs. It is also proper to observe that one of the witnesses whose expenses are charged for, Mr. W. Hamilton, never gave evidence at any subsequent stage of the case, and his expenses might possibly be disallowed for that reason alone; but it appears to me that the grounds already

stated are sufficient to disentitle plaintiffs to tax against defendants' items 1, 2, 3 and 4, aggregating $385.00, being mainly composed of the expenses of two witnesses coming to Vancouver from Peterborough to attend the abortive trial. With respect to items 6, 7, 8, 9, 10 and 11, I think the Taxing Officer has rightly allowed them as costs attributable to the counter claim and occasioned thereby, although I have reduced one or two items of counsel fees on the ground that too much has been allowed, and the *quantum* may be dealt with in review, *Gilbert* v. *Guignon*, 21 W.R. 745, as well as the principle involved.

With respect to counsel's fee on appeal, I think the rules authorize two counsel being briefed on an appeal like the present one. I think the costs of one set of plans of boiler, etc., should be allowed, *Pilgrim* v. *Southampton & Dorchester Railway Co.*, 8 C.B. 25; *The Robin* (1892), P. 95, but that the second charge therefor should be disallowed as unnecessary. With respect to those items wherein the plaintiffs' solicitors claim an increase, I affirm the rulings of the Taxing Officer, as I think he exercised his discretion properly and was substantially right, pursuant to *Sparrow* v. *Hill*, 7 Q.B.D. 362, 368. The costs of the application are allowed to the successful party.

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Order accordingly.

DRAKE, J.

[In Chambers].

1896.

June 29.

GRAY *ET AL.* v. HOFFAR.

BOSTOCK (Garnishee).

Attachment of debts—Debt dependent on unperformed condition—Priority between prior assignment without notice and attaching order.

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A sum of money payable under a building contract as soon as the building should be finished, is not attachable before performance of the condition, as not being a debt.

The fact that the creditor has assigned the debt to a third person, though there be no notice of the assignment to the debtor, is a good answer to an attaching order, as the attaching creditor can only take that which the debtor can lawfully part with, having regard to the rights of others.

Statement.

APPLICATION by plaintiff to make absolute an attaching order and summons to pay over.

Thornton Fell, for judgment creditor.

W. H. Langley, for judgment debtor, *contra.*

Judgment of DRAKE, J.

DRAKE, J.: Plaintiffs obtained judgment against defendant on 18th February, 1893. On 6th February they issued a garnishee summons on Bostock and served it the same day. Hoffar was the architect for Bostock, and his remuneration depended on the expenditure made on a building at Vancouver, and was not payable until the building was finished. At the time of the garnishee order the building was not finished, and although Hoffar had received monies on account it was a matter of favour and not of right.

An attachable debt must be a perfected debt and payable absolutely some time, *Webb* v. *Stenton*, 11 Q.B.D. 518.

The claim here depended on a condition which had not been performed at the time of the notice of garnishee, and therefore there was no attachable debt, *Howell* v. *Metropolitan Railway Co.*, 19 C.D. 508. Mr. Coltart in his affidavit says that $59.47 was due if Hoffar completed his work; if

Hoffar could not sue, his judgment debtor is in no better condition.

But independently of this view, Hoffar had, prior to the plaintiffs' judgment, assigned whatever money might be coming from Bostock to Cook. No notice however was given of this assignment until 5th May, after the service of the garnishee summons. But this is no bar to the validity of the assignment, *Hirsch* v. *Coates*, 25 L.J.C.P. 315. The judgment creditor can only obtain that which the debtor can lawfully part with, having regard to the rights of others. Hoffar had no interest in Bostock's debt when the plaintiffs obtained judgment. Formal notice of an assignment is not necessary except as between incumbrancers, in which case the person giving notice first may be able to obtain a priority over one who has neglected to give notice, *In re The General Horticultural Society Ex parte Whitehouse*, 32 C.D. 512, and *Badeley* v. *Consolidated Bank*, 38 C.D. 238, are authorities in point.

Judgment of DRAKE, J.

I therefore order the money in Court to be paid out to Cook, and that the plaintiffs pay the costs of Cook of this application, and the costs of Bostock, amounting to $14.00 on the garnishee summons.

Order accordingly.

DRAKE, J.

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June 2.

PARSONS PRODUCE CO. v. GIVEN

PARSONS' PRODUCE COMPANY v. GIVEN.

County Courts Act—Equitable jurisdiction—Chattel mortgage.

County Courts have no equitable jurisdiction other than that conferred by the County Courts' Act, C.S.B.C. 1888, Cap. 25, Sec. 44, and cannot entertain an action to set aside a chattel mortgage as being a fraudulent preference.

Statement. ACTION brought under the equitable jurisdiction of the County Court by plaintiffs on behalf of themselves and all other creditors of the firm of Blakie & Mackinnon, to set aside a chattel mortgage given by Blakie to the defendant, as being a fraudulent preference and null and void as against other creditors.

Argument. *Archer Martin*, for the defendant, at the trial took objection to the jurisdiction of the Court.

S. P. Mills, contra.

Judgment. DRAKE, J.: The County Court has no equitable jurisdiction other than that conferred by the County Courts' Act, C.S.B.C. 1888, Cap. 25, Sec. 44. That section does not include the power sought to be invoked.

Action dismissed with costs.

RICHARDS v. ANCIENT ORDER OF FORESTERS.

WALKEM, J.

[In Chambers].

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RICHARDS v. A.O.F.

Practice—Officer—Registrar—Whether Deputy competent to take examination appointed to be held before the Registrar.

An order directed the examination of a witness *de bene esse* before "the Registrar of this Court." The Registrar not being able to take the examination the witness was examined before the Deputy Registrar of the Court.

By the Supreme Court Act, C.S.B.C. 1888, Cap. 31, Sec. 2, "The District Registrar shall include any deputy of such Registrar."

Held, That the nomination of the Registrar by the order to take the examination was not as "*persona designata*," but as Registrar, and that the Deputy Registrar was competent to act for him thereon.

APPLICATION by the plaintiff that evidence of a witness taken *de bene esse* before the Deputy Registrar, notwithstanding the objection of the defendants' counsel at the examination, under an order of DRAKE, J., for the examination of the witness before "the Registrar of this Court," be admitted at the trial of the action.

Statement.

P. Æ. Irving, for the application: The evidence was properly taken. By Supreme Court Rule 1071, "Registrar" shall mean a District Registrar, and by the Supreme Court Act, C.S.B.C. 1888, Cap. 31, Sec. 2, the term "District Registrar" shall include any deputy of such Registrar. Where a commission was directed to the Judges of a Court, which had ceased to exist, or to such person as they or one of them should depute, evidence taken before an examiner appointed by a Judge of the succeeding Court was received, *Wilson* v. *Wilson*, P.D. 8; see also *Darling* v. *Darling*, 8 Ont. Pr. 391.

Argument.

F. B. Gregory, contra: The Registrar, by right of his position only, has, under the Rules of Court, no power to

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examine witnesses *de bene esse*, but derives his power from the order appointing him examiner. He is *persona designata*, and only named as "Registrar" for the purpose of identification. *Wilson* v. *Wilson* is not an analagous case, but depends on the construction of the statute abolishing the Court to which the commission was addressed and appointing its successor.

Judgment of WALKEM, J.

WALKEM, J.: This case is stronger than *Wilson* v. *Wilson*, *supra*, by which it must be governed. The evidence was properly taken before the Deputy Registrar, and the order for its admission must be made; but the plaintiff must pay the costs of this application.

Order made.

REGINA v. GARROW AND CREECH.

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Criminal law—Murder—Evidence of cause of death—Insufficient post mortem examination—Effect of.

On a trial of the accused for murder, by committing an abortion on a girl, it appeared in evidence that a *post mortem* examination of the girl had been made by a medical man, which was however confined to the pelvic organs and was, upon the medical evidence, inconclusive as to the cause of death, but there was other evidence pointing to the inference that death was caused by the operation. DAVIE, C.J., left the case to the jury, but reserved a case for the Court of Criminal Appeal as to whether there was in point of law evidence to go to the jury upon which they might find that the death of the girl resulted from the criminal acts of the accused. The jury found a verdict of guilty.

Held, per MCCREIGHT, J. (Davie, C.J., and Walkem, J., concurring), That there is no rule that the cause of death must be proved by *post mortem* examination, and that there was evidence to go to the jury of the cause of death notwithstanding the absence of a complete *post mortem* examination.

CASE reserved for the Court of Appeal by DAVIE, C.J., pursuant to section 743 of the Criminal Code, as follows:

At the Victoria Spring Assizes the prisoners were convicted of manslaughter, upon an indictment for having murdered Mary Ellen Janes.

The prisoner Garrow was a physician and surgeon. The prisoner Creech had, for upwards of five years previous to her death, been engaged to be married to the deceased Mary Ellen Janes, during which time the evidence shewed that, outside of the members of her immediate family, he was her only male companion. Statement.

The deceased was of the age of twenty-four years, and lived with her mother and brothers.

On the sixth December, 1895, the deceased complained to her mother of sickness, and the prisoner Creech procured a buggy and took her from home, for the purpose, as he stated to her mother, of going to the family physician, Dr. Frank Hall. Instead of going to the family physician, however, the evidence seems to shew that the prisoner Creech took the girl to the prisoner Garrow, to whom she complained of intractable vomiting. The prisoner Garrow passed an instrument called a "sound" into her *uterus*. He had previously

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prescribed ergotine for her in three-grain pills, twenty-four in one prescription, to be taken as directed. The prisoner Creech had this prescription made up on 30th November, 1895.

Ergotine is the essence or active principle of the drug ergot, the precise action of which alone, upon the womb, in cases of pregnancy is open to question, some authorities maintaining that it is inert and innocuous, others that it acts in the later but not in the earlier stages, and others again that it acts to a greater or less extent at all times. All authorities, however, are agreed that once uterine action is set up from other causes, the use of ergotine is powerful as an auxiliary in expelling the contents of the womb, and it is also agreed by all medical authorities that the effect of passing an instrument into the *uterus* during pregnancy is to set up uterine action.

On Saturday, 7th December, the prisoner Creech called upon Dr. Frank Hall (who had previously attended the deceased, and who described her as having a tendency towards tuberculosis and anæmia, and of a delicate constitution), and asked Dr. Hall to at once attend her, telling him that she was having a miscarriage, and had been treated by Dr. Garrow, who "had operated upon her." The prisoner Creech also told Dr. Frank Hall that the girl had a piece of flesh protruding from the womb,

Statement.

Dr. Hall at first refused to have anything to do with the case, but eventually went to see her on the night of Sunday, 8th December.

He found the patient in bed and made a digital examination of the *vagina*, finding a piece of something protruding, "not as big as a hen's egg." He removed it, but without examination. Dr. Hall in his evidence states that what he removed may have been *ovum* or *placenta*, or it may have been mucous membrane of the *uterus*, or an organized blood clot, but, as he did not examine it in any way, he could not say. He also said that *placenta* did not shew itself until the end of the third month of pregnancy.

The symptoms to him pointed to a miscarriage; the girl having been pregnant about six weeks or two months. He was of the opinion that the girl was then suffering from blood poisoning, caused by a decomposition consequent upon miscarriage, and, after applying due remedies, he left the patient, with instructions to her attendants, her mother and the prisoner Creech, to report to him next day the girl's condition. He would not, however, neither would any of the other medical witnesses state positively that it was a case of miscarriage, or that there was blood-poisoning, or that the girl had even been pregnant.

There was no report the next day, nor until four o'clock, a.m., on the following Tuesday, when the prisoner Creech again summoned Dr. Hall, who, together with Dr. Fraser, proceeded to an operation by dilating the *uterus* and scraping it of all foreign substances. In the operation so performed, as also in that of the preceding Sunday, all

antiseptic and other precautions usual to such operations were duly observed. Something was scraped out during the latter operation, but whether mucous membrane of the *uterus* or the membrane of pregnancy, the surgeons could not say, as they had not examined it, and the difference between these substances could only be determined under the microscope, which was not used.

The operation which they performed is called curetting, and after its performance the *uterus* was duly cleansed and purified, and all proper remedies adopted.

There was no nurse in the room during this operation, other than the prisoner Creech, who acted as nurse.

On the Wednesday the girl's condition was worse, and a third physician, Dr. Ernest Hall, was called in. All the physicians diagnosed the case as one of *septicæmia* or blood-poisoning. She died at eight o'clock on Wednesday night.

A *post mortem* was performed by Dr. John Lang, but was confined to the pelvic organs; and in regard to which the evidence of Dr. Lang was as follows:

"I examined the womb, the ovaries and the fallopian tubes and the broad ligaments; the womb was considerably enlarged; the organ weighed about five ounces, and its cavity measured three and a half or four inches, as if there had been gestation for two or three months; the womb was empty; the posterior surface of the womb was darkish in appearance, there were also darkish patches on the anterior surface; the interior of the womb was raw looking and coated with a mucous-like substance, having a somewhat fœtid odor; the lips of the mouth of the womb were thickened, the anterior lip bruised; there was a small wound on the anterior lip and two small wounds on the roof of vagina, such as would be produced by being caught by valcellum forceps (the instrument used in the curetting operation); the ovaries and broad ligaments were normal in appearance; the fallopian tubes were congested; the pelvis was full of a bloody fluid; the body had been injected by the undertaker with fluid before the *post mortem*, and vitiated the *post mortem*; I believe the woman had been pregnant; if a recent pregnancy, then two or three months; I saw nothing to account for a miscarriage; the body was well nourished."

Statement.

Dr. Lang also said, in cross-examination: "I am unable to form any safe conclusion from the *post mortem* examination; I meant that when I used the phrase "the *post mortem* was vitiated."

Each of the medical men examined at the trial said that he could not swear positively to the cause of death; that it was possible that death might have been occasioned by some undiscovered disease, of which however there was no indication, but which a *post mortem* of the other organs might have disclosed.

There was evidence tending to shew that, apart from any criminal

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intent, the prisoner Garrow had acted with gross negligence and rashness in prescribing ergotine, introducing the "sound," and then leaving the girl without attention.

I read to the jury the sections of the Code bearing upon homicide, and attempts at procuring abortion and miscarriage, and I told them that if death was either occasioned or accelerated by medicines or drugs administered or operations performed by the prisoner Garrow, then he was guilty of manslaughter; if they thought that in prescribing the drug, if that caused or accelerated the death, or performing the operation, if the operation caused or accelerated the death, he acted either with a criminal intention or with any gross negligence.

That regarding the prisoner Creech, he was not concerned with the mere gross negligence or rashness of Garrow. That they could only convict him if they concluded that Garrow's medicines or operation were administered or performed with criminal intent, causing or accelerating death, and that Creech counselled, procured, or assisted in administering the drug or performing the operation with the like criminal intent.

I left it to the jury to say whether they were satisfied that the girl came to her death from either the operation or the medicines of the prisoner Garrow, telling them that they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that her death was the result of the operation and drugs or of either of them.

Statement.

The jury having convicted the prisoners of manslaughter I reserved the question for the opinion of the Court, whether there was in point of law evidence to go to the jury that death resulted from the medicines and operation, or either of them, and in the meantime I deferred sentence and admitted the prisoners to bail.

If, then, the Court should be of opinion that there was evidence in point of law upon which the jury might find that the death resulted from the criminal acts of the prisoners or either of them, the conviction is to be affirmed, otherwise to be quashed.

The question was argued before DAVIE, C.J., MCCREIGHT and WALKEM, JJ., on 16th May, 1896.

A. G. Smith, for the Crown.

S. P. Mills, for the prisoner Creech.

Frank Higgins, for the prisoner Garrow.

Cur. adv. vult.

July 27th, 1896.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: In this case it was contended the

evidence of the cause of death was not sufficient, and that the prisoners were not sufficiently proved to have been connected with it. A case of *Reg.* v. *Morby*, 8 Q.B.D. 571, where a man was indicted for manslaughter in neglecting to procure medical aid for his child, was relied upon, among other authorities, as strongly supporting this view; but in that case no medical man saw the deceased during life; the only medical witness, who had made a *post mortem*, could say no more than that "in his opinion the chances of life would have been increased by having medical advice; that life might possibly have been prolonged thereby; or indeed might probably have been; but that he could not say that it would, or, indeed, that it would probably have been prolonged thereby."

In the present case, besides the *post mortem*, the deceased was attended by three medical men who diagnosed the case as one of blood poisoning, and one of them stated "that the symptoms pointed to a miscarriage, the girl having been pregnant about six weeks or two months. He was of opinion that the girl was then suffering from blood poisoning caused by decomposition consequent upon miscarriage," but neither he nor any of the other medical witnesses would state positively that it was a case of miscarriage, or that there was blood poisoning, or that the girl had even been pregnant.

Judgment of McCREIGHT, J.

However, the surrounding circumstances stated in the special case furnish a great deal of light, see Roscoe's Criminal Evidence, 11th Ed. pp. 710, 711, under the title "proof of the means of killing," and corroborate the views of the medical witnesses so distinctly that I think the learned Chief Justice had no choice but to leave the case to the jury.

In *Reg.* v. *Burton*, Dearsley's Crown Cases, 284, Mr. Justice MAULE points out that there is no rule that the *corpus delicti* must "be expressly" proved in every case, though Lord HALE'S caution in this respect should be

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attended to in cases of murder where the disappearance of the supposed murdered man is consistent with his being still alive.

The only question which is left to the Court in this case is whether the case should have been withdrawn from the jury or not, and I do not think it would have been right to withdraw it from them. I may add that I am far from suggesting that they were not warranted in arriving at their verdict, and I think the conviction should be affirmed.

DAVIE, C.J., and WALKEM, J., concurred.

Conviction affirmed.

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Contract—Rescission of—Sublease—Whether breach of covenant in lease not to assign—Contemporaneous documents relating to same matter—Covenants in—Whether dependent or independent—Land Registry Act, Sec. 35—Pleading.

A lease of land for 25 years, containing a covenant by the lessee not to assign without leave, was executed contemporaneously with an agreement by the lessee to purchase from the lessor a building on the land, which agreement contained a covenant by the lessee to pay the purchase money by instalments and to insure, and gave the lessor the right to cancel the agreement "upon breach of any of the covenants herein contained." The only reference to the agreement in the lease was contained in a proviso "the first month's rent to be paid on the execution of an agreement of even date," etc.

The lessee sub-let the premises for ten years, and did not pay the instalments of purchase money under the agreement, or insure.

The action was to cancel the agreement, lease and sub-lease, for such breaches. The sub-lessee set up in his defence that the lease and sub-lease were registered and that the agreement was not, and claimed the benefit of the Land Registry Act, Sec. 35 (*a*).

Held, per DAVIE, C.J.:

1. That the covenants in the lease and agreement were incorporated with each other and dependent, and that the breaches of the covenants in the agreement avoided the lease; citing *Paget* v. *Marshall*, 28 C.D. 255.
2. *Quære*, Whether the sub-lessee was a purchaser of any registered real estate, or registered interest in real estate, within the meaning of section 35, *supra*.
3. That, on the evidence, the sub-lessee had actual notice of the agreement and could not invoke section 35, *supra*.

Upon appeal to the Full Court:

Held, per MCCREIGHT, WALKEM and DRAKE, JJ., overruling DAVIE, C.J., as to the cancellation of the lease and sub-lease:

1. That a sub-lease is not a breach of a covenant in a lease not to assign.
2. That the agreement and its covenants were independent of the lease and its covenants.

ACTION to have a lease from the plaintiff to the defendant Statement.

NOTE (*a*)—*See* Next page.

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Canonica and an agreement between them and a sub-lease from the defendant Canonica to the defendant Ralston declared null and void and delivered up to be cancelled. The action was tried at Vancouver on 12th and 14th February, 1896, before DAVIE, C.J. The facts fully appear from the headnote and judgments.

J. A. Russell, for the plaintiff.

E. A. Magee, for the defendant Canonica.

John Campbell and *J. H. Senkler*, for the defendant Ralston.

Cur. adv. vult.

March 3rd, 1896.

Judgment of DAVIE, C.J.

DAVIE, C.J.: The facts of this case shew that the plaintiff being seized in fee of Lot 13, Block I, Old Granville Townsite, on which was erected a wooden building used as a hotel named the "Sunnyside," and some other wooden buildings besides the "Sunnyside," bringing in small rentals, agreed with the defendant Canonica, who was already in possession of the premises as tenant, to give him lease of the lot for twenty-five years at a rental of $85.00 per month on condition of the lessee purchasing the "Sunnyside" buildings for $900.00, payable by instalments of $200.00 on 15th September, 1895, and $100.00 per month afterwards. The lease and agreement for sale took the form of separate documents of even date, viz., 3rd September, 1895.

NOTE (*a*). "35. No purchaser or mortgagee 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 or law or equity notwithstanding."

By the lease, expressed to be made "in pursuance of the Leaseholds' Act, 1874," the plaintiff demised to Canonica, his heirs, administrators and assigns, "all and singular that certain parcel of land, etc." (describing the land but making no express mention of the buildings) from 1s September, 1895, for the term of twenty years thence ensuing, at the rent of $85.00 per month in advance, the lessee covenanting to pay rent and taxes, to repair, and not to assign without leave, with a proviso for re-entry on non-payment of rent or non-performance of covenants, the first month's rent to be paid "on the execution of an agreement of even date herewith between the parties hereto." By the written agreement the plaintiff agreed to sell and Canonica to purchase the building known as the "Sunnyside," for the sum of $900.00, which amount Canonica covenanted to pay by the instalments I have already mentioned; to pay all taxes and keep the building insured, handing the policies and receipts to the plaintiff. Time was to be the essence of the contract; and it was provided that in default of any instalment or on breach of any of the covenants the agreement should, at the option of the plaintiff, be null and void and he should be at liberty to re-sell the building. After the execution of the document Canonica, without the consent or knowledge of the plaintiff, made a sub-lease of the land, including the buildings, for a term of ten years dating from 1st December, 1895, to the defendant Ralston, who, it is clear upon the evidence, had notice of the agreement between the plaintiff and Canonica, as well as of the lease. The defendant Ralston then entered into possession of the premises and still holds possession by himself and tenants.

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None of the instalments of purchase money for the building have been paid, and the insurance has been permitted to lapse. Canonica is unable or unwilling to pay, and the same is the case with Ralston, who, however, claims to retain possession of the buildings as well as the

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land, on the plea that under the general words of demise contained in the lease from the plaintiff to Canonica the buildings pass with the land, and that he is entitled to them under his sub-lease.

The plaintiff has refused to recognize Ralston as a tenant, or to accept rent from him. He has likewise, since learning of the sub-lease, refused to accept rent from Canonica, and now brings this suit to recover possession of the land and buildings and to cancel the lease and agreement between himself and Canonica and the sub-lease to Ralston.

In their respective statements of defence the defendants set up the fact that the lease from the plaintiff to Canonica was duly registered but that the agreement for purchase of the building was not registered, and that the sub-lease to Ralston was registered, and they claim the benefit of the Land Registry Act. It is likewise pleaded and has been urged before me that the mere sub-lease for ten years is not a breach of the covenant against assignment, which would be broken only by an assignment of the whole term of twenty years. There is, however, in the view I take, no occasion to deal with this contention further than to remark upon the danger in the use by careless persons of forms which may be mere statutable pitfalls to catch the unwary. Fortunately for the plaintiff, although the short form may be a trap into which he has fallen, it is not difficult in this case to extricate him from it. Whilst both defendants set up the Land Registry Act, it is difficult to see of what avail that statute is to the defendant Canonica, who has admittedly broken his agreement. The defendant Ralston, however, urges section 35 of the Land Registry Act (quoting the section), and that therefore, as claimed in his statement of defence, he is not concerned with the agreement to pay for the building and to insure, as he was not a party to such agreement. I am by no means satisfied that the evidence shews Ralston to be a purchaser for

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valuable consideration of registered real estate or interest therein; but however that may be, he certainly has not pleaded in his statement of defence that he is so. He has, it is true, claimed the benefit of the Land Registry Act, but all mention of the facts necessary to bring him within the protection of section 35 are absent. If a party wishes the benefit of section 35 he has, I apprehend, to plead the facts necessary to entitle him to such benefits. But apart from this, it is not denied but it is patent that Ralston knew all about the agreement between the plaintiff and Canonica, and under these circumstances, even if section 35 had been regularly pleaded, it seems clear that Ralston could take no benefit under its provisions. A person who purchases with notice of the title of another is guilty of fraud, and a Court of Equity will not permit a party so committing a fraud to avail himself of the provisions of a statute itself enacted for the prevention of fraud, *Rose* v. *Peterkin*, 13 S.C.R. 706; *White* v. *Neaylon*, 11 App. Cas. 175. Ralston then stands affected with all the infirmities of title which affect Canonica. It is clear that the lease set out only a portion of the bargain between the plaintiff and Canonica, and must be read as if incorporating the term of the contemporaneous written agreement, *Paget* v. *Marshall*, 28 C.D. 255. A breach then having happened owing to the failure of the instalments and the keeping up insurance, the plaintiff is entitled to recover possession. He is also entitled to his rent during the term of Ralston's occupancy against both Canonica and Ralston jointly and severally, against Canonica under his covenant, and against Ralston for use and occupation.

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Let judgment, therefore, be entered for the plaintiff vacating the term granted by the lease, cancelling the registration thereof, and also of the sub-lease to Ralston. Let the plaintiff recover against Canonica and Ralston jointly and severally for rent from 1st December, 1895, being the date when Ralston's occupation commenced, and against Canonica.

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The plaintiff will also recover against the defendant his costs of suit.

Judgment accordingly.

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From this judgment the defendants appealed to the Full Court, and the appeal was argued on 23rd April, 1896, before MCCREIGHT, WALKEM and DRAKE, JJ.

John Campbell, for the appellants.

J. A. Russell, for the respondents.

Cur. adv. vult.

July 27th, 1896.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: In this case the statement of claim is to the effect that the plaintiff Griffiths leased, by deed dated 3rd September, 1895, to the defendant Canonica, certain lots situate in Vancouver, for a period of twenty-five years, at a rent of $85.00 per month, such lease being in pursuance of the Leaseholds' Act, 1874; and the said lease contained covenants to pay rent in advance, the first month's rent to be paid on the execution of an agreement of even date therewith, between the same parties, and after that such payments to be made as therein mentioned. In the said deed were also covenants to pay taxes and to repair, and that the said lessor might enter and view the state of repair, etc., and that the said lessee would not carry on, or allow to be carried on, dangerous or offensive trades, etc., and would not assign without leave, and would leave the premises in good repair; and there was a proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants, and a covenant for quiet enjoyment. The statement of claim then alleges that "by agreement of even date with aforesaid deed, the execution and carrying out of which by defendant Canonica was a condition of such

letting as aforesaid by plaintiff to said defendant, and the execution of said deed by plaintiff, the plaintiff agreed to sell and the defendant Canonica agreed to purchase the said Sunnyside Hotel, situate on said land." The agreement of 3rd September, 1895, is then set out between the said Jos. Griffiths and Louis Canonica to the effect that the former agrees to sell to and the latter to purchase from the plaintiff Jos. Griffiths that certain building known as the Sunnyside Hotel, situate, etc., for the sum of $900.00, payable as "follows: viz., the sum of $200.00 on 15th September, 1895, and the remainder thus, that is to say, in equal instalments of $100.00 each on the 15th day of each month thereafter, or until the whole of the said sum of $900.00 is fully paid, etc., and satisfied." Upon payment of the said sum of $900.00 according to the terms of this agreement (time being of the essence thereof), the party of the second part (Canonica) is to receive a bill of sale of the said building. Then follow covenants by Canonica to pay the said $900.00 on the days and at the times, etc. above mentioned; to pay all taxes, etc., in connection with said lot or building; to assign all policies of insurance upon the said building to the plaintiff. Then follows a stipulation or agreement that time should be considered the essence of the agreement, and that unless payments were punctually made in manner, etc., these presents should at the option "of the party of the first part (that is, the plaintiff Griffiths) only, his executors, administrators and assigns, be null and void, and he and they shall be at liberty to re-sell the said building, and the payments made by the party of the second part shall be forfeited as liquidated damages." Then follows an agreement by Canonica to insure and keep insured the said building, etc., for a sum of not less than $900.00, and to assign the policy to Griffiths. And the agreement then concludes as follows: "And it is further understood and agreed between the parties hereto that the party of the first part may, at his option only, cancel and

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discharge this agreement upon breach by the party of the second part of one or any of the covenants herein contained; and thereupon the party of the first part shall be at liberty to re-sell the said building, and the payments made by the party of the second part shall be forfeited as liquidated damages." As witness, etc.

The first breach assigned by the plaintiff is that Canonica, subsequent to the making of the said deed of lease, let, etc., the said lands, building and premises to the defendant Ralston for a term of ten years from 1st December, 1895, contrary to the terms of the said lease, etc., and that the plaintiff has never recognized, etc., the defendant Ralston as tenant, etc., and, as a wrong on the part of Ralston, that he Ralston is in possession of the land, buildings and premises as tenant under the said demise or assignment from Canonica, and is carrying on business, contrary, etc.

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The second breach assigned is that Canonica has not paid the sum of $200.00, being the first instalment under the said agreement, or any of the subsequent instalments due under the said agreement, or any sum on account of the same; and further, that he has otherwise broken the covenants in the said agreement by not insuring the building in the said agreement mentioned, etc. The plaintiff claims that the lease and agreement between Griffiths and Canonica, as well as the lease from Canonica to Ralston, should be declared void, etc., and possession of the said land, building and premises.

It was scarcely, if at all, argued for the plaintiff that the sub-lease to Ralston for ten years was a breach of the covenant not to assign without leave, having regard to columns 1 and 2 of the second schedule to the Leaseholds' Act, 1874, at p. 591, C.S.B.C. 1888, and it would be difficult to do so successfully. I think the words here like those in *Cruso* v. *Bugby*, 2 W. Bl. 766, and 3 Wils. 234, to use the language of Sir William Grant in *Greenaway* v. *Adams*, 12 Ves. 395, at p. 400, "can have distinct effect or operation

without referring at all to an underlease, and it did not necessarily follow that the lessor, as he did not choose that the tenant should assign, therefore intended to restrain underletting." Again, Lord ELDON, in *Church* v. *Brown*, 15 Ves. 258, at p. 265, says in substance that a covenant restraining assignment of a lease would not prevent underletting; and again in the same page he says "these covenants having been always construed by courts of law with the utmost jealousy, to prevent the restraint going beyond the express stipulation." *Kinnersley* v. *Orpe*, 1 Douglas, 58, and *Roe* v. *Harrison*, 1 R.R. 513, are cases on the same line of thought, and see Woodfall's Landlord and Tenant, 15th Ed. 696. I observe in all the conveyancing forms, see especially in Prideaux on Conveyancing, 14th Ed. Vol. II. 55–63, there is always a distinct covenant against underletting; and see Revised Statutes of Ontario, 1887, Cap. 106, p. 964, No. 7, where the expression "sublet" is introduced by the Legislature. I must therefore hold there is no breach of the covenant not to assign without leave. There is no breach assigned in the statement of claim for non-payment of rent, or as to any other covenant in the lease, nor do I see that there is anything to warrant the prayer that the said deed of lease in the first paragraph of the statement of claim mentioned, and the assignment as it is termed, of the lease, but in reality only a sub-lease from Canonica to Ralston, should be declared void, etc. The agreement in the second paragraph of the statement of claim for the sale of the building known as the "Sunnyside Hotel," stands on a very different footing. The learned Chief Justice finds that "none of the instalments of purchase money" for the building have been paid, and the insurance has been permitted to lapse; I think therefore there is a plain case of forfeiture under the "agreement" of the 3rd September, and applicable to that instrument, but none under the indenture of lease of the same date. It appears to have been suggested that the "building" known as the "Sunny-

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side Hotel" was a part of the freehold and passed with the lease, but I think the evidence shews that it was a chattel and always treated by the parties as such. Griffiths says "I told him I would not rent the house but would sell it and rent the ground. Well, he said if he bought the house he would have to have a long lease; I told him I would give him a long lease on condition he would buy the house. We settled the price at $900.00." This of course in no way dealt with the land. Moreover, the learned Chief Justice evidently considered the house to be merely a personal chattel, by his application of the doctrine of *White* v. *Neaylon*, 11 App. Cas. 175. But whilst there seems to me to be a clear case of forfeiture as regards the house under the "agreement," I fail to see that has any effect on the "lease" of the realty. The suggestion that it has, and that it enures to the forfeiture of the lease is comprised in the somewhat vague averment in the statement of claim, which I have already quoted, to the effect that the execution and carrying out of the agreement by Canonica was a condition of such letting, etc., and the execution of said deed by plaintiff. This averment, and especially the expression "condition," requires examination. Now, in Thomas' Coke upon Littleton, Vol. 2, Ch. 27, Note A. (Vol. 2, p. 201*a*. 17th Ed.) we find it said that "any quantity of interest, either a fee simple, a freehold, or a term of years, may be granted with an express condition annexed whereby an estate may be created, enlarged or defeated upon an uncertain event. Where the condition must be performed before the estate can commence, it is called a condition precedent; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a condition subsequent. Again, at page 19 of the same volume, note K, we find "conditions precedent are such as must be punctually performed before the estate can vest. Conditions subsequent are when the estate is executed but the continuance of such estate depends on the breach

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of performance of the condition." The theory that the above averment is one of a condition precedent is clearly not maintainable, if we consider the remainder of the statement of claim and that the "agreement" for the payment of $900.00 was to be performed thus: the sum of $200.00 on 15th September, 1895, and $100.00 on 15th of each succeeding month, the payments thus to extend at the option of Canonica till completed in the month of April, 1896, following, whereas the lease of 3rd September was to take effect "from the first day of September, A.D. 1895, for the term, etc." This shews a distinct negation under seal of the "execution and carrying out" of the agreement being a condition of the letting and execution of the lease by the plaintiff, or at all events a condition precedent. The theory of the "agreement" operating as a condition subsequent is negatived also by the terms of the lease. It contains several conditions subsequent contained in the "proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants," see Note A. Cap. 27 of Thomas' Coke upon Littleton, *supra*, but of course—see column 2 of the second schedule to the Leaseholds' Act, 1874, already referred to—this proviso is confined to payment of rent performance of covenants in the lease and has no relation to those in the "agreement." The draughtsman might have inserted a condition subsequent in the lease (see again Note A, Cap. 27 of Thomas' Coke upon Littleton) to the effect that all and each of the covenants in the "agreement" must be strictly observed by the lessee, as well as any other condition, otherwise the lessor should have power to re-enter and avoid the leasehold estate, but he has not done so, and Lord ELDON'S remarks in *Church* v. *Brown*, *supra*, already quoted, shews the jealousy with which such conditions are to be construed, and again the above quoted Note A. 201*a*, says that whilst "conditions precedent which are to create an estate receive a liberal construction, etc., it is a rule that

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conditions which defeat estates are to be construed strictly." I must therefore hold that whilst the "agreement" is forfeited for breach of covenants therein contained, the leasehold estate clearly is not forfeited. The *ratio decidendi* of the learned Chief Justice, as to Ralston, appears to be that Ralston had notice of the alleged agreement between Griffiths and Canonica, that forfeiture of the agreement should likewise entail forfeiture of the lease. But I think I have shewn that there was no such agreement between them, *i.e.* Griffiths and Canonica, in the eye of the law, and if there was no such agreement between them, then Ralston cannot be bound by notice of that which was not an agreement. Canonica is not bound, and Ralston is not bound because Canonica is not bound. I think the fallacy involved in the contrary view was not brought to the attention of the learned Chief Justice. I may add that the defendant Ralston denies that the "agreement was a part or condition of the demise," likewise Canonica denies the same. If this was an action for reformation of the lease and agreement owing to mistake, the evidence on the subject might be of importance; at present I shall only say that I am by no means sure, on perusal of the evidence of Griffiths and Canonica, that the affirmative of the above averment is made out on the issue. Ralston perhaps, or his alleged agent Allan, may have "read the lease and agreement over carefully and couldn't see where the lease connected with the agreement," and I think this view of the law is correct. Canonica's lease is not forfeited merely by reason of the forfeiture of the "agreement," nor is his sub-lessee, Ralston, affected by that which does not affect Canonica. We had no argument as to the form of the decree or the course to be pursued in case the "agreement" should be held to be forfeited whilst the lease continued, and I can think of nothing better than that either the plaintiff or the defendants, or either of them, should be at liberty to bring the case before a Judge in such manner

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and for such purpose as he or they may feel advised, the case being remitted from this Court to the Supreme Court for that purpose. The appeal has failed as to forfeiture of the agreement, but succeeded as to the alleged forfeiture of the lease; and the usual rule must be followed, that the appellant having partly failed and partly succeeded there should be no costs of the appeal.

WALKEM, J., concurred.

DRAKE, J.: This action is to have a lease for the term of twenty-five years, of Lot 13, Block 1, Old Granville Townsite, cancelled, on the ground of breach of covenant; and also to have a deed for the sale and purchase of a building on the land so leased cancelled for non-performance of the covenants therein contained. The lease and bill of sale were both executed on 3rd September, 1895. Canonica, the tenant, went into possession under the lease and bill of sale, and subsequently underlet the house and lot to Ralston for a term of ten years. All rent under the lease has been paid. Both the lease and bill of sale are under seal. The learned trial Judge ordered the cancellation of the lease and the agreement, on the ground apparently of a breach having happened in the payment of the instalments under the agreement and a failure to keep up the insurance, holding that the bill of sale and lease in fact made one document and should be read together. The lease and the bill of sale are quite distinct documents, the former deals with the land and such buildings as are not covered by the bill of sale, the latter is a sale on time of that certain building known as the Sunnyside Hotel. There were other buildings on the lot.

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It has been urged that the lease and bill of sale should be read as one document, and the covenants in the one imported into the other. There is no ambiguity in either document, there is no ground of mistake shewn, and it is apparent from the documents themselves that they were

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intended to be kept distinct. The only reference in the lease to the bill of sale is that the execution of that bill of sale, or agreement as it is there called, should fix the period from which the rent of the land was to commence.

I am of opinion that the failure of Canonica to comply with the terms of the bill of sale cannot work a forfeiture of his lease. Under the agreement for sale the plaintiff, the vendor, has power to cancel it upon breach of any of the covenants therein contained, and thereupon he is at liberty to re-sell the building. It is clear that there has been a breach both in non-payment of the instalments and non-insurance, therefore in my opinion this agreement should be cancelled and possession of the property agreed to be sold under it given to the plaintiff.

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With regard to the lease, I see no forfeiture in the fact that Canonica has made an under-lease to the other defendant, Ralston; the lease is made under the Short Forms Act, and the tenant thereby covenants that he will not assign without leave, this term according to the Act being "that the lessee shall not nor will during the said term assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred or set over unto any person or persons whomsoever without the consent in writing of the said lessor, his executors, administrators or assigns, first had and obtained."

An under lease is not an assignment of the whole term and to make an under-lease for part of the term is no breach of the covenant not to assign; a covenant of this description is only broken when the lessee parts with the demised premises for the whole residue of his term. A covenant not to assign or otherwise part with the premises or any part thereof for the whole or any part of the term, is broken by a sub-lease, *D. d. Holland* v. *Worsley*, 1 Camp. 20, but a covenant not to assign, transfer, set over or

otherwise do away with the lease or premises, is not, *Crusoe* v. *Bugby*, 2 W. Bl. 766.

The language in our statute does not touch sub-letting; and in fact when one considers that a covenant against assigning or sub-letting is held not to be a usual covenant in the case of an agreement for a lease which is to contain all the usual covenants, see *Hampshire* v. *Wickens*, 7 C.D. 555, the omission of a clause against under-leasing in the Act can hardly be considered as an error in the draftsman.

The result is that the plaintiff having sued Ralston on the ground that he, contrary to the terms of the said lease, is in possession of the said land and building, the action must be dismissed as against him, with costs both here and in the Court below.

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Further, that so much of the judgment of the learned trial Judge as directs that the lease and sub-lease and the registration thereof be cancelled, discharged and vacated, be set aside, and also that so much of the judgment as grants to the plaintiff possession of the land and premises, in the lease mentioned, be set aside. And further, that the plaintiff is entitled in the Court below only to those costs of the issues raised and decided in his favour.

There should be no costs of this appeal as regards Canonica.

Appeal allowed in part.

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FRASER RIVER MINING CO. *v.* GALLAGHER

THE FRASER RIVER MINING AND DREDGING COMPANY, LIMITED LIABILITY, v. GALLAGHER, CROCKETT AND EDWARDS (By Original Action).

AND GALLAGHER, CROCKETT AND EDWARDS v. THE FRASER RIVER MINING AND DREDGING COMPANY, LIMITED LIABILITY, *ET AL.* (By Counter-claim).

Public Company—Trustees of—Distribution of share capital among promoters—Right of purchaser of shares to question—Directors—Removal of—Frame of action—Estoppel—Selling shares at a discount.

The action was brought by a public Company to remove two of its trustees for refusing to obey an order of the Court made in a previous action directing them to join with the other trustee in assessing, as not being *bona fide* fully paid up, certain founder's shares marked fully paid up, in order to raise funds for carrying on the Company.

Held, by the Full Court, upon appeal from the judgment of DAVIE, C.J.: 1. That the defendant trustees should be removed. 2. That they were estopped by the judgment in the previous action from objecting to the *status* of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action.

The promoters of the Company agreed to allot 127,500, out of its total capital of 250,000, $10.00 shares, all marked fully paid up, to one of their number, C., in consideration of his procuring A. to advance $25,000,00 to the Company, and of certain other services, and by the same instrument C. agreed to transfer 85,000 of such shares to A. in consideration of the $25.000.00.

Held, That A. was a purchaser of the 85,000 shares from C., who held them as fully paid up, and that A. could not be treated as a purchaser from the Company of the shares at a discount, and could not be forced at the instance of another shareholder to contribute to its funds any part of the difference between the $25,000.00 which he paid for them and their face value.

E. purchased at auction certain of the shares which had been placed in escrow, in the hands of trustees, by agreement between the promoters to be sold by such trustees to raise funds to carry on the Company.

Held, 1. That E. had no *status* to question the distribution of the share capital among the promoters, or to subject their shares to assessment for the purposes of the Company as not being *bona fide* fully paid up.

2. That proceedings to remove directors must be brought by the Company, and that an action for that purpose by one shareholder does not lie, and the fact that E. framed his action as on behalf of himself and all shareholders of the Company, other than those attacked, was immaterial.

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FRASER RIVER MINING CO. *v.* GALLAGHER

APPEAL from a judgment of DAVIE, C.J., at the trial, dismissing the defendant Gallagher from his position as a trustee of the Company and appointing a new trustee in his place, and dismissing the counter-claim of the defendant Edwards, who had purchased shares in the open market, part of them at auction held by the Company to realize funds. His counter-claim was to rescind the latter purchase for misrepresentation in the prospectus, and also to set aside the distribution by the promoters and directors among themselves of the nominally fully paid-up capital of the Company, and to assess, to supply funds to carry on the Company, the shares in their hands as not being in fact *bona fide* fully paid up; and also to remove certain of the directors for misconduct in the premises. Edwards had been made a defendant for the sole purpose of enabling him to introduce his counter-claim, as he was not originally a party to the action, nor was any relief claimed against him therein. The facts more fully appear from the judgments.

Statement.

The action was tried before DAVIE, C.J., at Vancouver, on the 20th, 25th, 26th, 27th and 28th days of September, 1895.

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

A. J. McColl, Q.C., for Alworth, Wood and Heimick.

J. A. Russell, for Gallagher and Crockett.

E. V. Bodwell, for Edwards.

Cur. adv. vult.

November 5th, 1895.

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DAVIE, C.J.: In *Broderip* v. *Salomon*, 12 R. 395, a

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company, composed only of Salomon and his relatives, had been formed under the Companies' Act, 1862, for the ostensible purpose of purchasing and carrying on Salomon's business, but with the manifest object of swindling everyone who might become connected with it, outside of the Salomons. At the instance of creditors, the sale of Salomon's business to the Company was declared to be fictitious, and Salomon was directed to indemnify the Company against its debts and liabilities. It has been stoutly contended that the Fraser River Company was a mere scheme to swindle subsequent shareholders, and that acting upon principles similar to *Broderip* v. *Salomon*, Alworth, who had purchased a controlling interest in the shares of the Company, at a comparatively insignificant price, should be ordered at the suit of subsequent shareholders to contribute to the assets of the Company the difference between the nominal value of the shares and what he paid for them. But I am of opinion that so far from the formation of the Company being a swindle on the part of Alworth, the Company, so far as he was concerned, was formed with perfect honesty of purpose, that he put his money (which was the principal money furnished) into the concern in good faith, with the object of developing what he believed to be a valuable property, and that the advantages complained of in this action were purchased *bona fide* only for his own protection and to guard against the possibility of his interests being sacrificed by those who had contributed nothing, or next to nothing. The facts of the case are these :

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C. S. Bailey, W. Bailey, T. J. Beatty, W. H. Gallagher and James Tallyard had applied for a lease from the Government of forty-two miles of the Fraser River, for the purpose of dredging for gold. Being without funds for entering upon the work, they made an agreement, dated 9th February, 1894, with C. E. Crockett, who claimed to have experience in such enterprises, to furnish $25,000.00,

$12,000.00 within ninety days, and the remainder from time to time as required, upon condition that a company was to be formed with a nominal capital of $2,500,000.00, divided into 250,000 shares of $10.00 each, of which Crockett was to receive fifty-one per cent. He was to be the general manager of the Company, and was to expend the money in building a steam scow and completing and equipping pumps and machinery necessary to successfully operate the claims, and to be at work inside of ninety days. By a supplementary agreement of the same date, in consideration of $54.00 (receipt acknowledged), Bailey and the other holders of the lease assigned to Crockett an undivided one-sixth interest therein, Crockett agreeing to pay one-sixth of all future expenses in connection with the claims, agreeing to vest in the Anglo-American Mining Company the use of any patents he had for mining purposes, and to act as general manager of the Company, giving the Company the benefit of his knowledge until the Company should be in successful operation.

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Crockett was without means to find the needed $25,000.00, so he went to Duluth, where he enlisted Alworth, who on behalf of himself and his friends engaged to find the necessary funds, Crockett himself contributing $2,000.00. The terms upon which Alworth found this money, except as to a further transfer of shares by Crockett, to which I shall presently refer, are contained in an agreement dated 10th May, 1894, made between the Baileys, Beatty, Gallagher and Tallyard of the first part, and Crockett of the second part, and Alworth of the third part, which, after reciting the leases (or applications for them), the expenditure by Crockett of time and money in preparatory development work, and in enlisting Alworth and his associates in the enterprise, goes on to provide for the completion of the leases and the formation of a company to be called the Anglo-American Mining Company, Limited Liability, to be capitalized at the same amount divided into the same

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number of shares as provided by the agreement of the 9th February, 1894, and having for its purpose the construction and operation of suitable and proper plant for the development of the property and the dredging of the bed of the river for gold. The agreement goes on to provide for the transfer of the leases to the intended Company, Crockett engaging to devote himself wholly to the procuring and equipment of suitable plant for dredging the river. Alworth agrees to pay into the treasury of the Company the necessary monies, including the first year's rental upon the leases, such monies in the aggregate not to exceed $25,000.00, to be paid from time to time as required, "it being by all the parties hereto assumed and believed that the monies herein provided for shall be sufficient" for the purposes of dredging operations. For these considerations Bailey & Co. agreed to cause to be issued and delivered to Crockett fifty-one per cent. of fully paid and unassessable capital stock, in full discharge for his services, etc., and Crockett agrees, immediately upon receipt thereof from the Company, in consideration of the monies agreed to be furnished by Alworth, to transfer and deliver to Alworth $850,000.00 in par value of the stock of the corporation. The remaining forty-nine per cent. of the capital stock is to be issued and delivered to the Baileys & Co., as fully paid and unassessable stock, "the same to be in full consideration of all the expenditures of time, money and labour by them, and in full consideration for the transfer and delivery to the Company of the leases." It is then agreed that should the $25,000.00 to be furnished by Alworth be insufficient for the construction of the plant, and its establishment in successful operation, then that any further monies which might be required should be furnished and raised without Alworth contributing thereto at all; and, so as to provide an assured means for raising such further monies when required, the Baileys & Co. and Crockett are to deposit in escrow with a chartered bank,

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the Baileys a one-third part of their forty-nine per cent. and Crockett a one-third part of so much as remains of his fifty-one per cent., after deducting thereout the $850,000.00 to be transferred to Alworth. It is further provided that this escrow stock should be held in trust to the order of a committee to consist of Crockett, Gallagher and Alworth, and that in case it became necessary to find money in excess of Alworth's $25,000.00, that sufficient to meet such excess should be raised by sale of escrow stock ("to be made up by contributions *pro rata* from respective holdings thereof") at a price to be fixed by the committee, the owners being at liberty to save their stock from sale by contributing "cash in place thereof." It is also provided that the plant is to be deemed completed and in successful operation when the same should be accepted by the board of directors of the Company.

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From the evidence it appears that the Company was duly formed, but before its formation Crockett agreed to turn over to Alworth one-third of his remaining interest in the Company. The consideration for so doing is stated by Alworth to have been $508.42, a payment certainly made by him to Crockett, for which the cheque was produced. Crockett, on the contrary, swears that these shares were turned over to Alworth for no valid consideration, and the suggestion is that they were turned over for and as part of a scheme to give Alworth an undue advantage over the other shareholders. Still, the fact remains that $508.42 was paid by Alworth to Crockett. Crockett does not satisfactorily account for this payment; in one place he says it was paid him for his share in money realized for some stock bought from Tallyard, but that is a manifest mistake, for the Tallyard money, some $590.00, was a separate payment; in another place he says the $508.00 cheque was for a two-third share of expenses somehow or other, but how he does not explain, due from Alworth to him. In face of such conflicting statements, I am bound to believe

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Alworth's account, which shews that the one-third of Crockett's stock, other than the 85,000 shares stipulated for under the agreement of 10th May, was purchased for a cash consideration of $508.00, which, as Alworth says, was for one-third of his expenses, which he (Crockett) placed at that sum. I must say that I did not quite understand at the trial what this meant, but, in reading over the correspondence, I find not only an explanation of what was meant by expenses, but a cogent, because accidental, corroboration of Alworth's evidence on this point, not alluded to, so far as I remember, at the trial. I refer to Crockett's letter to Alworth, dated June 8th, 1894, being a distinct offer of the shares of stock in question, at the price mentioned, which is stated to be Crockett's expense so far in securing the property. It appears also that Crockett agreed to transfer a further one-third of his shares to Wood and Heimick, in consideration, as I understand Crockett, for their introduction of Alworth, and the others who put the money in. These others have no complaint to make regarding this transfer of stock to Wood and Heimick. The Company was incorporated on 3rd July, 1894, and, before its first meeting, Wood and Heimick, by indenture dated 30th July, agreed to pool their stock, amounting in the aggregate to 127,500 shares, thus giving them absolute control of the Company; and at the meeting of 30th July, Alworth, Wood and Crockett were elected directors, and, conformably to the agreement of 10th May, 85,000 shares were allotted to Alworth, and 42,500 to Crockett, who, pursuant to his agreement with Wood and Heimick, transferred them each 14,166 shares, and the same number to Alworth. It also appears that Alworth transferred some of his 85,000 shares to Wood and Heimick for what they had cost him. Alworth, Wood and Heimick have all along acted in concert; in fact, it appears that Wood and Heimick's shares practically belong to Alworth, and they have acted throughout as Alworth's agents.

It further appears that after the $25,000.00, subscribed as to $8,500.00 personally by Alworth, and as to the remainder (except Crockett's $2,000.00) by Alworth or his friends, had been exhausted, Crockett moved and Gallagher and all parties consented to assess the escrow stock $3,000.00 to pay liabilities, and afterwards again a second assessment was ordered, upon the motion moved and carried by the votes of Gallagher and Crockett. Crockett during all this time was engaged in procuring and placing in position the necessary machinery and plant for the prosecution of mining operations, drawing for the necessary monies from time to time upon the secretary, Mr. Wood, who, in turn, was kept supplied by Alworth, who, to quote from Crockett's evidence, "was very prompt in sending his money to help along the enterprise," "and there is no suggestion that his accounts are not straightforward and clear," and, in a letter to Alworth, dated August 16th, 1894, Crockett says: "I feel as though Wood getting me acquainted with you, and the fact of your getting the capital to put this thing on its feet, ought to earn me a fortune and a very large one."

Eventually, when the plant was getting towards completion, Crockett met with a mishap in running the dredge ashore. It was a pure mishap so far as I can see, and no particular blame attributable to Crockett. He seemed, however, to blame himself, and on 2nd January, 1895, sent in his resignation, and Alworth then undertook to complete the plant. Up to this time the most perfect confidence existed between Crockett on the one hand and Alworth and his associates on the other, but soon after the resignation trouble developed itself between Crockett and Alworth, Gallagher and the Baileys ranging themselves on Crockett's side. Some thousands of dollars more than had been raised by the two assessments were, in Alworth's opinion, required to properly complete the plant, but Crockett contended that it could be done for $100.00 or $150.00, and he and Gallagher, as members of the escrow committee,

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refused to levy the necessary assessment, which refusal led to the suit to compel the carrying out of the agreement, which resulted in a decree accordingly. The present suit was then brought to remove Crockett and Gallagher from the office of trustees, and was opposed mainly on similar grounds to those set up in the counter-claim presently mentioned.

On 30th July, at the commencement of the trial, I made an order removing Crockett, but Gallagher, having intimated his willingness to concur in the assessment, was permitted to remain as trustee, and the trial was adjourned. The assessment for raising the necessary money has been levied accordingly upon the escrow stock, but matters can now proceed no further, as Gallagher refuses to concur in a sale unless ordered to do so by the Court; and the further hearing of the case with the object of removing Gallagher has now been proceeded with.

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In this stage of the suit Edwards has been joined as a party, and given leave to counter-claim against the plaintiff Alworth, and against Wood and Heimick, and, as a co-plaintiff with Gallagher and Crockett, he complains—and I must admit with considerable reason—that he has been defrauded and deluded into buying shares at a comparatively high price which are now placed in competition with escrow stock, which is being sold for next to nothing. But who has so deluded him? Not Alworth, Heimick or Wood, so far as I can discern, but the very men with whom he is associated in this litigation, his co-plaintiffs, Crockett and Gallagher. Edwards purchased a portion of his shares at the first sale of escrow stock, which sale was ordered, as it will be remembered, by Gallagher and Crockett, and the remainder from T. J. Beatty. He says he made no enquiry regarding the formation of the Company; but, as alluring Mr. Edwards to the auction sale, a highly seductive and untruthful advertisement was published, and prospectus issued,

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prepared not by Mr. Alworth, but by Mr. Gallagher and one of the other members of the committee.

The advertisement was signed by the auctioneer, and was as follows :

NOTICE TO THE PUBLIC.--Important Auction Sale of Mining Stock. I have received instructions to offer for sale by public auction, at my auction room, 63 Cordova street, on SATURDAY EVENING, 12th INST., without reserve, a number of shares of the Fraser River Mining and Dredging Company, Ltd. This is no wild-cat scheme, as it has been proved that there are immense quantities of gold in the bed of the Fraser River, which can only be secured by dredging, on account of the strength of the current. The plant, costing $40,000.00, has been purchased and set up ready for work and it is of the best and most modern manufacture, and will soon be working, so that only a short time will intervene before large returns may confidently be expected from the present outlay. An opportunity like this may possibly never occur again to secure stock in this the most promising project for the securing of the precious metal so near the hand of man, and which in the past has been so difficult to obtain.

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In truth, no such sum as $40,000.00 had been expended, and so far from the dredge being set up ready for work, both Mr. Gallagher and Mr. Beatty, as well as Mr. Crockett, knew it was stranded on a bar, and time and trouble must be expended in getting it to work. "The large returns which may confidently be expected," may or may not materialize ; in the meantime it is an utterly undeveloped property. Gallagher and Beatty also prepared a prospectus—for which Alworth is not shewn to have been in any way responsible, or even to have seen—the material portions of which, to put the matter very mildly, are perfect fiction. No prospecting of any kind has been shewn to have been done by the Fraser River Mining and Dredging Company ; in fact, it is notorious that the Company, without anything but the bare word of Mr. Crockett when he went to Duluth and found Mr. Alworth and his friends, was formed to take over leases already granted to Gallagher and his asssociates, upon which even the first year's rent had not been paid, yet the prospectus states "That the Company, after spending

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several seasons prospecting the country and testing different dredging appliances, have secured from the Government a lease of forty miles of the most suitable ground, a thorough prospection of which shews that the bars will average $2.00 per yard." "The test of the different dredging appliances" was purely imaginary, as also was the statement that "The Company has also secured timber limits enough to supply timber for their own use for many years;" the fact being that the Company has not a foot of timber land belonging to it—a most mendacious statement all through. But, as remarked before, this production does not come from Mr. Alworth, but was concocted by the very men, Gallagher and Beatty, with whom Mr. Edwards is associated in this litigation. The Company are not responsible for this prospectus, for they never issued it, and, outside of Gallagher and Beatty, no one seems to have been aware of it, and Gallagher's evidence goes to shew that after distributing some copies, he suppressed the remainder. These gentlemen are now, through Edwards, who after all has but comparatively small interest in this Company, asking that Mr. Alworth, the man who has contributed all the money, shall be compelled to pay up for their benefit not only the $25,000.00 of which they have had the advantage, not contributing thereto themselves a single dollar, but shall pay up also the difference between the $25,000.00 and the 127,000 shares he holds at $10.00 per share, a million or so of money. Really, if such a demand had not been soberly urged, it would be past conception.

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I grant that if the Company was in debt, and being wound up, Alworth would, notwithstanding his having what are nominally paid-up shares, have to contribute for the debts of the concern to the extent of (if necessary) the face value of his shares; the Companies' Act, 1890, section 20, is perfectly clear on this point. But that is not the case, no creditors intervene. In England, under the Companies' Act, 1862, it seems to be a debatable point whether the owner of

shares sold at a discount can, during the life of the Company, at the suit of the shareholder who has paid full value for his shares, be made to contribute the deficiency. Lord HERSCHELL, in the *Ooregum Gold Co.* v. *Roper* (1892), A.C.125, was prepared to hold, had the point been urged, that he could not; and *In re the Pioneer of Mashonaland Syndicate*, 3 Rep. 265, Mr. Justice VAUGHAN-WILLIAMS distinctly holds that a fully paid-up shareholder has no right to assert such claim, either by action during the life of the Company, or by petition upon a winding-up. If such is the law under the English Joint Stock Companies' Acts of 1862 and 1867, *a fortiori* would it be the case under the British Columbia Companies' Act, 1890. I can well understand that, proceeding under the Companies' Acts of England, Lord HALSBURY should, in *In re Railway Time Tables Publishing Co.*, 12 R. 199, whilst holding himself at liberty to uphold the contrary rule should the case come before the House of Lords, hold that in the Court of Appeal, upon a winding-up, shares issued at a discount must contribute. That undoubtedly is the law, as established by *In re Almada and Tirito Co.* 38 Ch. D. 415, 59 L.T. 159; and in *Re Weymouth and Channel Islands Steam Packet Co.* (1891) 1 Ch. 66, 63 L.T. 686; and I should not be surprised to find that when the point comes before the House of Lords Lord HERSCHELL'S strong *dictum* the other way is overruled; but that is because of, and the English cases proceed upon, sections in the Companies' Act, 1862, which are absent from the British Columbia Companies' Act. In the English Act, under "Liability of Members," the measure of such liability is an amount sufficient to satisfy all claims of creditors, to pay all expenses of liquidation, and to adjust the claims of members *inter se*; and section 25 of the English Act of 1862 specifies as part of the information to be entered on the register of members the amount "paid, or agreed to be considered as paid, on the shares of each member." Here we have no corresponding

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legislation to this; its operation, so far as liability of the shareholder to contribute, seems limited to the claims of creditors. Sections 6 and 20 of the Companies' Act, 1890, are as follows:

"6. No shareholder in any such company shall be individually liable for the debts or liabilities of the company; but the liability of each shareholder shall be limited to the calls and assessments to be legally levied upon the shares held by him."

"20. (1) Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company, to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall, subject to the provisions of the next section, be the amount recoverable with costs against such shareholders."

"(2) Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company, except a claim for unpaid dividends, or a salary, or allowance as a trustee."

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Whatever view may hereafter be taken under the English Acts, of Lord HERSCHELL'S remarks, they appear to be unassailable when applied to the British Columbia Act, and they directly apply to this case: "But the question before Your Lordships does not arise in the case of a winding-up. The interest of the creditor is not in issue. The action is brought by a shareholder avowedly for the purpose of benefitting the holders of the ordinary shares at the expense of those who are possessed of the preference shares, which were taken on the express condition that their holders should not be required to pay more than £5 per share. To accede *simpliciter* to the prayer of the plaintiff, would, as it seems to me, be to sanction a violation by the Company of a solemn agreement entered into between them and those who took the shares. I should have thought it was wrong to do this, except in so far as the contract provides for that which has been otherwise provided for by the Legislature. In so far as the obligations arising under the contract do not involve a contravention of any enactment of the Legislature, I see no reason why they should

not have effect given to them. "Except when the Legislature has expressly, or by implication, forbidden any act to be done by a company, their rights must be governed by the ordinary principles of law, and they are free to make, as between themselves and their shareholders, such contracts as they please." See also 30 Can. L.J. 54.

It appears to me, although the point was not urged in the argument of this case, that there is a wide distinction between the English Companies' Acts and our own. It was strongly urged by Mr. *Bodwell* that the acceptance by Alworth and by Heimick and Wood of the two-thirds of Crockett's stock, and the transfer by Alworth to Heimick and Wood of part of his 85,000 shares at bed-rock prices, must be taken as bribes accepted by directors, for which, upon principles laid down in *Nant-Y-Glo. Iron Works Co.* v. *Grave*, 12 C. D. 738, and in *Re Newman & Co.* 12 R. 228, they must account to the Company, and, as shewing that Alworth was taking something which he knew to be morally wrong, reference was made to his letter to Crockett, in which he asks Crockett to write him a letter (which Crockett never wrote and does not produce) in form of a draft letter enclosed in Alworth's, denying that he, Alworth, had anything on "the side in the Company," "as some persons seemed to think that he, Alworth, had some side agreement." I find myself unable to place any such unfavourable construction on Alworth's letter. I think that in asking a denial of any "side agreement" he had in mind only his position, and, honestly, asked a denial of that which could with truth be denied. It is significant that Crockett, whilst endeavouring to give a dishonest impression to Alworth's letter, does not produce the letter which Alworth asked him to write. I observe no indications of anything fraudulent or wrong in the transfers as between Crockett, Alworth, Heimick and Wood, and, in the absence of fraudulent intent, such transactions are not open to impeachment, *Lands Allotment Co.* v. *Broad*, 13 R. 699.

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The ground of Gallagher's defence and of Edwards' counter-claim is a charge of fraud against Alworth, which, in my opinion, utterly fails. If it could be shewn, as claimed by the pleadings, that the actions of Alworth, Wood and Heimick "are part and parcel of a fraudulent and collusive scheme and conspiracy between them to obtain control of the Company by any means, and to practically close out all the Vancouver shareholders, and that Alworth is the prime mover therein, and Wood and Heimick are merely active tools employed by him to carry out such illegal and fraudulent schemes and purposes," there would be no difficulty in bringing justice home to Alworth. I think Edwards is entitled to some consideration, but not against the Company, who had issued their shares before his purchase. He was, I think, too sanguine in buying shares without making enquiry as to the constitution of the Company, but at the same time I think the Company was blameworthy in not taking care to disclose its true position before the escrow shares were offered for sale, or, indeed, before it came into the power of Beatty, Gallagher and other shareholders to dispose of stock. On this ground, in dismissing Edwards' counter-claim, which I do, I shall dismiss it without costs, see *British Seamless Paper Box Co.*, L.R. 17 Ch. D. 467, at p. 475.

Crockett and Gallagher are, I think, mainly responsible for all the trouble. The former was guilty of what appears to me from one of his letters of a deliberate suggestion to load the mine, and so practice a huge deception upon the public. Gallagher, besides being associated with bad company, was responsible for a fraudulent prospectus and a false advertisement. Crockett has already been removed from the trusteeship. The order will be to remove Gallagher also, and that the plaintiffs, by original action, recover their costs of suit against Gallagher and Crockett.

Judgment accordingly.

Statement.

From this judgment Gallagher and Edwards appealed

to the Full Court, and the appeal was argued before McCreight, Walkem and Drake, JJ., on 13th, 14th, 15th and 16th April, 1896.

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

C. Wilson, Q.C., contra.

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McCreight, J.: The decree of 15th May, 1895, should have been promptly obeyed by Gallagher and Crockett, and as their disobedience was without excuse, I think there was no choice but, for the sake of the Company, to get them removed (Crockett consented to the removal), and the Court had undoubted power to do so, see *Letterstedt* v. *Broers*, 9 App. Cas. 371.

It is plain that the disobedience evinced by Gallagher was without excuse. It seems to me to have been thought by the writers of the letters that the legality of the appointment of the other directors, Alworth, Wood and Heimick, could be questioned in the present suit by Gallagher and Crockett, and they, Gallagher and Crockett, plead that "The said directors have been illegally and wrongfully appointed, and have no right to act in the premises." But it is plain that both Gallagher and Crockett are estopped from raising this defence in this suit.

Judgment of McCreight, J.

When the action was brought in April, 1895, by the Company and Alworth against Gallagher and Crockett, to carry out the trusts of the deed of May 10th, 1894, it might perhaps have been a good defence or plea that Alworth, Wood or Heimick were not legally elected or re-elected to the office of directors of the Company, but the omission to raise such a defence in that suit, which terminated in the decree of May 15th, 1895, afterwards affirmed by the Full Court, debars them, by estoppel, from raising it in the present suit, *i.e.* the present suit for their removal.

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This appears to be clearly the law, from the case of *Bossi* v. *Bailey*, L.R. 3 Q.B. 621. At page 628, the Court of Queen's Bench say: "We agree with CHANNELL, B., that the general rule of law is that the party who might have pleaded and prevented a judgment, and did not, is "estopped from afterwards raising that defence." The Court refer to *Staffordshire Banking Co.* v. *Emmott*, L.R. 2 Exc. 208, in which, at page 217, Lord BRAMWELL says: "The rule being that defences must be pleaded at the time for pleading, or as soon after as they arise, or the benefit of them will be lost," and see the remarks of CHANNELL, B., at the end of his judgment, page 222.

Judgment of McCREIGHT, J.

The same principle of estoppel precludes Gallagher and Crockett from raising any defence which they did raise, or might have raised, in the action which was brought in April, 1895, and disposes not merely of the alleged improper election, through the supposed defect in Heimick's proxy, but also of the point raised by the appellants in their *factum*, "that the stock represented by Heimick was not in law paid up stock," as said to be required by the Articles of Association.

I think the letters to which I have referred plainly shew refusal by Gallagher to perform his trust in pursuance of the decree, and he must be taken to have known the law as laid down in the cases to which I have referred.

The estoppel applies also to the contention that "The trust, if any, set out in the agreement of 10th May was not declared in favour of the Company, but for the individuals who were parties to the agreement." Nothing was left for Gallagher but obedience.

It is further contended that the action should have been brought by the persons for whom the trust was undertaken. I will not repeat my remarks as to estoppel, but will only say a decree having been made against Gallagher, or directing him to carry out certain trusts, the Chief Justice has dealt very leniently with his disobedience. In days

gone by, and probably before many other Judges, he would have received sterner treatment. There is very little use in the Court making orders unless they are to be obeyed, and to relieve him from the payment of costs would be "*pessimi exempli.*" A Judge's order, say for an injunction, must always be obeyed until successfully appealed from.

In dealing with the doctrine of estoppel, apparent as it is from the records of the Court, I must not be taken as admitting that the evidence was in favour of Gallagher, and that he succeeded in proving his case or defence.

With respect to Crockett, I think the reasons given by the Chief Justice at the end of his judgment are quite sufficient to justify Crockett's removal; besides he has by his counsel consented to it.

With respect to the counter-claim of the defendant Edwards, it does seem that there was really no jurisdiction to add him as a defendant. The Court or Judge may order the names of parties to be added "whose presence before the Court may be necessary in order to enable the Court effectually to adjudicate upon . . all questions . . involved in the cause or matter." Order XVI. Rule 11*a*.

In this action, to remove Gallagher and Crockett for disobedience to the order of the Court, and confined to that object, Edwards could not possibly be a necessary or useful party. Again, even if the Court had jurisdiction to make him a defendant, I think he should not have been so made for the mere purpose of enabling him to counter-claim, see *Montgomery* v. *Foy, Morgan & Co.* (1895) 2 Q.B. 323, and see per KAY, L.J., at p. 325; and in the present case it has caused much trouble and expense without any corresponding advantage, as it did in the case of *Montgomery* v. *Foy Martin & Co.*, *supra*, where it was done to avoid circuity of action, if not worse.

But I think, having regard to Edwards' position, he has altogether mistaken his remedy. He seems to have been deceived, and probably he and other shareholders might

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maintain actions for deceit within the law laid down in *Derry* v. *Peek*, 14 App. Cas. 337, where each might obtain damages for the injuries sustained. But the Court have already decided that the trusts of the deed of May 10th should be performed, and that the trustees should "levy from time to time upon the shares deposited . . such assessments as may be necessary for providing for the present and accruing obligations of the plaintiff company."

I think this decree of 15th May should be carried out before a declaration can be made that the shares "of Alworth, Wood and Heimick are liable to assessment in order to satisfy the debts of the Company, and that the parties holding them are bound to account to the Company for the difference between the amount paid and the par value of the said shares."

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But I think further that the right to the above declaration in any event (and this constituted a principal argument in favour of the claim of Edwards on behalf of himself and other shareholders except Wood, Alworth and Heimick) can be shewn to be untenable. This may be shewn by reference to the *Ooregum Gold Mining Co. of India* v. *Roper* (1892) App. Cas. 125, and the subsequent cases *Re Eddystone Marine Insurance Co.* (1893) 3 Ch. (C.A.) at pp. 18, 19 and 21; and *Hirsche et al.* v. *Sims*, 11 R. 303. In the *Ooregum Gold Mining Co.* case, NORTH, J., made an order declaring "that the issue of the preferred shares of one pound each at a discount of fifteen shillings per share was beyond the powers of the Company, and that the said shares so far as the same were held by Wallroth" (an original allottee) "or by original allottees represented by him, were held subject to the liability of the holders to pay to the Company, in cash, so much of the one pound per share as had not been paid on the same; and ordering that the Company do rectify the register in accordance with the above declaration." This order was affirmed by the Court of Appeal and the House of Lords, see (1892) App. Cas. 128.

Now, if Alworth, Wood and Heimick had been original allottees there might be ground for contending that, subject to what I have already said, a similar decree to the above might be made against them, and that the Company should rectify the register accordingly.

But perusal of the evidence shews that Mr. Washbourne has with considerable care and skill so directed the formation and constitution of the Company that none of the three were original allottees. For this I refer to the deed of May 10th, 1894, and the evidence of Gallagher: "At the time the stock certificates were first issued, Mr. Washbourne was there, I raised the point I did not understand why the stock certificates were not made out according to the agreement. I did not understand it. The stock ledger will shew that the stock, a great deal of it, was made to Mr. Crockett and assigned to the others. Mr. Alworth and his associates were to get 85,000 shares. I did not see why they should not get it direct, and raised the point at the meeting." Question: "You were overruled?" Answer: "Mr. Washbourne said there was so much stock to be given, it made no difference how it was done."

Again he says, "I objected that the 85,000 (shares) should have been made direct to Alworth." By the Court: "All that was made out to Crockett?" Answer: "Yes, my Lord. Their solicitor, Mr. Washbourne, stated there in the meeting that there was an object for doing so."

Alworth, Wood and Heimick cannot be liable to have an order made against them like that in the *Ooregum Gold Mining Co.* case, and other cases I have referred to, they not being "original allottees."

I cannot hold, as at present advised, that Alworth, Wood and Heimick were "original allottees," but I must say moreover that the order of Mr. Justice NORTH in the *Ooregum Gold Mining Co.* case, *supra*, by no means warrants the suggestion that as contended the shares were generally assessable. Alworth, Wood and Heimick are in any event

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not more liable than others, and then only to calls regularly made; and considering that Alworth, Wood and Heimick hold the majority of the shares, and no doubt intend to continue to do so, such calls will no doubt be made to suit their convenience rather than that of their antagonists.

In attempting to frame an order like that in the *Ooregum Gold Mining Co.* case, in addition to the above difficulties, we are met with those which arise from Sections 6, 16 and 20 of the Companies' Act, 1890.

The next point in the counter-claim by Edwards, suing on behalf, etc., is that Alworth, Wood and Heimick "having acquired the said shares for an inadequate consideration whilst occupying a fiduciary position towards the Company," are bound to restore, etc. I do not think this allegation is made out. Alworth gets his shares, or agrees to take them, before the formation of the Company, by the deed of May 10th, 1894, and did not become a director until some time afterwards. This is not a case of acquiring shares "whilst occupying a fiduciary position towards the Company." Heimick got his shares by purchase from Alworth, out of Alworth's 85,000 shares. He bought 3,400 shares, it seems, from Alworth. I gather Wood got his from Crockett. It may be true, as stated in the appellant's *factum*, "that if a trustee makes a profit out of the trust estate he must return that profit to the beneficiaries;" but in this case, so far, it seems little or nothing has been made, but loss. Again, Alworth, Wood and Heimick were not original allottees.

Judgment of McCREIGHT, J.

The next, and as it seems to me the last, point of the appellants which it is necessary to consider is, that "the evidence clearly shewed that the election of said Alworth, Wood and Heimick was irregular and void, and that the sale of the escrow stock was void." This point does not seem to have been brought to the attention of the Chief Justice. He gave no opinion on it, nor was it argued before the Full Court. Whilst Gallagher and Crockett cannot raise it by reason of the doctrine of estoppel, it

might be raised by Edwards ; but, for many years it seems to have been settled that proceedings to question the regularity of the appointment of directors should be taken by the Company, and not by a shareholder on behalf of other shareholders.

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In *MacDougall* v. *Gardiner*, 1 Ch. D. 25, MELLISH, L.J., says : "Some directors may have been irregularly appointed, some directors irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the Company to fyle a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated ; whereas if the bill must be fyled in the name of the Company, then, unless there is a majority who really wish for litigation, the litigation will not go on."

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But the point that the authority of the directors to act can only be questioned by proceedings taken in the name of the Company, is distinctly decided by *Mozley* v. *Alston*, 1 Ph. Ch. Cas. pp. 790, 800, and I must refer to the remarks of the Lord Chancellor there as shewing that Edwards suing on behalf, etc., by counter-claim is not sufficient, and the action of the Company itself is necessary.

The only other matter to consider is the question of costs. The respondents have succeeded throughout, but, whilst giving them full credit for care and skill, it seems to me that the formation and conduct of the Company from the first has been characterized by design and unscrupulous disregard of the welfare of all but Alworth and his associates. Gallagher and Crockett no doubt are to blame, but it is not easy to conclude that the other directors are free from blame. For instance, Wood and Heimick were both present at the sale where Edwards bought.

In *Harnett* v. *Vise and Wife*, 5 Exch. Div. 307 (C.A.), it was held that the conduct of a party previous to and

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conducing to the litigation might be taken into consideration in exercising a discretion to deprive a successful party of his costs, and I think the same should be done here. The Chief Justice refused to make Edwards pay costs, and I think he should not be obliged to pay the costs of this appeal. The appeal should be dismissed. I have already said that I thought Gallagher and Crockett should pay the costs of their appeal.

WALKEM, J., concurred.

DRAKE, J.: This action was brought to remove the defendants from their position as two of the trustees of certain shares which are called escrow stock in the pleadings, and which shares they, jointly with one Marshall Alworth, had to deal with in accordance with the trusts contained in an agreement dated 30th July, 1894.

Judgment of DRAKE J.

On 11th September, 1895, Edgar W. Edwards was added as a defendant, with liberty to enter a counter-claim against the Company. On 30th July, Crockett consented to be removed as a trustee and Cesare J. Marani was substituted, and an order of the Court was made accordingly.

The counter-claim of Edwards is made on behalf of himself and all other shareholders of the Company except Alworth, Wood and Heimick, and he claims that the election of Alworth, Wood and Heimick as directors of the Company be declared invalid; that the sale of escrow stock, of which Alworth, Gallagher and Crockett were the trustees, be declared fraudulent and void, and for an injunction; that the shares of the Company allotted to Wood and Alworth on 30th July, 1894, were allotted through misfeasance of the directors, and that they the said Wood and Alworth are liable to contribute to the assets of the Company a sum which should be equal to the difference between the nominal value of the said shares and the sum of $25,000.00 paid by Alworth; and further relief.

The Company was incorporated on 3rd July, 1894, under the Companies' Act, 1890, with a capital of $2,500,000.00, divided into shares of $10.00 each, and the objects for which the Company was formed were the acquisition and operation of certain mining leases in which the defendant Gallagher and others had at the time of the incorporation of the Company the beneficial interest; the idea was that by dredging the Fraser River within the limit of the land contained in the lease the Company could obtain large quantities of gold, and Crockett was to construct the necessary appliances, which consisted of a scow, dredge, and machinery, and find the money to the extent of $25,000.00 therefor.

Prior to the formation of the Company, namely, on 10th May, 1894, an agreement was entered into by which Alworth agreed to find the $25,000.00 for Crockett, in consideration of 85,000 shares of the intended Company's stock, and Crockett agreed to construct the necessary machinery in consideration of obtaining a controlling interest in the Company to be formed.

After the formation of the Company on 30th July, 1894, Crockett made a proposal to the Company to complete a dredge and put the same in working operation on the Fraser River, and make the same over to the Company when completed, in consideration of issuing to him 127,500 shares of the capital stock of the Company, which proposition was accepted by the Company. It is to be remarked that the parties voting in favour of this resolution are Alworth, Gallagher, Wood and Crockett, the latter voting on his own contract; at the same meeting the remainder of the capital, $1,225,000.00, was voted to Gallagher and Bailey in payment of the mining leases granted by the Provincial Government for mining for precious metals in the bed of the Fraser, and was carried by the same votes. On the same day 85,000 of the 127,500 shares were issued to Crockett, which he immediately transferred to Alworth

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on the terms of his agreement with him, and Crockett's certificate was cancelled.

Alworth found the $25,000.00, and subsequently parted with a considerable number of his shares to others, who are now registered as owners thereof. Various other transactions in shares took place, which it is not necessary to discuss; the shares now held by Alworth are 40,705.

Gallagher, Crockett and Alworth, on 10th May, 1894, before the formation of the Company, entered into a further agreement to the effect that when the Company was formed and the distribution of capital stock effected, the holders of 49 per cent. of the stock should deliver one-third of the shares held by them to Gallagher, Crockett and Alworth, and that Crockett should deliver to the same persons one-third of the shares held by him, excluding the 85,000 handed to Alworth, to be held by them for the purpose of realizing further funds in case the $25,000.00 found by Alworth should be insufficient for the works contemplated; this is called the escrow stock, and such stock was to be sold from time to time as the directors of the Company ordered. Sales took place and Edwards, the plaintiff in the counter-claim, and numerous other persons became purchasers of these shares, and it is in respect of these shares that Edwards is now suing and for which he claims that Alworth and Wood should contribute to the assets of the Company the difference between the nominal value of the shares held by them and the sum of $25,000.00. It is to be remarked that Edwards purchased his fully paid-up $10.00 shares at a price ranging from thirty to fifty-five cents a share.

The contention is that the whole arrangement was a device to avoid the operation of the Companies' Act. As long as it was divided among the original promoters it mattered not how or in what manner they dealt with share capital. They distributed one portion to the holders of the lease and the other to Crockett for his labour and

for the capital required; so far no one was injured, it was a mutual arrangement satisfactory to all who then were interested in the Company. In many respects this is like the *Gold Company's* case, 11 Ch. D. 701. In that case the whole capital was allotted between the existing shareholders; afterwards some of the shareholders sold to the public; the undertaking proved a failure; the Company agreed to wind up voluntarily, but the plaintiffs wanted a winding-up under the supervision of the Court, and Lord Justice JAMES refused the application; and although some very strong expressions of disapprobation are used by all the Judges in respect of the mode in which the Company was got up and the capital divided, yet they say the injury the plaintiff sustained was a wrong done by the person who deluded him into making the purchase of that which was worthless; it was not a wrong done by the Company or to it; it was not a wrong done by persons in a fiduciary capacity towards the Company for whom they were trustees.

Here the plaintiff purchased shares from one Heimick, and subsequently, as he alleges, was induced by a highly coloured advertisement to increase his holding by buying shares at auction, not from the Company, but from certain shareholders. The plaintiff must have known that if he could purchase shares of a nominal value of $10.00 for a few cents that the concern could not be very flourishing, and if he had chosen to make enquiries he could have ascertained the actual facts as they then existed; but why should this plaintiff, having paid only a nominal sum for his shares, call upon other shareholders who may have paid less to furnish funds for his benefit.

The case of *Andrews* v. *Mockford* (1896), 1 Q.B. 372, decides that the person issuing a false representation, known to him to be false, with the object of inducing persons to purchase shares in a company, is personally responsible for the loss sustained. If Edwards' action had

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been against Gallagher the plaintiff might have had a remedy, but there is no evidence that the Company issued the prospectus or authorized its circulation.

The relief Edwards seeks is contribution in unequal amounts, not to place all the shareholders on an equal footing but to benefit some at the expense of others.

It is quite possible that if the action had been for rescission, Edwards might have obtained relief.

In the case of *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, Lord CAIRNS points out that an action for damages for fraud in inducing the plaintiff to become a shareholder in the Bank could not be sustained, the proper course would be to get rescission of the contract, and in answer to counsel, who claimed that on general principles one could retain shares and yet get damages, Lord CAIRNS said that for a quarter of a century no such contention had ever been put forward.

The Act under which this Company was formed is one which has ignored the safeguards which have been found necessary both for creditors and shareholders in England, and been embodied in continued amendments of the English Joint Stock Companies' Act, in order to protect shareholders and creditors.

I quite agree with a great deal that has been said respecting the mode in which this Company was got up and launched. There is little doubt but that those persons who have been induced to buy shares have lost their money by buying worthless paper—they have only themselves to blame for it—but they cannot now obtain relief in this action.

The other branch of the case is whether or not Gallagher and Crockett should be discharged from their position of trustees. Crockett has resigned and another trustee has been nominated in his place, and so far I see no reason why he should be saddled with costs.

As regards Gallagher, he assented to the delivery up of

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the escrow stock and signed the necessary authority, but pointed out to his co-trustee certain difficulties which his lawyers had raised. In this I think he was acting rightly, he complied with the order of the Court, but the objections which had been taken by his lawyers he handed on to his co-trustee, who considered them sufficiently serious to require careful consideration. But it is alleged that he was the author of a prospectus which contained inaccurate statements; this prospectus was not circulated, with the exception of a few copies, and was not apparently adopted by the Company; he also prepared the advertisement which was published prior to the sale of the escrow stock, and this advertisement also was inaccurate. These are not grounds for discharging a trustee, unless it is shewn that such acts were in direct contravention of his duties. This brings us back to what the plaintiff's course should have been; he does not ask for a rescission of his contract on account of the prospectus and advertisement, he wishes to retain his shares and yet complains of the facts which induced him to buy, possibly he gave a few cents more for the shares in consequence, but of this he does not complain.

Judgment of DRAKE, J.

For these reasons I think the appeal should be dismissed, but that the learned Chief Justice's order should be varied, by retaining Gallagher as a trustee, and so much of the order as imposes costs on Gallagher and Crockett should be struck out.

Appeal dismissed without costs.

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THE BEATRICE

THE BEATRICE.

Behring Sea Award Act, 1894 [57 & 58 Vict. (Imp.)]—Wrongful seizure—Damages—Measure of.

The measure of damages recoverable for a wrongful seizure under colour of an infringement of the Behring Sea Award Act, 1894 (Imp.), is the whole injury caused by such seizure.

ASSESSMENT of damages against the Crown for the unlawful seizure of the sealing schooner Beatrice by the U.S.S. Rush, for an alleged infraction of the Behring Sea Award Act, 1894 (Imp.), Art. V. Schedule. An action for condemnation of the schooner was tried before DAVIE, L.J.A., and dismissed, on 18th November, 1895, the learned Judge finding that the charge upon which the vessel was arrested was one upon which the arrest could not legally be made, and directed the present reference to assess damages for such illegal arrest and detention.

Statement.

The facts affecting the amount of the damages fully appear from the judgment.

E. V. Bodwell and *G. H. Barnard*, for the ship.

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

DAVIE, L.J.A.: This was an assessment of damages arising out of the seizure of the sealing schooner Beatrice by the United States revenue steamer Rush on 20th August, 1895. Upon the trial before me of the action for condemnation of the ship for alleged infraction of the Behring's Sea Award Act, 1894, I dismissed the action on the ground that the seizure was unlawful, and I directed a reference as to the damages sustained by the owners of the Beatrice on account of her unlawful arrest and detention, 4 B.C. 347, 5 Exch. Rep. Can. 9.

Judgment.

The arrest took place on 20th August, 1895, in latitude

54.54 north and longitude 168.31 west, whilst the vessel was engaged in seal fishing. She had then caught 202 seals, having an outfit of six boats and two canoes and a crew of eighteen white men, but no Indians. She had been fishing since 2nd August, and under instructions to the master, given by the owner, would probably have continued fishing until the end of the season, which is shewn to be the 20th September, several of the vessels having continued until that date, making good catches up to the last day; for instance, the Walter Rich caught 72 skins on the 9th September, and 36 on the 18th; the Ainoko 137 on the 9th September, 36 on the 17th and 54 on the 19th; the Florence M. Smith took 69 on the 20th September. These vessels were all sealing in Behring Sea in the same way as the Beatrice, and although they had more boats and more men than the Beatrice it is useful to refer to their catches as shewing that it would have probably been profitable for the Beatrice to have continued sealing up to the last day. There were some forty vessels, including the Beatrice, sailing out of Victoria engaged in sealing that year, and Mr. Godson, whose duty it was under the Paris award to keep a record of the industry, informs us that the average catch per schooner was 897.95, or of about 70 to each boat or canoe. It has been contended on the part of the Crown that in assessing damages I should proceed upon the average catch per boat, but I think this would afford hardly a fair estimate for the Beatrice.

Judgment.

In the first place, Mr. Godson's average includes the catch of the Beatrice, which had only just commenced sealing when seized, as also of the E. B. Marvin, which was seized on the 2nd September, when she had caught only 376 seals. These seizures, therefore, reduce the average which would otherwise be shewn. Moreover, many of the other vessels had stopped sealing before the 20th September, whereas the Beatrice was provisioned to, and had instructions to continue until the 20th. The catches are shewn to

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be heavier after the 20th August than they were before that date. Some of the vessels took as high as 100 and more to the boat; the Borealis, a vessel of only 37 tons register, with twenty-one white men and six boats, taking as high as 123 seals to the boat.

The seizure in this case having been established as wrongful, the defendant is entitled to substantial damages, the criterion of which is the whole injury which he has sustained thereby. In the *Consett*, L.R. 5 P.D. 232, where a charter party was lost in consequence of detention caused by a collision in which the defendant was to blame, the measure of damages was held to extend to the loss of the charter. The defendants' case here stands upon at least as high a footing as in the *Consett*. Here, I think, I am bound to allow such an amount as would represent the loss of an ordinary and fair catch if the voyage had been extended until 20th September. (*The Argentino*, L.R. 14 App. Cas. 519.) I think that 90 seals to the boat would have been an ordinary and fair catch for the Beatrice to have made; as the Borealis with only three more men took 123 seals, it is not unreasonable to presume that the Beatrice would have taken at least 90. This, for eight boats, including canoes, would make 720 seals, or 518 more than were taken.

Judgment.

The evidence shews that the agents for the Beatrice, R. Ward & Co., who were also the agents for several of the other schooners, sold all of their catches at Victoria, and realized $10.25 per skin, including the 202 caught by the Beatrice before she was seized. I think the same price must be allowed the Beatrice for her estimated additional catch of 518 seals, or $5,309.50. From this has to be deducted $4.00 per skin, which it was proved would amply cover all expenses of the lay to which the sealers would have been entitled, as well as all wages. There will also be deducted $74.00 for the tinned goods and two barrels of beef which would probably have been consumed had the the Beatrice completed her voyage, but which Mr. Doering

had restored to him after the vessel was released. The remainder of the provisions were mildewed, eaten by rats and otherwise spoiled whilst the vessel was under arrest. There can be no deduction in respect of these. These deductions leave a balance of $3,163.50 in favour of Mr. Doering, for which sum, together with interest at the rate of six per cent. per annum from the 20th September, he is entitled to judgment against Her Majesty.

Order accordingly.

BOLE, CO. J.

1896.

April 7.

REGINA v. WIRTH AND REED.

Criminal Law—Appeal—Code, Secs. 782, 783 (a) and 784—58 & 59 Vic. (Can.), Cap. 40.

REGINA v. WIRTH

The right of appeal given by section 782 of the Criminal Code, as amended by 58 & 59 Vic. (Can.) Cap. 40 (*a*), from convictions by two Justices of the Peace, under Code Sec. 783 (a) and (f), is not taken away in British Columbia by Code Sec. 784, Sub-sec, 3, as amended by 58 & 59 Vic. (Can.), Cap. 40 (*b*).

Statement.

APPEAL from a conviction of the defendants by two Justices of the Peace, under the Criminal Code, Sec. 783 (*a*), for stealing a coat. The appeal was argued before BOLE, Co. J. The facts fully appear from the judgment.

Richard McBride, for the appeal.

A. C. Sutton, contra.

Judgment.

BOLE, Co. J.: The defendants herein were convicted before two Justices of the Peace on a charge of theft, the value of the goods stolen being under $10.00. From this conviction they have appealed, and it is contended that

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NOTE (*a*). Amends "Section 782, by adding the following sub-paragraph after sub-paragraph (iv) of paragraph (a): (v) in all the provinces where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of section 783, any two Justices of the Peace sitting together, provided that when any offence is tried by virtue of this sub-paragraph an appeal shall lie from a conviction in the same manner as from summary convictions under Part LVIII., and that section 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal."

NOTE (*b*). "3. The jurisdiction of the magistrate in the Provinces of Prince Edward Island and British Columbia, and in the District of Keewatin, under this part is absolute without the consent of the person charged."

there is no right of appeal in such cases in British Columbia. 58 & 59 Vic., Cap. 40, enacts as follows, by way of amendment to the Criminal Code, 1892: (quoting the section).

Section 784, by repealing sub-section three thereof, and substituting the following therefor: (quoting the section).

Section 782 of the Code provides for the summary trial of indictable offences before tribunals—differing more or less in the different Provinces, and the amendment of 1895 introducing sub-paragraph (v) at the end of paragraph (a) makes additional provisions for all the Provinces by enacting that the offences mentioned in paragraphs (a) and (f) of section 783, may be tried before two Justices of the Peace, etc., and provides that where such a trial takes place under that sub-paragraph, *i.e.* before two Justices of the Peace, an appeal shall lie, while the amendment of section 784 is confined to making the jurisdiction of the magistrate in British Columbia absolute without the consent of the person charged; so it appears to me that whether there is or is not an appeal from any tribunal other than two Justices of the Peace, summarily dealing with the offences mentioned in paragraphs (a) and (f) of section 783 is a matter with respect to which I am not now called on to express an opinion. The defendants in the present case, having been charged with theft under paragraph (a) of section 783, and tried summarily before two Justices of the Peace sitting together, are, in my view, entitled as of right to appeal against their conviction, which appeal is subject to the conditions provided in Part LVIII., and section 879, and following sections of the Criminal Code, 1892, relating to appeals. If there were any doubt on the subject, one cannot help observing that the Criminal Code taken as a whole shews a marked disposition on the part of the Legislature to extend, not curtail, the right of appeal in criminal matters. Furthermore, the interpretation of all Statutes

Judgment.

BOLE, CO. J.

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(especially penal ones) should be highly favourable to personal liberty, *Henderson* v. *Sherborne*, 2 M. & W. 239, and where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself, *Nicholson* v. *Fields*, 31 L.J. Exch. 235 ; *Foley* v. *Fletcher*, 28 L.J. Exch. 106. Again, in *Scott* v. *Morley*, 57 L.J.Q.B. 45 (C.A.), BOWEN, L.J., says : 'In dealing with the liberty of the subject, one ought not to read into statutes something which is not there, and which would be in derogation of that liberty," in the 'absence of express and positive words to that effect, and to hold that while defendants tried with their own consent and convicted under paragraphs (a) and (f) of section 783, by two Justices of the Peace, should have the right of appeal, while those who were in British Columbia, etc., tried and convicted without any reference to their consent, and possibly against their will, under the same paragraphs (a) and (f) of the section, have no right of appeal, would, to my mind, be adopting a view at variance with the declared and manifest object of the statute, derogatory to the liberty of the subject, and entirely unwarranted as far as I can see by the words of the Act itself. Even were the section open to two constructions, the reasonable one should be adopted, and the unreasonable one rejected, *O'Brien* v. *Cogswell*, 17 S.C.R. 444 ; *Plumstead Board of Works* v. *Spackman*, 53 L.J. M.C. 142. I must, therefore, hold that the defendants herein have a right of appeal from the conviction complained of, and am prepared to deal with same if otherwise regularly before me.

Judgment.

Appeal heard and defendants released on their own recognizances.

IN RE SHARP.

BOLE, L.J.S.C.

1896.

June 15.

IN RE SHARP

Creditors' Trust Deeds Act, 1890—Execution—Exemption—Selection of—Statute regarding procedure—Retroactive.

A deed of assignment of the estate and effects of insolvents for the benefit of their creditors, executed on 26th March, 1896, pursuant to the Creditors' Trust Deeds Act, 1890, excepted "such personal property as may be selected by the said debtors under the Homestead Act and Homestead Amendment Act, 1890."

Held, That the *onus* was on the claimant to shew that the claim was not within the exception to the right of exemption provided by section 10 of the Homestead Act, 1890, as amended by the Act of 1893, section 2, in regard to goods seized in "satisfaction of a debt contracted for or in respect of such identical goods," and in the absence of evidence upon the point the claim was disallowed.

Semble, The Homestead Act Amendment Act, 1896, Cap. 23, Sec. 2, directing the method of selecting the goods proposed to be exempted is retroactive in its effect, as regulating procedure, and applied to the claim under the deed in question though passed after the date of the deed, and that the claim was also invalid for want of compliance with that statute.

APPLICATION by a Trustee for creditors by originating summons for the direction of the Court as to whether the insolvents were entitled to $500.00 worth of the property conveyed by them to the trustee by deed of assignment under the Creditors' Trust Deeds Act, 1890, executed on 26th March, 1896, pursuant to a term in such deed excepting such personal property as might be selected by the said debtors under the Homestead Act and Homestead Amendment Act, 1890. The application was argued at Vancouver before BOLE, L.J.S.C.

Statement.

H. C. Shaw, for the Trustee.

A. Williams, for the insolvents.

R. L. Reid and *J. A. Russell*, for creditors.

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BOLE, L.J.S.C. : In this matter the claimants are applying for an order declaring them entitled to a homestead exemption of $500.00 worth of personal property out of the goods assigned by them to Mr. Weart for the benefit of their creditors.

It is contended for the debtors that this $500.00 worth of personal property never passed to the assignee by reason of the following clause in the deed of assignment : " Save and except such personal property as may be selected by the said debtors under the Homestead Act and the Homestead Amendment Act, 1890," and that their rights are measured by the deed of 26th March, 1896, without any reference to the Homestead Act of 1893, Cap. 16, which by section 2 provides : " Section 10 of the Homestead Act is hereby amended by adding thereto the following words, ' Provided

Judgment.

that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels ;" and Stat. 1896, Cap. 23, Sec. 2, further enacts as follows : " 2. Section 10 of the Homestead Act and section 2 of the Homestead Act Amendment Act, 1893, are hereby repealed, and the following enacted in lieu of said section 10 :" "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 : Provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels. Provided further, that this section shall not be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock in trade of his business. No evidence has been offered to shew that the goods now claimed under the exemption are not within the purview of Section 2 of

Cap. 16 of 1893 ; and if the Statute of 1896 applies, as I am inclined to think it does, on the ground that it relates to matters of procedure and would be therefore retrospective— *Gardner* v. *Lucas*, 3 App. Cas. 582 ; *Kimbray* v. *Draper*, 37 L.J.Q.B. 80 ; *A.-G.* v. *Theobald*, 24 Q.B.D. 560 ; *Wright* v. *Hale*, 30 L.J. Ex. 40 ; *Jones* v. *Bennett*, 63 L.T. 705 ; *Dibb* v. *Walker* (1893), 2 Ch. 429 ; *Kemp* v. *Wright* (1895), 1 Ch. 121–26 (C.A.)—the debtors' contention must fail. In any event I do not think the debtors can be heard to say that they have, by such a deed as the present one in the absence of a clearly expressed assent of all other creditors, rendered futile statutory provisions passed for the protection of creditors, one of which Acts was in force three years before the deed was executed. Furthermore, they are asking for a privilege (*Rideal* v. *Fort*, 25 L.J. Exch. 204), and the *onus* of clearly proving themselves entitled to it, under the existing law, lies on the claimants ; and they have failed to satisfy me that, even having regard only to the Act of 1893, leaving the Statute of 1896 out of the question, that they are entitled to the exemption which they seek. I therefore dismiss the application of the debtors for a homestead exemption, with costs.

Judgment.

Application dismissed.

WALKEM, J.

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KNOTT v. CLINE ET AL

IN THE COUNTY COURT OF VICTORIA.

H. T. KNOTT, PLAINTIFF v. W. J. CLINE (Contractor) AND JOHN LEANDER BECKWITH (owner), DEFENDANTS.

Mechanic's Lien Act, 1891—No lien for materials—Affidavit for lien—Particulars of work done—Insufficient statement of.

In an affidavit for a mechanic's lien the particulars of the work done were stated as follows: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of $123.00."

Held, insufficient, and plaintiff nonsuited.

ACTION against the defendant Cline, as contractor, for balance due for brick and stone work and setting tiles in the house of the defendant Beckwith (owner), and to enforce a mechanic's lien against the property in respect thereof. The affidavit fyled in support of the lien was as follows:

"I, Herbert Thomas Knott, of No. 14 Milne Street, in the City of Victoria, British Columbia, make oath and say: 1. That I, Herbert Thomas Knott, of No. 14 Milne Street, Victoria, aforesaid, claim a mechanic's lien against the property or interest hereinafter mentioned, whereof John Leander Beckwith, of No. 40 Johnston Street, in the said City of Victoria, is owner.

Statement.

2. That the particulars of work done are as follows: For brick and stone work and setting tiles in the house, situate upon the land hereinafter described, for which I claim the balance of $123.00.

3. That the work was finished or discontinued on or about the 29th February, 1896.

4. That I was in the employment of Walter Jefferson Cline, contractor for the work in respect of which the lien is claimed, until the above mentioned date.

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5. That the sum of $123.00 is owing to me in respect of the same, and was due, one half thereof on 29th February, 1896, and the remaining half thereof on 19th April, 1896.

6. That the description of the property to be charged is as follows: All and singular that portion of Lot number 28 (twenty-eight) of sub-division of sub-lot number 39 (thirty-nine), Fernwood estate, in the City of Victoria (Map 164), being forty-five feet frontage on Fernwood Road, by one hundred and thirty feet."

The action was tried by WALKEM, J., sitting as a Judge of the County Court, on the 18th July, 1896.

It appeared at the trial that the defendant Beckwith was owner of the equity of redemption only; that the plaintiff had agreed to do the work and supply the materials for one price, and that at the time the action was brought, March 28, 1896, only one half the amount was due, the other half not being due until 19th April, 1896, as appeared by the affidavit for lien.

Statement.

F. B. Gregory, for the defendant Beckwith: The affidavit is insufficient. The residence of the plaintiff is insufficiently stated. It should appear whether the place stated is the business place or private residence. The particulars of the work done are not given. The statement that the claim is for brick and stone work and setting tiles is too general. The items should be given in detail, *Smith* v. *McIntosh*, 3 B.C. 26; *Haggerty* v. *Grant*, 2 B.C. 176. The interest to be charged is not stated. There is a lien only against the interest of the owner at the time of the contract, or afterwards acquired by him, see Stat. B.C. 1891, Cap 23, Sec. 4. It should appear for certain whether the owner's interest is a fee or equity of redemption, and if the property is mortgaged the mortgagee should be a party to the action, Holmestead on Mechanics' Liens, Ed. 1888, p. 73. The statement of the time when the work was completed, as "on or about," etc., is insufficient, *Reg.* v. *St. Paul*, 7 Q.B. 232; *Larsen* v. *Nelson & Fort Sheppard Ry.*, 4 B.C. 151.

Argument.

There is no lien for materials, and it is impossible to separate the materials from the labour in this claim, *Albion*

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Iron Works v. *A.O.U.W.* (*a*) ; *Haggerty* v. *Grant*, 2 B.C. 176.

H. D. Helmcken, Q.C., contra: As to the non-statement of the interest, the effect of section 7 of the Act is that unless notice to the contrary is given the person in possession is to be considered as the owner. The mortgagee is only a necessary party where the lien is sought to be enforced against some one else than the owner, *i.e.* in respect of the value as increased by the improvement, *Douglas* v. *Chamberlain*, 25 Gr. 288. The particulars of the work done, etc., in the affidavit are sufficient. The affidavit is in the form provided.

WALKEM, J.: I think that the particulars of the work done in respect of which the lien is sought are insufficiently stated in the affidavit and are not such particulars as are contemplated by the Act, which has not been complied with either in letter or spirit.

Judgment.

The Act does not give a lien for materials ; and as the amount of the claim for materials and for work is not separated, it is impossible to ascertain the value of the work done.

Plaintiff nonsuited.

NOTE (*a*).—This was an appeal from a judgment of CREASE, J., sitting as a Judge of the County Court, declaring that under the Mechanics' Lien Act, C.S.B.C. 1888, the plaintiffs had a valid and subsisting lien against the building in question, and the lot on which it was erected, owned by the defendants, for materials used in the construction of the building. The defendants appealed to two Judges of the Supreme Court, and the appeal was argued on 13th June, 1895, before DAVIE, C.J., and WALKEM, J., who held (in a verbal judgment) that the question was governed by the Mechanics' Lien Act, 1891, which, by section 30, repealed all antecedent Acts, and, as it conferred no right to a lien for materials, such lien did not exist. *P. S. Lampman* for the appeal. *A. P. Luxton, contra.*

ELWORTHY v. THE CORPORATION OF THE CITY OF VICTORIA.

DAVIE, C.J.

1896.

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Municipal Corporations—Diversion of corporate funds to unlawful purpose—Injunction—Parties to action.

The Municipal Corporation of the City of Victoria having by specia resolution appropriated $5,200.00 to defray the cost of constructing a bridge over navigable water, part of a public harbour within the city limits, did not obtain the sanction of the Dominion Government to the work, and proceeded to execute it in such a way as to interfere with navigation. Upon information by the Attorney-General of Canada, an injunction was granted restraining the continuation of the work.

This action was then brought by the plaintiff individually as a ratepayer to restrain the Corporation from expending any part of the $5,200.00 in payment for the work.

Held, That an injunction should be granted restraining the application of the money to any further construction of the bridge, but refused as to payment for work *bona fide* done upon that part of it already completed.

As to the frame of the action :

1. That the Provincial Attorney-General was not a necessary party.
2. That the plaintiff should sue on behalf of himself and all other ratepayers, except the Aldermen.
3. That both the Corporation, and the members thereof responsible for the illegal action, should be parties defendants.

MOTION by the plaintiff to continue until the trial of the action an *interim* injunction granted by DAVIE, C.J., restraining the defendant Corporation from paying any monies of the Corporation to any persons in respect of work or materials on the Point Ellice Bridge, or from paying to any persons the sum of $5,200.00 appropriated by resolution of the Municipal Council of the said Corporation

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or any part thereof. The motion was argued before DAVIE, C.J., on 30th July, 1896.

George Jay, Jr., for the motion.

W J. Taylor, contra.

Cur. adv. vult.

July 31, 1896.

DAVIE, C.J.: This is an action brought by the plaintiff as a ratepayer of the Corporation to restrain the Mayor and Aldermen from paying any monies of the Corporation to any person or persons for and in respect of work done on, or material supplied for or in connection with the erection of a pile bridge at Point Ellice, in the City of Victoria; and this is an application on behalf of the plaintiff (upon notice) to continue until the hearing an injunction granted by me on the 28th instant, restraining the defendants until a time which is now past, from paying any monies of the Corporation to any persons in respect of work or materials on the Point Ellice Bridge, or from paying to any persons the sum of $5,200.00 appropriated by the resolution of the Municipal Council on 25th June, 1896, or any part thereof. As the matter is of much urgency, I shall at once state the conclusions which the limited time at my disposal has enabled me to arrive at.

Judgment.

The facts giving rise to the proceedings, as detailed in the affidavits, shew that a bridge over a portion of Victoria Harbour, between Work Street and the Indian Reserve, Victoria West, and over which a large traffic passed daily, collapsed on 26th May last, by the breaking away of one of the spans, and that since the collapse of the bridge, until recently when the E. & N. Railway bridge was by arrangement with the company brought into requisition, it has been impossible to take vehicles between the city and the town of Esquimalt, except by a circuitous route of several miles.

It appears that nothing was done by the Corporation to restore communication until the 24th June, when the Council passed an appropriation of $5,200.00 for the purpose of replacing the defunct bridge with a temporary structure upon piles to be driven in rows at every sixteen feet. This work being immediately commenced was objected to on behalf of the Dominion Government as being an obstruction to navigation and unlawful under Rev. Stats. Can., Cap. 92, which enacts that no bridge, etc., shall be constructed so as to interfere with navigation unless (as was not the case) the site thereof has been approved by the Governor-in-Council and the plans approved by the Government. The Corporation, notwithstanding notice from the resident engineer, went on with the work, acting on the contention that the new pile bridge did not impose a greater obstacle to navigation than a former bridge did, which had been wholly removed and had ceased to exist upwards of ten years ago.

Judgment.

On 24th July, instant, upon complaint of the Attorney-General for Canada, an injunction was granted by this Court restraining the defendants from further proceeding with the objectionable structure, on the ground that its erection is unlawful.

The present action is now brought to prevent the Corporation paying out any portion of the $5,200.00 voted by them for the construction of the pile bridge, or any other monies of the Corporation in connection therewith.

Whilst it appears to be settled law that a Corporation will be restrained from applying its monies to unlawful purposes, or to purposes not authorized by law (*Atty.-General* v. *Aspinall*, 2 Myl. & Cr. 613 ; *Atty.-Gen.* v. *Mayor of Norwich*, 2 *ibid.* 406), yet other considerations arise here.

The officers of the Corporation, wrongfully as it may be, have given contracts for the works, which have been partially and in some places wholly executed. These

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contracts were undertaken and executed by those engaged therein in good faith, with a body corporate which has, under the Municipal Clauses Act, Sec. 50, Sub-sec. 122, abundant powers to provide for making, preserving, repairing etc., roads, bridges and highways. The persons contracting with the Corporation were not supposed to know, neither were they concerned to enquire, whether in their plans for restoring communication the Corporation were impeding navigation, or whether they had or had not obtained the permission of the Dominion Government so to do. Consequently, it seems clear that the injunction, so far as it restrains the Corporation from paying for work and contracts already done and executed, must be discharged. The Corporation cannot be restrained from paying its debts. The injunction, however, will be continued to restrain the defendants from entering into or further proceeding with any contracts or works in pursuance of their projected pile bridge.

Judgment.

It may be well for the plaintiff to consider what form of remedy he shall seek in this action. His grievance would appear to be not so much against the Corporation as against the members thereof. The mayor and aldermen are trustees of the civic property and funds, and would seem to be liable for wasting and squandering the property entrusted to them, the same as private trustees are for wasting trust funds. By the English Corporation Reform Act, and the decisions under it, the individual responsibility of aldermanic bodies has been defined.

Before that Act, as pointed out by Vice-Chancellor ESTEN, in *Patterson* v. *Bowes*, 4 Grant's Chancery Rep. 180, "A corporate body could dispose of its property as it pleased. It could have wasted, alienated or destroyed it. The Corporation Reform Act, however, defined the purposes to which corporate property was in future to be applied, in such a manner as to impress it with a trust, which gave the Court of Chancery jurisdiction to prevent its mis-appli-

cation ; and a number of cases almost immediately arose in which corporate property which had been applied in a manner inconsistent with the provisions of the Act, was reclaimed on the ground of trust, and the jurisdiction of the Court to compel the restitution of such property was established. "The directors and other officers of the Corporation, though constituent members and composing the governing body of the Corporation, are regarded as its agents, and if they are acting wrongfully may be severed from the corporate body and proceeded against by the Corporation itself for the purpose either of prevention or correction." And the same right attaches to any ratepayer suing on behalf of himself and the other ratepayers when it is impracticable to use the name of the corporation. See also *Newcastle* v. *Atty.-General*, L.R. (1892) App. Cas. 568; *A.-G.* v. *Newcastle*, L.R. 23 Q.B.D. 492.

Judgment.

It will be necessary also to consider the frame of this suit. Whilst *Paterson* v. *Bowes* decides that the Attorney-General is not a necessary party, it would seem that the plaintiff should sue on behalf of himself and all other ratepayers, and both the Corporation and the members of the Corporation in their individual capacity would seem to be necessary parties, see *Morrow* v. *Connor*, 11 Ont. Prac. 423. As the defendant aldermen are of course themselves ratepayers, it follows they cannot be co-plaintiffs against themselves. The action therefore should be by the plaintiff on behalf of himself and all other ratepayers except the defendant aldermen.

The order, therefore, will be to discharge the order for injunction so far as it restrains the payment for materials or work already delivered or done, with leave to plaintiff to amend in the manner suggested. The costs will be costs in the cause.

Order accordingly.

BOLE, L.J.S.C.

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UNITED TRUST COMPANY v. CHILLIWACK.

UNITED TRUST v. CHILLIWACK

Municipal Corporation—Contract—Seal—C.S.B.C. 1888, Cap. 88, Secs. 71, 83—Municipal Act, 1892, Secs. 21, 82—Estoppel—Ratification.

Section 82 of the Municipal Act, 1892, providing: "Each Municipal Corporation shall have a corporate seal, and the Council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council," is imperative, and applies to all contracts of the Corporation.

That the contract was in fact wholly executed, and the work completed and accepted by the Corporation, and part payment therefor made, and that the clerk of the Corporation had acknowledged an order by the contractor in favour of the plaintiffs. *Held*, not to operate to cure the objection that the contract was not under seal.

Statement.

ACTION by the plaintiffs as assignees of one Beaumont, of balance due by the Municipal Corporation of Chilliwack to him, for work done upon roads and bridges for the Corporation. The facts fully appear from the headnote and judgment.

E. P. Davis, Q.C., for the plaintiffs.

Alexander Henderson and *P. McL. Forin*, for the defendants.

Judgment.

BOLE, L.J.S.C.: The plaintiffs' claim is founded upon an alleged equitable assignment of a certain debt alleged to be due by the defendant Corporation to one Samuel Beaumont, with respect to a contract for road and bridge work, and for which he gave an order upon the defendant corporation in favour of the plaintiffs.

It is clear from the evidence that Samuel Beaumont had a contract with the defendant Corporation with respect to certain work upon the Hopedale road, and that the said work was duly completed by him, and the amount thereof

paid to his workmen by his order, save the sum of $99.35, which was paid to himself direct, subsequent to his having given the order in question in favour of the plaintiffs and communicated same to the defendant Corporation.

The contract, however, was not entered into under seal, as required by section 82 of the Municipal Act, 1892. The first question which I have to decide is: was there a contract which was capable of enforcement against the defendant Corporation, who have pleaded the want of seal? The law on the case was very fully and ably argued by the learned counsel for the plaintiffs and defendants, and it would appear as if the two leading cases on the subject were still the old familiar case of *Bernardin* v. *The Municipality of North Dufferin*, 19 S.C.R. 581, and *Young* v. *The Corporation of Leamington*, 8 App. Cas. 517.

The principal question, as I understand it, which I have to decide is whether, in my opinion, the provision here relied on is imperative or directory; because, if it be imperative, it falls within the purview of *Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48, approved in *Young* v. *The Corporation of Leamington*, *supra*.

Judgment.

Looking at C.S.B.C. 1888, Cap. 88, I find that section 71 enacts as follows: "Each Municipal Council shall have a corporate seal, and the Council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council."

Section 83 provides: "83. The Council may, out of their own body, from time to time, appoint committees, consisting of such members as they think fit, for any purposes which in the discretion of the Council would be better regulated and managed by means of such committees; but all proceedings of such committees shall be subject to the approval of the Council."

Then, in order to make the provision more explicit, and to demonstrate its imperative nature, we find that section 82 of the Municipal Act, 1892, enacts: "82. Each Municipal

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Council shall have a corporate seal, and the Council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council."

And section 21 of the same Act, sub-section (*c*), provides: "(*c*) The Mayor or Reeve shall have power to appoint such members of the Council as he may deem proper to be standing committees for any purposes which he considers would be better regulated and managed by means of such committees, but the proceedings of all such committees shall be subject to the approval of the Council, and no debt may be contracted or money expended by the authority or at the direction of any such committee in excess of $50.00 at a time, unless first sanctioned by the Council in manner provided by statute or by-law or resolution of the Council."

Section 174 of 38 and 39 Vic. Cap. 55, Imperial (1875), sub-section 1, enacts: "1. Every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority."

Judgment.

Section 82 and section 21, sub-section (*c*) of the Municipal Act, 1892, read together, as it appears to me they ought to be in order to arrive at the true intention of the Legislature, convey to my mind that the Legislature intended to say, and did in effect enact: "Every contract made by a Municipal Council, whereof the amount or value exceeds fifty dollars, shall be in writing and sealed with their corporate seal."

I, therefore, if I may be permitted to do so, would quote as peculiarly applicable to the case the words of Lord BRAMWELL, in *Young* v. *Leamington*, *supra*, at p. 528: "As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the common law; I must add that I do not agree in the regret expressed in having to come to this conclusion. The Legislature has made provisions for the protection of the ratepayers, shareholders

and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say that there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard for these safeguards, and improvident engagements are entered into. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement."

Under these circumstances, and holding the view I have already expressed, it is almost unnecessary to say that if there was no contract that could be legally enforced by Beaumont, his assignee could be in no better position than himself. The plaintiffs have further raised the question of estoppel, and rely upon the clerk's letter acknowledging receipt of Beaumont's order in favour of the plaintiffs. I do not think the doctrine of estoppel can be successfully invoked in cases like the present, where a municipal corporation, a representative public body, are imperatively bound by statute to enter into their contract in a particular mode, *Ashbury Ry. Co.* v. *Riche*, L.R. 7 H.L. 653. But it does not become necessary to discuss that question further in the present case, as I do not think that the conduct of the defendant Corporation constituted a legal wrong, upon which the plaintiffs could rely by way of estoppel, *Bishop* v. *Balkis Consolidated Co.*, 59 L.J.Q.B. 565, (C.A.); *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *Ogilvie* v. *West Australian Mortgage Corporation*, 65 L.J.P.C. 46; *Chadwick* v. *Manning*, 65 L.J.P.C. 42.

Judgment.

Judgment will, therefore, be entered for the defendants, with costs.

Judgment for defendants.

SUPREME COURT

MCCREIGHT, J.
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PAISLEY v. CORPORATION OF CHILLIWACK.

Municipal Act, 1892. Section 82—Contract—Seal.

Section 82, *supra*, providing, "Each Municipal Corporation shall have a corporate seal, and the Council shall enter into contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council," is imperative and applies to all contracts by Municipal Corporations subject to the Act.

APPEAL to two Judges of the Supreme Court from a judgment of SPINKS, Co. J., at the trial at Chilliwack, whereby the plaintiff was non-suited. The appeal was argued before MCCREIGHT, J., and BOLE, L.J.S.C., at Vancouver.

R. L. Reid, for the appeal.

Alexander Henderson, contra.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: We are of opinion that the contract must be under seal, and that the language of section 82 in the Municipality Act of 1892, is imperative, not directory. To allow a representative public body to evade the provision of an Act made for their protection, would be something which this Court should not be expected to do. *Ashbury Ry. Co.* v. *Riche*, L.R. 7 H.L. 653, seems in point. The judgment of the Court will, therefore, be, that the judgment appealed from be affirmed and the appeal dismissed, each party to the appeal to bear his own costs thereof.

Judgment of BOLE, L.J.S.C.

BOLE, J., concurred, and referred to *Chadwick* v. *Manning*, 65 L.J.P.C. 42, on the question of estoppel, and also *In re Eddystone Marine Ins. Co.*, 62 L.J. Ch. 742; *Foster* v. *Tyne Pontoon and Dry Docks Co.*, 63 L.J. Q.B. 50.

Appeal dismissed.

SODER V. YORKE.

BOLE, L.J.S.C.

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SODER v. YORKE

Accord and satisfaction—Solicitor—Right to proceed for costs after settlement by parties.

Defendant after service of a writ claiming $152.16 settled with plaintiff personally by payment of $60.00, taking a receipt in full. Plaintiff's solicitor, being unaware of the settlement, signed judgment for the full amount and costs.

Upon motion by the defendant to set aside the judgment as a breach of the settlement:

Held, That as there was no release under seal of the balance of the debt, or consideration for the agreement to accept a part in full discharge, the plaintiff was entitled to maintain the judgment.

The plaintiff consenting to accept the amount of the settlement:

Held, That the plaintiff's solicitor had a right to maintain the judgment as to his costs, and, *nem. con.* the judgment was allowed to stand for the amount of the settlement and costs.

MOTION by defendant to set aside a judgment in default of appearance. The facts fully appear from the headnote and judgment. Statement.

J. H. Senkler, for the defendant.

E. A. Magee, for the plaintiff.

BOLE, L.J.S.C.: This matter comes up upon a motion to set aside a judgment herein, obtained by the plaintiff against the defendant. As I gather from the affidavits, the plaintiff, some considerable time ago, instructed Mr. *Magee*, a solicitor practising in Vancouver, to proceed to recover from the defendant a certain debt ($152.16) due to him for wages. Some delay occurred in the issue of the writ of summons, but after it was issued it appeared the defendant, at Townsend, U.S A., paid the plaintiff the sum of $60.00 and obtained a receipt in full from the plaintiff for the amount of his claim, judgment having been obtained and execution issued, notwithstanding this payment and receipt (no notice of which appears to have been communicated to Mr. *Magee* until after execution was issued). The defendant now Judgment.

BOLE, L.J.S.C. moves to set aside the judgment by reason of the alleged agreement between himself and the plaintiff.

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I doubt that, in view of *Foakes* v. *Beer*, 9 App. Cas. 605, the agreement relied on, which was not under seal, can be upheld, as in that case it was decided that an agreement not under seal, between a judgment debtor and creditor, made in consideration of the creditor paying down part of the judgment debt and costs, and on further condition of his paying to the creditor or his nominee the residue by instalments, the creditor would not take any proceedings on the judgment, was *nudum pactum*, being without consideration, and did not prevent the creditor, after payment of the whole of the debt and costs, from proceeding to enforce payment of the interest upon the judgment.

Judgment.

But, it having been agreed by all parties hereto that, notwithstanding the present shape the motion is in, I shall be at liberty to vary the judgment in such a way as I may think proper, and to make such order with respect to the costs of the judgment and execution, and of the motion, and of this order, as I may think fit; and, having come to the conclusion that the plaintiff accepted the sum of $60.00 in discharge of his debt, the defendant at the time being well aware that proceedings had been instituted against him to recover the claim; and also knew the name of plaintiff's solicitor, but neglected to communicate the matter to him, and allowed execution to issue; and the plaintiff's solicitor appearing to have acted properly throughout the transaction, and as I think he should not be deprived of his costs, I direct that the judgment herein shall be deemed to be only for the sum of $60.00, with costs, same to be varied and amended accordingly, and costs of execution properly incurred; and that, after giving credit for the sum of $60.00 already received, execution may be levied for the balance, and costs of this motion.

Order accordingly.

LORING v. SONNEMAN.

DRAKE, J.

[In Chambers.]

1896.

Aug. 19.

LORING v. SONNEMAN

Practice—Writ of summons—Service after the twelve months—Appearance under protest—Laches.

Held, 1. An appearance does not waive a right to object to the jurisdiction if notice of the objection be given to the plaintiff.

2. A notice appended to an appearance, that it is fyled under protest, is a sufficient notice for that purpose. *Fletcher* v. *McGillivray*, 3 B.C. 50, questioned.

3. A delay of four months, unaccounted for, from the date of the expiry of a writ, is fatal to a motion to renew the writ.

MOTION by the plaintiff to renew a concurrent writ of summons for service outside the jurisdiction, which had been served after it had expired by the lapse of twelve months from the date of the original writ. It appeared that the defendant had fyled an appearance containing a note that same was entered under protest. Four months had elapsed between the date of the expiry of the writ and the making of the motion. The defendant had not applied to set aside the service.

Statement.

DRAKE, J.: Plaintiff applies to renew a writ which expired April, 1896. It appears that after action brought plaintiff discovered both defendants were out of jurisdiction; he obtained an order to issue concurrent writs, one of which was served in due course; the other was not served until after the twelve months for which the original writ was in force had expired.

Judgment.

A concurrent writ has no longer life than the original writ.

It is objected that after a writ has expired it cannot be renewed, see however *Eyre* v. *Cox*, 46 L.J. Ch. 316.

In this case the defendant, who was served some months after the expiration of the twelve months, entered an appearance.

DRAKE, J.

[In Chambers].

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A defendant improperly or irregularly served cannot treat the writ thus served as a nullity, *Hamp* v. *Warren*, 11 M. & W. 103. He must apply to set it aside, and this he can do without entering an appearance, see Rule 70. Here the defendant has appeared, and under the appearance is written a note stating that the defendant appears under protest.

In the case of *Fletcher* v. *McGillivray*, 3 B.C. 50, some remarks are made on the subject of appearance under protest being unknown under our rules. In that case, *Frith & Sons* v. *DeLas Rivas*, 69 L.T. 383, in which an appearance under protest was recognized as valid under a rule which is not in our Code, was not brought to the attention of the Court, but that case was decided on *Mayer* v. *Claretie*, 7 T.L.R. 40, where it was held that an appearance unqualified by protest did not take away the right to object to the jurisdiction if notice of the objection was given by the plaintiff at the time of entering the appearance, as it may be considered that this appearance conveys notice of an intention to raise the question of jurisdiction.

Judgment.

The defendant has taken no step to set aside the service of the writ, and the plaintiff seeks to renew the writ in order presumably that fresh service may be effected.

I think the delay of four months unaccounted for too great *laches*, and the application is refused, with costs.

Application refused.

GILL v. ELLIS.

DRAKE, J.

[In Chambers].

1896.

Oct. 12.

GILL
v.
ELLIS

Practice—Second commission to same place—Costs.

A second commission to New York granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action.

APPLICATION by the defendant for a commission to New York to examine a witness for the defendant. It appeared that the defendant had already obtained a commission to the same place, but that the witness in question was absent from that city at the time of its execution. Statement.

L. P. Duff for the defendant.

A. P. Luxton, contra, cited *Crowther* v. *Nelson*, 7 T.L.R. 793.

DRAKE, J.: The defendant should have obtained an order to extend the time for the return of the former commission and examined the witness under it. He must pay the costs thrown away upon this commission in any event of the action. Judgment.

Order made accordingly.

GETHING v. ATKINS.

FULL COURT.

1896.

Oct. 19.

GETHING v. ATKINS

County Court Appeal—Full Court—Setting down—Time—Rule 673-78—Stat. B.C. 1893, Cap. 10, Sec. 17.

Notice of an appeal from a judgment of SPINKS, Co. J., was served on 20th September, 1895. The appeal was never set down for argument in the Supreme Court and no further step was taken by the appellant for over a year, when respondent served on the appellant's solicitor notice of motion to dismiss the appeal. In answer to the motion the appellant produced an affidavit that the reason for not proceeding with the appeal was that he had been unable to obtain the notes taken at the trial by the learned County Court Judge.

Held, per WALKEM and DRAKE, JJ., dismissing the appeal, That the appellant had no excuse for not setting down the appeal within the time limited by Rule 678. Leave to extend the time for appealing refused.

Per MCCREIGHT, J. (dissenting), That the Court under the circumstances should now extend the time for appealing, upon payment of costs of the motion.

MOTION to dismiss an appeal from a judgment of SPINKS, Co. J., at the trial. The facts fully appear from the judgment and headnote.

Statement.

E. P. Davis, Q.C., for the motion, cited *Ellington* v. *Clark*, 38 Ch. D. 332; *Norton* v. *L. & N. W. Ry. Co.*, 11 Ch. D. 118. The fact that the notes of the County Court Judge were not procurable would perhaps have been a ground for postponing the argument of the appeal but is no excuse for not setting it down as required by the Stat. B.C. 1893, Cap. 10, Sec. 17, and Sup. Ct. Rule 678. It might possibly also have supported an application for extension of time for appealing if made at the proper time, but is no answer to the present motion.

Argument.

Charles Wilson, Q.C., contra: The appeal ought to have been set down, but the Court can cure that irregularity by now extending the time, *In re Manchester Economic Building Society*, 24 Ch. D. 488. The appeal could not have been heard owing to the absence of the notes.

McCREIGHT, J.: The appellants should have set down their appeal of which they had given notice as required by the rules. I think, however, that the Court should now extend the time for setting down the appeal upon payment by the appellant of the costs of this motion.

WALKEM, J.: I regret that I am unable to agree with my brother McCREIGHT. It is of the first consequence that the members of the profession should understand that this Court is governed by the rules and by the practice laid down in the authorities. A mistake has been made by the appellant in not perfecting his appeal. He must bear the consequences of that mistake. The right of appeal is subject to certain pre-requisites and they must be observed. The Court has power to extend the time for appealing, but I see no reason for doing so. The fact that the notes taken at the trial were not procurable is no excuse for not setting down the appeal in this Court.

Judgment of WALKEM, J.

DRAKE, J.: I agree with my brother WALKEM. The appellant has no excuse for not setting down the appeal within the time limited by the rules. I do not think that a mistake of that kind is any ground for now, after the lapse of a year, extending the time for appealing.

Judgment of DRAKE, J.

Motion allowed and appeal dismissed with costs.

CRANSTOUN v. BIRD.*

FULL COURT.
1896.
Oct. 19.

CRANSTOUN
v.
BIRD

Practice—Evidence—Commission—Right of non-resident defendant—affidavit.

A defendant resident outside the jurisdiction has a *prima facie* right to a commission to take his own evidence for use at the trial.

An affidavit that such defendant was resident in Australia and manager of a woollen factory, held sufficient to support an order for a commission to examine him though it did not state that he could not personally attend at the trial. The fact that he could not do so without great inconvenience was a reasonable inference from the facts deposed to.

APPEAL from an order of BOLE, Co. J., sitting as a local Judge of the Supreme Court, made upon the application of the defendant Bird for the issue of a commission to Australia to examine him as a witness on his own behalf at the trial. The affidavit fyled in support of the application stated that Bird was resident in Australia and was manager of a large woollen factory there, and that his evidence was necessary and material, etc., but did not state that he could not attend the trial at Vancouver.

Statement.

Charles Wilson, Q.C., for the appeal: The affidavit is insufficient. A party asking to have a witness examined abroad must shew clearly that he cannot be brought to the place of trial, *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137.

Argument.

E. P. Davis, Q.C., contra: The case of a non-resident defendant is different from that of an ordinary witness. Such a defendant has a *prima facie* right to a commission, *New* v. *Burns*, W.N. (1894) 196; *Ross* v. *Woodford* (1894), 1 Ch. 38; *Wilson* v. *McDonald, et al*, 13 P.R. 6. As to the affidavit, the defendant being absent the affidavit had to be made by the solicitor. It might have

NOTE—* See 4 B. C. 569.

been drawn that he had reason to believe, etc. every reasonable inference from the main fact that Bird is in Australia and manager of a large concern. That he cannot come here to the trial without great loss and inconvenience is a necessary inference which the Court must draw. An appellate Court will not interfere with an order for a commission without very strong grounds, as it is a discretionary order, Ann. Prac. 1896, p. 737.

McCREIGHT, J.: I cannot say that the discretion of the learned Judge was improperly exercised in granting the order. It appears to me that the defendant himself is more likely to suffer at the trial from his absence and the evidence having been taken on commission than the plaintiff. The application appears to have been perfectly *bona fide*. From ordinary knowledge of affairs it is likely that Bird would lose his situation if compelled to be absent from it for over three months, besides the question of expense. As to the affidavit, I think the fact deposed to, with the necessary inferences from it, is sufficient.

Judgment of McCREIGHT, J

WALKEM, J.: I agree. I would rather have found the usual allegations in the affidavit, but their absence has been explained satisfactorily and the inferences are unquestionable.

DRAKE, J.: I concur.

Appeal dismissed with costs.

CARSE v. TALLYARD.

DRAKE, J.
[In Chambers].
1896.
Oct. 16.

CARSE
v.
TALLYARD

Practice—Rule 70—Form of application to set aside writ for irregularity —Summons or motion—Plaintiff's address in writ.

An application to set aside a writ of summons for irregularity need not be by motion to the Court, but may be by summons in chambers, and objection that the defendant had no *status* to take out such summons without entering a conditional or other appearance, overruled.

The writ was in Form 2 of Appendix A. of the Rules, and gave the plaintiff's address as "Victoria, B.C."

Held sufficient.

APPLICATION by defendant by summons in Chambers to set aside the writ of summons and service thereof for want of a sufficient address of the plaintiff, under Rule 18.

Statement. The writ was in Form 2 of Appendix A, and the address was given as "Victoria, B.C." After the service of the Chamber summons and before the return thereof, the full address of the plaintiff was furnished by his solicitor to the defendant's solicitor.

Gordon Hunter for the plaintiff: We take the preliminary objection that the defendant has no *status* to issue this summons to shew cause, as he has not entered any appearance, conditional or otherwise. The application must be

Argument. by notice of motion, *Boyle* v. *Sacker*, 39 Ch. D. 249. (Drake, J., referred to *Black* v. *Dawson*, 72 L.T. 525.)

S. Perry Mills, contra: The defendant was not bound to enter a conditional appearance. Rule 70, *Fletcher* v. *McGillivray*, 3 B.C. 37.

DRAKE, J.: I will hear the application subject to the objection.

S. Perry Mills, on the main question, as to the insufficiency of the address, cited *Sherwood* v. *Goldman*, 11 P.R. 433; *Stoy* v. *Rees*, 24 Q.B.D. 748; Ann. Prac. 1896, cases cited under Order IV.

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Gordon Hunter, contra : The only provision under Order IV. of our rules in regard to writs issued by a solicitor is, (1) that the solicitor shall endorse the "address" of the plaintiff. With regard to plaintiff's suing in person, the provision is that the place of residence and place for service shall be given. In the forms of writs given in Appendix A., while it is provided in regard to writs in Form 1, that the name of the street and number of the house of plaintiff's residence be given, in regard to the form of writ No. 2, which is the form here, it is provided only that the plaintiff's address be given. It is submitted that "Victoria, B.C." is a sufficient address to satisfy Form 2.

Argument.

Judgment reserved.

DRAKE, J. : *Mr. Hunter* objects that the application to set aside the writ for irregularity should be by motion and not by summons.

As a general rule every application should be made in the first instance at Chambers, unless expressly required by statute to be made to the Court, Archbold's Q.B. Prac. 14th Ed., p. 1378.

Judgment.

The English Rule 30 of Order 12 uses slightly different language to our Rule 70. Our Rule says move on notice to set aside service—the English Rule says "serve notice of motion to set aside service."

Under the English rule, in *Clarke* v. *Laidlow*, decided Q.B.D. 12th March, 1884, it was held the application must be to the Court, see Archbold's Q.B. Prac., 14th Ed., 241, note *z*.

In our rule the language used "move on notice," although not so distinct means the same thing. But in *Black* v. *Dawson*, 72 L.T. 525, (1895) 1 Q.B. 848, this rule came under review by the Court of Appeal ; in that case an order for service out of the jurisdiction had been made.

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[In Chambers].

1896.

Oct. 18.

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The defendant moved the Divisional Court to have the order set aside. This motion was by way of appeal from the Judge at Chambers. The Court held, after consulting all the members of the Court of Appeal, that the proper and convenient practice would be for the defendant in the first place to apply to the Judge at Chambers to set aside the order and service of the writ, from which order an appeal could be had.

Such being the state of the case on this rule, I think I may safely follow the opinion of the Judges on Appeal, and declare that an application under this rule may be made to a Judge at Chambers and need not be by motion.

Judgment.

The summons is taken out to set aside the writ and service on defendant Tallyard, because the address of the plaintiff is given at "Victoria, B.C." The general form, Appendix A., No. 1, requires the name of the street and number of the house of the plaintiff's residence. Form 2, which is the form of writ used in the present action, requires after name and address for service of the plaintiff's solicitor the plaintiff's residence, but does not enter into the minute detail which is given in Form 1.

The full address of the plaintiff was given to the defendant's solicitor before hearing the summons, and therefore there was no necessity of bringing on the hearing. I cannot say that the writ is irregular, but it should be always borne in mind that where a plaintiff has a residence a particular description should be given. Under the circumstances there will be no order, costs in the cause.

Application refused.

THE GOLDEN GATE MINING COMPANY

v.

THE GRANITE CREEK MINING COMPANY.

BOLE, L.J.S.C.

1896.

Sept. 29.

FULL COURT.

Oct. 20.

GOLDEN GATE CO. *v.* GRANITE CREEK CO

Practice—Prohibitory injunction—Disobeying—Remedy—Attachment or committal—Rule 451—Endorsement—Service.

Upon motion for a writ of attachment against the manager of the defendant company for disobeying an injunction restraining the company, its agents, servants, etc., from blasting or depositing rock upon plaintiffs' mineral claim, it was objected: (1) Under Rule 451, that there was no memorandum of the consequence of his disobedience endorsed on the order. (2) That the notice of motion for attachment was not personally served on the manager but only on the solicitor for the defendant company.

Counsel had appeared for the manager and obtained several adjournments of the motion to obtain affidavits on the merits, which, finally, were not forthcoming.

Held, per BOLE, L.J.S.C., over-ruling the objections:

(1) That Rule 451 does not apply to prohibitory injunctions.

(2) That the want of personal service of the notice of motion upon the manager was waived by the adjournments at his request.

Upon appeal to the Full Court:

Held (*per* McCreight, Walkem and Drake, JJ.), allowing the appeal:

That committal and not attachment is the appropriate remedy for breach of a prohibitory injunction.

That personal service of a notice of motion is an essential pre-requisite to committal, and that the party applying in a case proper for committal is not absolved from the necessity for such personal service by moving for attachment instead of committal. *Browning* v. *Sabin*, 5 Ch. D. 511, distinguished.

That the objection of want of personal service of the notice was not waived by the adjournments.

Statement.

MOTION by plaintiffs for a writ of attachment against

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Robert Stevenson, manager of the defendant company, for disobeying an order for a prohibitory injunction against that company, its agents, servants, etc. The original order for the injunction was not served upon Stevenson. The order was afterwards amended, but the amended order was never passed or entered or served. Stevenson, it appeared, however, had notice of the order and amendment. Neither the notice of motion for the attachment, nor the affidavits in support thereof, were served upon Stevenson, but they were served upon the solicitors for the defendant company.

D. G. Macdonell for the plaintiff.

J. H. Senkler for the defendant company and Stevenson.

BOLE, L.J.S.C.: An application is made herein for leave to issue a writ of attachment against Mr. Robert Stevenson, manager of the defendant company, for disobeying the order of this Court. On 8th June, 1896, an injunction order was obtained *ex parte* restraining the defendants, their servants and agents, etc., from committing certain trespasses upon the plaintiffs' mining claim. The defendants moved to dissolve this order, and upon the motion coming on to be heard before the Hon. Mr. Justice McCREIGHT the injunction order with some variations was continued by consent. Subsequent to this amended order the acts now complained of were done by Mr. Stevenson, the defendants' manager, in utter disregard thereof. The matter has been down on the motion paper for four weeks, having been adjourned from time to time at request of defendants' counsel, to enable answering affidavits to be put in, yet notwithstanding the several adjournments no affidavit displacing the evidence offered by plaintiff has been fyled. From that uncontradicted statement it appears clear to me that Mr. Stevenson has acted with entire disregard of the amended injunction order. No attempt is made to justify his conduct, but his counsel now rely on the objections that service of the notice of motion for a writ of

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attachment should be personal instead of being made on his solicitor, and that the order should have the endorsement required under Rule 451.

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In the first place it may be that these technical objections now put forward for the first time after so many postponements in defendants' interests are made too late, and the irregularities if any have been waived, for although in a case involving the liberty of the subject appearance alone is not a waiver of irregularity (*Mander* v. *Falcke*, 1891, 3 Ch. 493), still no authority has been cited to extend this proposition so as to cover indefinite postponements at defendants' instance where the right to object is not specially reserved.

And *Rendell* v. *Grundy*, 1895, 1 Q.B. 20 (C.A.), points rather the other way. However, with respect to this point I do not feel called on to express an opinion, as it appears to me that the objection to mode of service is not in the present case tenable. *In re Morris*, 44 Ch. D. 151, it was held that where defendant had not entered an appearance, fyling the notice of motion was sufficient service under the Rules. As also *In re Evans*, 1893, 1 Ch. 252 (C.A.); and while in *In re Bassett*, 1894, 3 Ch. 179, a similar order was refused, there the circumstances were so peculiar that the decision does not in my opinion conflict with *In re Morris*, *supra*, or with *Browning* v. *Sabin*, 5 C.D. 511; see also *Howarth* v. *Howarth*, 11 P.D. 98, 99 (C.A.), and I therefore think the service effected herein of the notice of motion on defendants' solicitor was sufficient under the Rules. As to the endorsement required by Rule 451, I do not think the rule applies to a case like the present, and if it did, the order being a prohibitive one, *Selous* v. *Croydon Local Board*, 53 L.T. 209; *Hudson* v. *Walker*, 64 L.J. Ch. 204, would render it unnecessary. Such being the case, and as I am satisfied by the evidence on fyle, as well as from what has occurred before me in Court, that Mr. Stevenson was perfectly cognizant of the order of the Court, and with that

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knowledge committed a flagrant breach of the injunction, so much so that I cannot help saying that many of the remarks made by PEARSON, J., in *United Telephone Co.* v. *Dale*, 25 Ch. D., at p. 787, might be applied to the present case.

Order made.

From this judgment the defendant company appealed to the Full Court, and the appeal was argued before MCCREIGHT, WALKEM and DRAKE, JJ., on 20th October, 1896.

Charles Wilson, Q.C., for the appeal: The proper remedy for disobedience of the injunction was sequestration and committal, and not attachment, because the injunction was not mandatory but prohibitory, *i.e.* from depositing rock, etc., on plaintiffs' lands. Stevenson is not a party to the action. Rule 540 requires service of the affidavits (McCreight, J., even that may be waived, *Rendell* v. *Grundy*, 1895, 1 Q.B. 20). The want of personal service upon Stevenson of the notice of motion for the attachment is fatal to it, *In re Evans, Evans* v. *Evans*, 1 R. 468, 1893, 1 Ch. 252, and editor's note, p. 261; *Browning* v. *Sabin*, 5 Ch. D. 511; *Stockton Football Co.* v. *Gaston* (1895), 1 Q.B. 453; *In re Bassett* (1894), 3 Ch. 179. The adjournments did not constitute a waiver of the objections though they were not taken when the adjournments were asked for.

Argument.

D. G. Macdonell, contra: Where a notice of motion is given for a writ of attachment to issue against a defendant, service of such notice on the defendants' solicitor on the record is sufficient, *Browning* v. *Sabin*, 5 Ch. D. 511. The defendants being a company which acts through its principal officers, the solicitors represent such officers as a part of the company to the same extent as they represent the company as a whole. The adjournments constituted a waiver of the objection of want of personal service (Drake,

J., *Mander* v. *Falcke*, 1891, 3 Ch. 488, appears to shew the contrary). Attachment was the proper remedy, *C.P.N. Co.* v. *Vancouver*, 2 B.C. 298.

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McCREIGHT, J.: This is a case in which committal and not attachment is the appropriate remedy. Where the injunction is mandatory the defendant is attached and brought into Court to explain why he has not done what was required of him, and the process is for the contempt, of which he is given an opportunity of purging himself by compliance, and the proceeding is tentative in its nature. But where the injunction directs that something shall not be done and it is proved that in disobedience thereof it has been done, then the process is punitive, and an order to commit the delinquent to prison for that misconduct is the proper course. I agree with the note to *In re Evans*, *Evans* v. *Evans*, 1893, 1 Ch. at p. 261, and, although it was held in *Browning* v. *Sabin*, 5 Ch. D. 511, that service of a notice of motion for an attachment upon the solicitors on the record of the parties proceeded against was good service, yet I think that decision must be taken to apply only to attachments for breaches of mandatory injunctions as to which attachment is, strictly speaking, the proper remedy, and not to motions to punish for breaches of prohibitory injunctions as to which committal and not attachment was before the Judicature Act the only, and is now the only proper remedy, and that the obligation of personal service, always necessary in motions to commit, is not taken away by moving, in such a case, for a writ of attachment. *Mander* v. *Falcke*, 1891, 3 Ch. 488, is a sufficient authority that the adjournments of the motion did not operate as a waiver of this objection.

Judgment of McCREIGHT, J

WALKEM and DRAKE, JJ., concurred.

Appeal allowed with costs.

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1896.

Oct. 26.

LAPOINTE v. WILSON

LAPOINTE v. WILSON.

Practice—Changing venue—Preponderance of convenience—Fair trial.

Defendant moved to change the venue on the grounds of preponderance of convenience and residence of the majority of witnesses at the place of trial proposed. Plaintiff resisted the motion on the ground that a fair trial could not be had at the proposed place.

BOLE, L.J.S.C., refused the application, leaving it to the trial Judge to apportion the additional cost of trial in the venue as laid.

Statement. APPLICATION by the defendant by summons in Chambers to change the venue.

J. H. Senkler for the application.

G. E. Corbould, Q.C., for the plaintiff, *contra*.

BOLE, L.J.S.C.: In this case, which is an action for slander, the defendant moves to change the venue from New Westminster to Kamloops, and relies as a strong ground for so doing that five or six of his witnesses reside in the neighbourhood of Kamloops. The plaintiff resists the application on the ground that owing to the personal influence of the defendant, who is a well known cattle man, he apprehends he could not get a fair trial at Kamloops. Such being the case, on what principles should I act?

Judgment. In *Shroder* v. *Myers*, 34 W.R. 261, Lord ESHER said: "The defendants have to shew a serious injury to their case and no injury to the plaintiff for having the venue changed;" and in *Power* v. *Moore*, 5 Times L.R. 586, Lord COLERIDGE said: "The Courts ought not to interfere with the venue except on strong grounds;" *vide* also *Wheatcroft* v. *Mausley*, 11 C.B. 677.

The Berlin Piano Co. v. *Truaisch*, 15 P.R. 68, is authority for the proposition that upon a motion to change the venue it is necessary to shew an overwhelming preponderance of convenience in favour of the change; *vide* also to the same

effect *Standard Drain Pipe Co. of St. John's, P.Q.*, v. *Town of Fort William*, 16 P.R. 404; *Halliday* v. *Township of Stanley*, 16 P.R. 493; and under the authority of *Roberts* v. *Jones*, and *Willey* v. *Great Northern Ry. Co.*, 1891, 2 Q.B. 194, I decline to interfere with the venue as laid, leaving the presiding Judge at the trial to do justice by apportioning the costs if he thinks fit. The application will be dismissed, costs to be costs in the cause.

Application dismissed.

SPENCER v. COWAN.

Appeal—Right to—Waiver by taking benefit under order appealed from—Arrest.

Defendant, having been arrested under a *ca. re.*, applied to a Judge for his discharge on the ground that he had not intended to leave the jurisdiction. The Judge made the order, imposing as a term that the defendant should bring no action in respect of the arrest. The defendant served the order on the Sheriff and was discharged thereunder.

Held, by the Divisional Court, following *Wilcox* v. *Odden*, 15 C.B.N.S. 837 (*per* Walkem and Drake, JJ., McCreight, J., *dubitante*), That the defendant, having taken a benefit under the order, could not appeal from the term restraining him from bringing an action in respect of the arrest.

APPEAL by the defendant from an order of CREASE, J., discharging the defendant from custody under a writ of *capias ad respondendum*, on the ground that at the time of his arrest he was not about to leave the Province. The order was made on the terms that no action should be brought against the plaintiff or Sheriff in respect of the

Statement.

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arrest, and it was of this term that the defendant complained. The defendant had served the order on the Sheriff and was discharged thereunder.

L. P. Duff for the respondent: We take the preliminary objection that the appeal will not lie. The defendant has taken advantage of the order and has no right of appeal, *Wilcox* v. *Odden*, 15 C.B.N.S. 837; *Hayward* v. *Duff*, 12 C.B. N.S. 365; *Pearce* v. *Chaplin*, 9 Q.B. 802; *International Wrecking Co.* v. *Lobb*, 12 P.R. 207.

Argument.

A. L. Belyea, for the appellant, *contra*, cited *Adams* v. *Annett*, 16 P.R. 356; *Scane* v. *Coffey*, 15 P.R. 112; *Anlaby* v. *Prætorius*, 20 Q.B.D. 764.

Judgment.

WALKEM, J.: We must follow *Wilcox* v. *Odden*. The defendant has lost his right of appeal.

DRAKE, J.: I concur.

MCCREIGHT, J.: I think the point deserves further consideration.

Appeal dismissed with costs.

IN RE SCAIFE.

POTTS v. THE CITY OF VICTORIA AND THE CONSOLIDATED RAILWAY COMPANY.

WALKEM, J.

1896.

Oct. 30.

IN RE SCAIFE

Contempt of Court — Publication tending to influence litigation — Evidence.

Contempt of Court being a criminal offence, on the hearing of an application to commit nothing will be inferred, and it is necessary to prove the charge with particularity.

MOTION by the Consolidated Railway Company to commit Arthur Hodgkin Scaife, as being the editor of the "Province" newspaper, for contempt of Court, in writing, printing and publishing, in the issue of the said newspaper for 24th October, 1896, certain comments and statements alleged to be calculated to prejudice or interfere with the fair trial of the action then pending. The affidavits fyled in support of the motion omitted to state that the accused was the editor of the "Province," or wrote, printed, or published the alleged offending statements. The affidavit of service of the notice of motion upon Mr. Scaife stated that he was the editor of the paper. Statement.

A. E. McPhillips, for the application, referred to *Russell* v. *Russell*, 11 T.L.R. 38; *In re Pall Mall Gazette*, *ibid.* 122; *Herring* v. *British and Foreign Marine Insurance Co.*, *ib.* 345; *Wilson* v. *Collinson*, *ib.* 376; *Yorkshire Provident Assce. Co.* v. "*Review*," *ib.* 167; and *Regina* v. *Payne* (1896), 1 Q.B. 577. Argument.

Archer Martin, for Mr. Scaife: Contempt of Court is a criminal offence, *In re Pollard*, L.R. 2 P.C. 106; therefore the same particularity in the proof of the offence is necessary as in any other criminal trial; such evidence must be clear and satisfactory, Roscoe's Criminal Evidence, 11th Ed. 1; Paley on Convictions, 7th Ed. 129–31; Stephens' Digest of Evidence, 2.

The primary principles of criminal law require that the accused shall be connected with the charge.

WALKEM, J.

1896.

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A. E. McPhillips, in reply: The objection is a technical one and should have been taken before.

IN RE SCAIFE

October 30, 1896.

WALKEM, J.: Here the charge is that certain language appears in the "Province" newspaper, and that that language is calculated to impair the administration of justice. While it appears in the "Province," there is not a word to connect Mr. Scaife with the writing or publishing of it. I cannot commit a man unless he is charged with something. It is a delicate matter and involves the liberty of the subject. You must prove, step by step, that the party charged is guilty, and then the responsibility is cast on me to determine the punishment to be imposed. There is not the slightest thing to shew that Mr. Scaife is responsible for this. I am not in a position to know who the editor is; it has not been shewn that Mr. Scaife was the editor, or was in the slightest degree responsible for the article in the paper. It was not necessary that he should have written it, if he published it. The writing and printing amounts to nothing, if he does not publish it, and this means sending forth the matter complained of to be published abroad. I dismiss the application with costs.

Judgment.

Motion dismissed with costs.

BANK OF MONTREAL v. MAJOR AND ELDRIDGE.

McCREIGHT, J.

[In Chambers].

1896.

Oct. 30.

BANK OF MONTREAL v. MAJOR ET AL

Practice—Time—Jury—Application for before issue joined—Rule 333.

An application to try a case before a jury made before joinder of issue or the time for the fyling of same is premature.

APPLICATION by W. M. Hayes, a member of the defendant firm, to have the action tried before a jury. The statement of defence of Hayes had been delivered. Neither reply nor joinder of issue had been delivered, nor had the time for same expired.

Statement.

D. G. Macdonell for the application.

J. H. Senkler for the plaintiff, *contra*: There must be some issue of fact to be tried, Rule 333.

McCREIGHT, J.: The application is premature and must be refused with costs.

Judgment.

Application dismissed.

DRAKE, J.

[In Chambers].

1896.

Nov. 19.

BANK OF MONTREAL v. MAJOR AND ELDRIDGE.

Practice—Examination of judgment debtor—Right of to counsel.

The examination of a judgment debtor is a personal examination and he is not entitled to the assistance of counsel to take part in such examination, but he can have counsel to privately advise him.

BANK OF MONTREAL v. MAJOR ET AL

APPLICATION by the judgment creditors by summons in Chambers for a second order to examine the defendant Eldridge as a judgment debtor. Upon the examination of the judgment debtor under a previous order counsel for the judgment creditor had objected to the presence at the examination of counsel for the judgment debtor, or to such counsel taking any part in the examination by re-examining his client by way of explanation, or otherwise. *A. E. Beck*, the Registrar of the Court, before whom the examination was held, ruled that the judgment creditor was entitled to counsel and to be re-examined by him, relying on *Merchants' Bank* v. *Kitchen*, 16 P.R. 366. The counsel for the judgment creditor thereupon withdrew and the examination was closed without any question being put to the judgment debtor.

Statement.

J. H. Senkler for the judgment creditor.

D. G. Macdonell for the judgment debtor.

DRAKE, J.: I am of opinion that the examination of a judgment debtor is a personal examination and he is not entitled to the assistance of counsel to take part in such examination, but he can have counsel to privately advise him.

Judgment.

Order made.

LYON AND HEALEY v. MARRIOTT.

DRAKE, J.

1896.

Nov. 24.

LYON v. MARRIOTT

Practice—Evidence—Examination for discovery—Use of at trial—Rule 725.

A party cannot use his own examination for discovery as evidence for himself at the trial. Defendant being absent at the time of trial, and counsel having put in evidence for plaintiff parts of the defendant's examination for discovery, defendant's counsel desired the trial judge to look at and direct certain other parts of the examination to be put in evidence under Rule 725.

Per DRAKE, J. : Refused.

TRIAL of an action upon a foreign judgment. The plaintiff put in evidence an exemplification of the judgment and part of the examination before trial of the defendant for discovery and adduced no further evidence. The defence was that the judgment, which was by default, had been obtained in the foreign Court against the defendant who was resident out of its jurisdiction, by reason of an appearance entered in the action by certain attorneys as for the defendant therein, without which appearance the said Court would not have had any jurisdiction, and that such appearance was entered without any authority from the defendant, who had no notice thereof until after the judgment.

Statement.

L. G. McPhillips, Q.C., for plaintiffs.

John Campbell for the defendant : The Court should look at the other parts of the examination which support the defence, and direct that they be put in evidence. The statements in examinations of opposite parties for discovery are evidence as being admissions. The reason of Rule 725 making it permissible to look at the whole examination, is that admissions must be taken in their entirety. If there is

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anything in the examination which displaces the inference to be drawn from the parts put in evidence by the plaintiffs, namely that the plaintiffs ought to have judgment here, the defendant is entitled to the benefit of it, as qualifying or nullifying the supposed admission.

DRAKE, J.: This action is on a foreign judgment. The defendant appeared to the action by his attorneys, and on the trial judgment went against him. He now claims that the attorneys were only authorized to appear for the purpose of discharging an attachment on some property or claim that he had, but he brings no evidence in support of his contention and does not appear himself to give evidence.

The defendant was examined before action, and the plaintiffs put such portions of his answers in as they considered necessary. The defendant desires to have the whole evidence read in support of the defence which he put in.

Judgment.

Rule 723 says that evidence duly taken and certified shall be received and read in evidence, saving all just exceptions.

Rule 725 says any party at a trial may use in evidence any part of the evidence of the opposite parties, and the Judge may direct further portions of the evidence, in his discretion, to be read and put in evidence.

There is no rule allowing the party examined to make use of his examination as evidence on his own behalf; in fact, to do so and keep out of the box would in most cases prevent the whole facts from being considered. If the party examined is in a position to give evidence then he must do so and cannot rely on the statements made by him before trial.

The object of these rules was to enable the parties to an action to see from their opponent's case whether or not it would be worth while to go to trial. I do not think any case has been stopped on this ground in our Courts, but it

enables both sides to see the weakness or strength of their opponent's case, and on the trial to direct their attention accordingly.

Such being the case, I cannot look at Mr. Marriott's examination for the purpose of seeing whether or not his instructions to his solicitors were strictly limited to obtaining a discharge of the attachments which had been obtained, as no evidence was adduced to shew that the attachment was a separate proceeding.

It may be that an application could not be made to discharge the attachment without entering an appearance to the action ; but I have no evidence on this head, and I therefore, finding as I do an exemplification of a judgment properly authenticated, or judgment rendered after appearance of the defendant, give judgment for the plaintiffs with costs. It has not, therefore, become necessary to consider the *dictum* of Lord BLACKBURN in *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155, because the contention here is purely hypothetical. There would have been but little difficulty in the defendant obtaining evidence to shew that his allegation that an application to set aside an attachment did not require an appearance to be entered to the action, if such was in fact the case.

Judgment.

Judgment for plaintiffs.

McCOLL, J.

1896.

Nov. 30.

REGINA v. LAWRENCE.

Criminal law—Speedy trial—Right to elect of accused admitted to bail under Code, Sec. 601.

REGINA v. LAWRENCE

A person accused of an indictable offence who has been admitted to bail under Code, Sec. 601, by the magistrate before whom he is brought for preliminary examination upon the charge, has a right to a speedy trial under Code, Sec. 765, to the same extent as if the magistrate had committed him for trial under section 596.

THE accused was brought before the Police Magistrate for Victoria, for preliminary examination upon an information for obtaining money and valuable securities by false pretences. After hearing the evidence the magistrate declined to commit him for trial under section 596 of the Code, but admitted him to bail under section 601, under a recognizance by himself and two sureties, conditioned as therein provided, namely, "if therefore the said L. appears at the next Court of Oyer and Terminer (or general gaol delivery, or Court of General or Quarter Sessions of the Peace), to be holden in and for the County of Victoria, and there surrenders himself into the custody of the keeper of the common gaol (or lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said Court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue."

Statement.

The accused having, before the sitting of the Court of Oyer and Terminer, intimated a desire to elect to be tried speedily, his right so to elect and the jurisdiction of a Judge to try him speedily under section 765 of the Code, was questioned by the Crown, and no further step in that direction was taken by the accused. An indictment for the charge was laid before the grand jury for the next sitting

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of the Court of Oyer and Terminer, who found a true bill. The accused was surrendered by his bail to the keeper of the common gaol, and was arraigned before the said Court, *coram* McColl, J., whereupon he pleaded not guilty to the indictment, and his trial was fixed for another day. Upon that day he appeared by counsel and desired to elect to take a speedy trial before a Judge, under section 765. Upon objection by counsel for the Crown, it was held by McColl, J., that the accused having pleaded to the indictment was concluded as to the mode of trial. Counsel for the Crown afterwards consented to the withdrawal by the accused of his plea to the indictment, upon a statement by his counsel that the plea was pleaded inadvertently. The plea being withdrawn the question of the right of the accused to a speedy trial was directed to be argued.

Statement.

Robert Cassidy and *J. Stuart Yates*, for the Crown: The speedy trials jurisdiction is strictly limited to cases within the terms of the enabling section 765. Was the accused "A person committed for trial on a charge?" He was not. The magistrate refused to commit him. He was bound over under section 601 to appear and surrender himself upon a contingency which might never happen, namely his indictment, and the finding of a true bill by the grand jury at the next Court of Oyer and Terminer. In the interval there was no charge against him upon which he could elect to be tried, or could be tried. When the indictment was preferred and a true bill found it constituted the only charge against the accused to the same extent as if his preliminary examination before the magistrate had never taken place. Section 765 cannot be said *ex vi termini*, or by any inference, to extend to such a case, see note to the section at page 676 of Crankshaw's Criminal Code. The only obligation of the accused after the preliminary examination, was that contained in the recognizance, the condition of which has been performed by his surrender and plea to the indictment. The Court, under the commission of Oyer and

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Terminer, has the duty imposed upon it of hearing, with a jury, and determining the charge contained in the indictment, which must be disposed of in some way, and which cannot be quashed, unless for inherent defect, except on motion of the Crown. If it is quashed, nothing upon which to try the prisoner remains, for it is not competent to the Crown now to initiate and prefer a charge against the accused under the procedure of the Speedy Trials Act. If the indictment is quashed, there is no process upon which the accused could be detained to answer such a charge, and it is clear that his consent would not give jurisdiction.

H. D. Helmcken, Q.C., and *S. Perry Mills*, for the accused: It is not the intention of the Act that a person accused of an indictable offence, whom the magistrate after a preliminary examination has released on bail to answer the charge at the next Court of Oyer and Terminer, under section 601, should be deprived of the right to elect to take a speedy trial by the circumstance that the evidence against him was not sufficiently strong to warrant his committal to prison to answer the same charge. The effect of a committal under section 596 is a holding to answer to the charge in the same tenor as the recognizance here, at the next Court of Oyer and Terminer, etc., unless the accused elects to be speedily tried under section 675; for neither the recognizance of bail under section 601, nor the commitment under section 596, contain any words relating to the right to elect, the words of the commitment being to "keep until he shall be thence delivered in due course of law." In each case the effect of the detention, and obligation is to be tried at the next sittings of Oyer and Terminer, subject to the unexpressed right of the accused to elect to be tried speedily. An accused person bound over by recognizance to answer to the charge, if and when laid before the grand jury, is as much committed for trial upon it as if he had been sent to gaol to be there held upon the same exigency. The bond

Argument.

is substituted for the imprisonment. In either case an indictment may possibly not be laid. That is a matter for the Crown. The recognizance is not discharged, as the accused, having withdrawn his plea, has not pleaded to the indictment, and the Court can quash the present indictment and allow the prisoner now to elect to be tried upon a charge to be preferred under the Speedy Trials Act.

Cur. adv. vult.

November 30th, 1896.

McColl, J.: The accused having been charged before the Police Magistrate of the City of Victoria with having obtained certain property by false pretences, was by him on 12th November instant, to use his own language, as appears from the proceedings, "bound over to answer any charge that might be brought against him at the next Court of competent jurisdiction."

Judgment.

I understand that the accused thereupon entered into a recognizance with sureties, in form conditioned, for his appearance at the then next sittings of the Court of Assize for this County and his surrender into custody to take his trial if any indictment should be found against him by the Grand Jury at such sittings.

It appears that the accused, before the holding of such Court, intimated to the counsel for the Crown the intention to elect for speedy trial, but that the right to do so in the circumstances was questioned by him, and on the 17th instant, no formal application for speedy trial having been made, the Grand Jury found a true bill upon an indictment against the accused in respect of the said charge.

The accused then applied to me in this Court for leave to elect for speedy trial, *Mr. Helmcken* and *Mr. Mills* appearing for him.

Mr. Cassidy, who appeared for the Crown, stated that he did not wish to oppose this course if permissible, but

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strongly pressed upon me that section 765 of the Code does not apply when the accused has been dealt with under section 601, as was done in this case, and referred me to Crankshaw, page 676, where that learned author evidently does seem to express an opinion to that effect.

No authority is however there given, nor has any been cited to me, and I am not aware of any case in which the point has been decided.

It was forciby argued by *Mr. Cassidy* that unless and until indictment found there is in such a case no charge upon which a trial can be had, and that the indictment if and when found is itself the only charge.

I cannot accede to this view. Even if it were so, section 765 does not in terms refer to a commitment by a magistrate. I do not know that I would be prepared to hold, bearing in mind the object of this provision and having regard to the well known rule for indictments of this kind, that such view is necessarily inconsistent with the existence of the right to elect as to mode of trial.

Judgment.

I am of opinion, however, that the accused has the right which he claims, on the ground that the words in section 765 "committed to gaol for trial," should not be confined to the technical or restricted sense contended for, but as meaning any case where the accused is found in custody charged with an offence of the kind, in respect of which the right of election is given. The settled practice in this Province has been to allow such election, although the accused has never been received into custody at all, except in the way of his surrender merely for the purpose of appearing before the Judge for election, and the case of *Reg.* v. *Burke*, 24 Ont. 64, is authority, if other authority be wanted, that this practice is correct. Then why should not the same course be pursued in cases like the present?

If the accused cannot find the bail required, the magistrate must commit him to prison ; the condition of the recognizance is the same whether the accused is admitted to bail

by the magistrate, or by a Judge after commitment by the magistrate. Whichever course is taken by the magistrate, the accused if out on bail may be surrendered by his sureties. Then why may he not surrender himself for the purpose of being tried without awaiting the action of the Grand Jury, and having been taken into custody because of his having been charged with the offence and being kept there with a view to his trial upon the charge, why is the benefit of the right to elect to be denied him ?

If the practice which has obtained is correct, I think that there is a right of election in cases like the present one.

A construction which would place the accused in a worse position when the evidence against him is slight than if overwhelming, and would permit a magistrate in any case, if so inclined, to deprive the accused of the right to elect, is not of course one from which I ought to shrink merely because of such actual or possible result, but it is proper to consider possible consequences in determining the question.

Judgment.

Reference may be made to *Reg.* v. *Johnson*, 8 L.J.M.C. 99 ; *Mullins* v. *Surrey*, 51 L.J.Q.B. 149 ; *Mews et al.* v. *The Queen*, 8 App. Cas. 339. (The words "committed for trial," used in relation to any person have now, by 52 & 53 Vic. (Imp.), Cap. 63, Sec. 27, been defined as regards subsequent legislation.)

As the circumstances here are not unlike those in *Reg.* v. *Burke*, *supra*, the better course will be, following that case, that the indictment should be quashed.

Indictment quashed.

FULL COURT.

1896.

Dec. 8.

NELSON & FORT SHEPPARD RAILWAY COMPANY v. JERRY AND THE PARIS BELLE MINING COMPANY (FOREIGN).

NELSON AND FORT SHEPPARD RY. v. JERRY, ET AL

Practice—Appeal—Foreign corporation—Security for costs—C.S.B.C. 1888, Cap. 21, Sec. 71 (a).

A foreign corporation appealing to the Full Court from a judgment against it at the trial, cannot be ordered to give security for payment of the costs of the action found against it by the judgment appealed from, as well as security for the costs of the appeal.

Statement.

APPEAL by the defendants from an order of DRAKE, J., directing the defendants, the Paris Belle Mining Company, a foreign corporation, to furnish the plaintiffs with security, not only for their costs of the appeal, but also for the payment of their costs of the action as taxed against the defendants under the judgment appealed from.

W. J. Taylor and *Robert Cassidy*, for the appeal, were not called on.

Argument.

P. Æ. Irving, contra: The defendants are a foreign corporation, and the bringing by them of the appeal is the commencement by them of a proceeding, within the meaning of C.S.B.C. 1888, Cap. 21, Sec. 71 (*a*), against the plaintiff corporation, which is resident within this Province.

Judgment of McCREIGHT, J.

McCREIGHT, J.: The appeal is a part of the proceedings in the action which was commenced not by but against the defendants the Paris Belle Mining Company, which it appears is a foreign corporation.

NOTE—(*a*) "In case of any action or suit or other proceeding at law or in equity being commenced by any foreign company against any person or persons, corporation or corporations, residing or carrying on business in the Province of British Columbia, such Company shall furnish security for costs, if demanded."

The defendants have a right of appeal, saddled, whether under Rule 684 or section 71 of the Companies' Act, C.S.B.C. 1888, Cap. 21, only with the obligation to give security for the costs of the appeal, if ordered. Even if the appeal by the defendant foreign corporation can be said to be the commencement of proceedings by them against the plaintiffs within the meaning of section 71, the costs for which they could be ordered to give security would be the costs of such proceedings—namely, the appeal, not of certain other former proceedings which the foreign corporation did not commence but had commenced against it.

The appeal must be allowed.

WALKEM and MCCOLL, JJ., concurred.

Appeal allowed with costs.

DRAKE, DEP. L.J.A.

1896.

Dec. 7.

THE AINOKO

THE AINOKO.

Behring Sea Award Act, 1894, [57 & 58 Vic. (Imp.)], Art. I.—Ignorance of position of ship.

In an action for condemnation of the ship, seized fourteen miles within the prohibited zone with freshly killed seals on board, evidence was given for the defence, that the ship had been carried into the prohibited waters by *vis major*, and that her master was ignorant of her true position by reason of being unable to obtain observations.

Held, insufficient to discharge the inference of culpable infraction of the Act, and that it was no excuse to say that the state of the weather was such that the master could not ascertain his position.

ACTION for condemnation of the ship for a contravention of the Behring Sea Award Act, 1894, [57 & 58 Vic. (Imp.)]

Statement. Article 1. The action was tried before DRAKE, Dep. L.J.A., on 30th November, 1896. The facts fully appear from the head-note and judgment.

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

H. D. Helmcken, Q.C., for the defendant ship.

Cur. adv. vult.

December 7th, 1896.

DRAKE, Dep. L.J.A.: This is an application to condemn the above vessel for breach of the provisions of the Behring Sea regulations, incorporated in Cap. 2 of the Imperial Acts,

Judgment. 1894.

The provision which it is alleged has been violated is the 1st Article, which forbids the citizens of the United

States and Great Britain, respectively, killing or pursuing at any time and in any manner fur seals within a zone of sixty miles around the Pribiloff Islands in Behring Sea.

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The vessel in question was seized by the United States SS. Perry, on 5th August, 1896, about 7:40 p.m. land time, in latitude 55 deg. 57 min. N., long. 170 deg. 30 min. W., a point fourteen miles within the zone.

Captain Heater, the master of the schooner, states that he got no observation after the 1st of August. On the 2nd of August he was boarded by the United States cruiser Rush, and their positions were exchanged, and he found his so nearly identical with that of the Rush that he was satisfied with the accuracy of his observations.

On the 3rd he went south south-east and then tacked to the westward, the wind increasing from south; on the 4th there was a strong gale with thick fog and high seas, wind S. by E.; on the 5th at midnight calm and light airs from S.W. The boats were off at 5 a.m. and returned at 6 p.m. with 108 seals. At the time the Ainoko was first sighted by the Perry she was coursing southerly and westerly about six miles off. This would bring her out of the zone apparently at the nearest point. The wind was very light according to the log, and according to Captain Heater he directed his boats to seal south and west, as he intended to follow in that direction. According to the position given by the navigating officer he must have been some considerable way within the prohibited limit at the time the boats were put over, and they gradually sealed outwards; a fresh killed seal was on the deck when the vessel was seized. I therefore find as a fact that the Ainoko was sealing and killed seals during this day within the prohibited zone. Captain Heater's defence is that he was unwittingly carried by a northerly current and a south-east gale into the zone, and according to his reckoning he was 17 miles outside. He had calculated his course by dead reckoning, allowing

Judgment.

DRAKE, DEP. L.J.A. 1896. Dec. 7.

two points for leeway. It is remarkable that the Perry was able to take and did get observations on the 3rd, 4th and 5th August, but Captain Heater said the fog prevented him.

THE AINOKO

Captain Heater states that he was not aware of a northerly current setting up towards the islands, but it appears to be generally known to sealers that there was such a current; he had been sealing round the islands before on the north side and had such northerly current then, but says he had not sealed south of the islands.

His remuneration was $50.00 a month as master, and fifty cents a skin. This inducement to make as large a catch as possible may possibly have had something to do with his inability to take observations.

Judgment.

A good deal of stress was laid on the error in the chronometer, both of the Ainoko and the Perry; this error in no way caused the mistake in the reckoning of the position of the schooner, because no observations were taken after the 1st August, and the chronometer is not used in estimating dead reckoning. The error in the case of the Perry's chronometer made a difference of five miles, but still left the Ainoko fourteen miles within the prohibited ground, and instead of the seizure taking place in long. 170 deg. 25 min., it took place 170 deg. 30 min. west, a difference of 31 miles between the schooner's actual position and the position she thought she was in.

It is the duty of the master to be quite certain of his position before he attempts to seal. It is no excuse to say that the state of the weather was such that he could not ascertain his position.

The mere fact of being within the zone is not an offence; it is killing, capturing, or pursuing seals in the zone that creates the offence. If the excuse of inadvertence or inability to obtain an observation were allowed the regulations could never be enforced; they are passed for the purpose of

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preventing all sealing within the defined radius, and vessels offending will not be relieved from the penalties imposed by the Act by any such excuses. I therefore declare the Ainoko and her equipment forfeited, but in case of payment of a fine of £400 and costs within thirty days she can be discharged.

Judgment accordingly.

DRAKE, DEP. L.J.A.
1896.
Dec. 7.
THE BEATRICE

IN THE VICE-ADMIRALTY COURT.

THE BEATRICE.

Behring Sea Award Act, 1894, [57 & 58 Vic. (Imp.)] Art. 1—Contravention—Ignorance of position no defence.

The ship having been seized, and evidence given that she had taken seals within the prohibited zone: *Held*, A master takes upon himself the responsibility of his position, and if through error, want of care, or inability to ascertain his true position, he drifts within the prohibited zone and takes seals there, he thereby commits a breach of the regulations. No attempt to take seals should be made unless the master is certain of his position.

Statement.

ACTION for condemnation of the ship for a contravention of the Behring Sea Award Act, 1894, [57 & 58 Vic. (Imp.)], Article 1. The action was tried before DRAKE, Dep. L.J.A.,

DRAKE, DEP. L.J.A.
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THE BEATRICE

on 1st December, 1896. The facts fully appear from the head-note and judgment.

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

H. D. Helmcken, Q.C., for the defendant ship.

Cur. adv. vult.

December 7th, 1896.

DRAKE, Dep. L.J.A.: This vessel was seized on 5th August, 1896, by the U.S. vessel Perry, in lat. 55.50 N., long. 170.37 W., some seven miles within the zone. While the officer was on board the boats returned with 58 skins.

The defence was the same as the Ainoko (ante), no observation after 2nd August, and a strong S.W. wind until the afternoon of the 4th—the position of the vessel being calculated by dead reckoning, but as the schooner had no log line by which to determine her speed it rendered the calculation more than usually inexact. The navigator of the schooner, Captain Pinckney, kept no ship's log, but had a memorandum book written in pencil, according to which he had an observation on the 3rd, of long. 172.8, and according to him his position on the day of the seizure was lat. 55.11 N., long. 170.39 W. This was a mere estimate based on his idea of her speed from looking over the side, and his log book shows evident marks of alteration. If the vessel had been properly found with a log line of any description the error would have been greatly reduced, and her position more nearly approximate to what it eventually turned out to be, which differs from his log. In his evidence he says that he got his last observation on the 2nd. A master takes upon himself the responsibility of his position, and if through error or want of care or inability to ascertain his true position he drifts within the prohibited zone and seals there, he thereby commits a breach of the regulations.

Judgment.

There appeared to be a discrepancy in his position as given by the cutter Perry on the seizure and that subsequently given as the correct locality, and it arose in this way: The position as given on first seizing was calculated from the last observation that morning, and allowing for dead reckoning up to the time of seizure; this was subsequently corrected after an observation had been taken that afternoon, but in giving this correction on working over the calculations again a clerical error which made a difference of some four or five miles was discovered, and this error was communicated to the schooner and the official log corrected; afterwards on arriving at Ounalaska the Perry's chronometer was rated and the exact error ascertained, as it had not been rated since May 21, and the several positions were gone over again, and the result was that the exact position was given at lat. 55.50, long. 170.57. This made the Beatrice seven miles within the prohibited zone limits; all the other calculations made the vessel within the zone, but not quite so far in—she was not in any way prejudiced by the corrections made.

Judgment.

It was proved that there was a current running north, which might vary from half a mile to two miles, depending on the wind and swell; the Beatrice had not allowed sufficiently for this, but this is not a sufficient excuse, no attempt to take seals should be made unless the master is certain of his position. I therefore declare the Beatrice and her equipment forfeited, but allow her to be redeemed on payment within thirty days of the sum of £400.

Judgment accordingly.

DRAKE, DEP. L.J.A.

1896.

Dec. 7.

THE VIVA

IN THE VICE-ADMIRALTY COURT.

THE VIVA.

Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.)], Article 1—Contravention—Ignorance of position arising from incapacity of master no defence—British ship within Act whether master or crew British subjects or not.

In an action for condemnation of the ship for infraction of the Act and regulations, it was proved that she captured seals and was also seized within the prohibited zone,

To an objection that by Article 1 of the Schedule the Act only applies to British subjects, and that there was no proof that the master or any one on board was a British subject,

Held, That the proceedings being for forfeiture of the ship, the fact that she was proved to be a British ship brought her within the Act, and that proof of the master being a British subject would only be necessary to a charge against him for a personal offence under section 1.

The fact that the master, by reason of insufficient observations, inaccurate chronomoters, etc., was unaware of the position of the ship at the time the seals were taken, *held* no defence, as to catch seals without knowing where he was could not be considered as taking reasonable precautions.

Owners employing ignorant and inefficient navigators cannot plead such ignorance as a defence.

Statement. ACTION for condemnation of the ship for a contravention of the Behring Sea Award Act, 1894, [57 & 58 Vic. (Imp.)], Article 1. The action was tried on 2nd December, 1896,

before DRAKE, J. The facts fully appear from the head-note and judgments.

DRAKE, DEP. L.J.A.

1896.

Dec. 7.

THE VIVA

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

P. Æ. Irving and *L. P. Duff*, for the defendant ship.

Cur. adv. vult.

December 7th, 1896.

DRAKE, Dep. L.J.A.: The Viva, a schooner registered at the port of Victoria, was seized on 24th August, 1896, in lat. 57.30 N., long. 171.23.30 W., at a point within the prohibited zone 35 miles from N.W. end of St. Paul's Island.

The vessel was boarded by the U.S.S. Rush, about 6 A.M. At that hour all the boats were aboard and the hunters at their breakfast.

The master asked if he might put his boats out, which was refused. The object of making this request is not apparent, unless it was to accentuate the ignorance of the master of being within the prohibited zone.

Judgment.

The official log of the Viva shews the capture of sixteen seals on the previous day, and the master details the course he had taken between the hour he got his boats on board and the time of his seizure, and says his position was lat. 57.44, long. 173.01 W., and on the previous day lat. 57.47, long. 72.50. He kept no ship's log, but laid down on the chart his position in pencil day by day; taking those positions as shewing correctly his daily change of position, he on the 24th was only six miles further west than he was on the 23rd.

The real position where he was seized varies from his alleged position on his chart by many miles.

The master states that he got an observation on the 16th, and none since except an imperfect one on the 22nd, which shewed his position so greatly different from what he

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calculated it that he did not rely on it—what it was is not entered anywhere. There are no entries to shew whether his dead reckoning was reasonably calculated — neither course of vessel, direction or force of wind are entered.

THE VIVA

His chronometer was slow. The master, by some manœuvres difficult to follow, satisfied his own mind that on the 24th July his chronometer was two minutes slow and was losing two seconds a day, and he allowed for this error when he obtained a sight for longitude on the 14th August. When the vessel arrived at Ounalaska on the 26th August his chronometer was found twelve minutes and eleven seconds slow, and it was shewn by Lieutenant Daniells that if he had obtained an observation for longitude with the chronometer as it was he must have been more than 100 miles to the east of his position as laid down on his chart.

Judgment.

How this sudden change in his chronometer arose is not explained further than stating that it took a jump occasionally. The evidence as to sealing in the zone is proved by the captain. He on the 23rd was only 6¼ miles from his position on the 24th when he was seized, which was 35 miles only from the N.W. end of St. Paul's Island, and he captured sixteen seals on that day; they therefore were captured in the prohibited waters, as he was at least 19 miles inside the limit.

The defence set up is, that by Article 1 of the 1st Schedule the Act only applies to British subjects, and there was no proof that the master of the Viva or any one on board was a British subject; and by section 1, sub-section 2, it is declared to be a misdemeanor if any person commits, procures, aids or abets any contravention of the Act, therefore it was necessary before a vessel could be condemned that it must be shewn that a British subject was employing the ship.

If the master was proceeded against for a misdemeanour it would be necessary to prove that he was subject to the

penal clauses of the Act, but the contravention being once established the vessel employed being a British ship becomes liable to forfeiture; if every man employed on the vessel was a foreigner, it would not release the liability of the ship once a breach was proved.

The defendant further claims exemption on the ground of want of proof of any intention on the master's part to contravene the Act. A man's intention is judged by his acts, and when once a vessel is found in the prohibited zone taking or having taken seals, then he has to satisfy the Court that he took all reasonable precautions to avoid any breach of the regulations. Did the Viva do so? According to the master he had no observations from the 16th August, he kept no ship's log shewing the weather, wind, and courses, his supposition is marked only from day to day in pencil on his chart, and he sealed on the 16th, 22nd and 23rd August without knowing where he really was. This can hardly be considered as taking all reasonable precautions. He apparently never attempted to establish his position by any lunar observations or other modes known to navigators; it cannot therefore be said that he took reasonable precautions.

Judgment.

It has been argued that the masters of the vessels engaged in sealing cannot be expected to be scientific navigators and to be able to ascertain their position with accuracy. This is no doubt true, but when owners entrust valuable property to men without the necessary qualifications the responsibility is theirs, and if they choose to run this risk they cannot relieve themselves by pleading want of knowledge in their servants.

I therefore adjudge the Viva and her equipment to be forfeited, and allow her release on payment of £400 and costs within thirty days.

Judgment accordingly.

DRAKE, DEP. L.J.A.

1896.

Dec. 7.

THE AURORA

IN THE VICE-ADMIRALTY COURT.

THE AURORA.

Behring Sea Award Act, 1894 [57 & 58 Vic. (Imp.)] Article VI., Schedule—Prohibition against use of fire-arms—Circumstances of suspicion—Rebuttal—Costs—Counter-claim.

The arms and ammunition of the ship were inspected by an officer of the U.S.S. Grant, and a record of all those produced was entered in the official log.

The ship commenced sealing on 1st August, and on 10th August was boarded by an officer of the U.S.S. Rush, whose attention was called to four skins which had holes in them, apparently caused by gaffs. The officers of the Rush, after examination, concluded that these seals had been shot. The guns and ammunition were again examined and checked and some small discrepancy was discovered, which was explained afterwards. The ship was ordered to Ounalaska and a further count of the ammunition made. While there two of the crew deserted, taking away one of the boats and some provisions. The captain denied any infraction of the Act.

Held, on the evidence, since it was not clear that the holes in the seal skins were caused by shots, or if they were that the shots were from the ship; and since the discrepancy in regard to the ammunition was accounted for as being apparently attributable to error in the counting, that the action should be dismissed with costs.

A counter-claim was made against the Crown for damages for loss of the boat and provisions whilst at Ounalaska under seizure.

Held, That as the master was in command and had full control of the crew he alone was responsible for the loss, and the counter-claim was dismissed.

Statement. ACTION for condemnation of the ship for an infraction of Article VI. of the Schedule to the Behring Sea Award Act,

1894, [57 & 58 Vic. (Imp.)] The facts sufficiently appear from the head-note and judgment. The action was tried before DRAKE, Dep. L.J.A., on 3rd December, 1896.

DRAKE, DEP. L.J.A.

1896.

Dec. 7.

THE AURORA

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

H. D. Helmcken, Q.C., for the defendant ship.

Cur. adv. vult.

December 7th, 1896.

DRAKE, Dep. L.J.A.: This vessel, a British schooner, had been sealing around Japan, and arrived at Attu, in Behring's Sea, on 20th July, 1896. She had arms and ammunition on board. The captain requested Lieutenant Barry of U.S.S. Grant to inspect the arms and ammunition, and a record of all that was then produced was entered in the official log.

They commenced sealing on 1st August in Behring Sea. On 10th August she was boarded by the Rush, and the attention of the officer who boarded was called to four skins which had been put aside as having holes caused by gaffs; he said he did this in pursuance of instructions from Lieut. Barry.

Judgment.

The skins were sent on board the Rush, and after a careful examination by the officers of the Rush, the conclusion arrived at was that these seals had been shot.

The guns and ammunition were examined and checked, and some small discrepancy was discovered, which was explained afterwards.

This examination was just as ineffective as the first one spoken of, because there was no search of the vessel and no evidence to shew that there was not other ammunition on board.

The vessel was ordered to Ounalaska and a further count of their ammunition made. While there, two of the crew

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deserted and took away one of the boats and some provisions, a claim for which was made against the Crown by way of counter-claim.

From the evidence adduced, the conclusion I arrive at is that the seals whose skins were in question had been shot, they had also been speared, but the evidence did not in my opinion establish the fact that the seals had been shot by those on board the schooner.

The reason of planing the skins on one side was difficult to appreciate. The captain said that the U.S. officer at Attu had asked him to place on one side all skins that had shot or gaff holes in them ; as it appears that the majority of seals speared have to be brought to the boat by the gaff, it must follow that gaff holes if carefully searched for would be apparent in the majority of skins. The captain denied that the seals were shot, but stated the holes were only gaff holes, and that the holes which were in the skins when taken on board the Rush, and which are apparent, were made by rats. Without discussing the evidence in detail there was in my opinion sufficient reason for the arrest of the vessel, and the burden of shewing that fire-arms had not been used was imposed on the vessel.

Judgment.

I therefore dismiss the claim with costs.

With regard to so much of the counter-claim as relates to a boat and provisions being stolen while the schooner was in charge of the authorities at Ounalaska, it was shewn that the master was in command and had full control of the crew, and that two of the crew deserted and stole a boat and some provisions ; the seizure of the vessel therefore had nothing to do with stealing of the boat. I therefore dismiss the counter-claim without costs.

Vessel discharged.

BANK OF MONTREAL v. MAJOR & ELDRIDGE.

BOLE, L.J.S.C.

1896.

Dec. 28.

BANK OF MONTREAL v. MAJOR, ET AL

Practice—Examination for discovery—Second order after material amendment of pleading.

Where a party, after being examined for discovery, materially amends his pleading so as to raise a new issue, he may be ordered to be examined again.

APPLICATION by defendant Hayes for an order to examine C. Sweeney, the manager of the plaintiffs' Bank at Vancouver, for discovery upon the amended statement of claim. Mr. Sweeney had been examined under a previous order, but since that examination the statement of claim had been materially amended and the defendant Hayes had pleaded to the amendments, raising a new issue.

Statement.

D. G. Macdonell, for the defendant.

J. H. Senkler, for the plaintiffs.

BOLE, L.J.S.C.: The application herein is made for the purpose of having Mr. Campbell Sweeney, the plaintiffs' manager, examined *viva voce* on oath before trial, he having been already examined in this cause on 29th October, 1896, before the Examiner, in the presence of counsel for both sides.

The writ herein was issued on 18th August, 1896, and is specially endorsed thus: The plaintiffs' claim is as against the defendants Major & Eldridge, as makers, and against the defendant Jesse Major, as endorser of a certain promissory note for $18,000.00, dated 1st June, 1894, made by Major & Eldridge, payable on demand to the Bank of Montreal, Vancouver, and which note was endorsed by the defendant Jesse Major, and was duly presented for payment at the place where the same was made payable, and was dishonoured, and protest thereof was waived by the defendant

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Jesse Major, in writing thereon endorsed, with a claim for interest on said note amounting to the further sum of $115.11.

The statement of defence of defendant, W. M. Hayes, was delivered 22nd October, 1896, and denies that he was at date of making the note a partner in the firm of Major & Eldridge, or that he assumed or agreed to assume any liability with respect to said note. Alternatively he alleges want of consideration, non-presentment for payment at place where payable, and that he, Hayes, received no consideration for said note, besides traversing the other allegations of fact in the statement of claim. On 28th November, 1896 (pursuant to order of 19th November, 1896) and subsequent to Mr. Sweeney's examination, the plaintiffs delivered an amended statement of claim. The third paragraph thereof is a reiteration of the special endorsement claiming $18,115.00, and calls for no special observation. The fourth paragraph alleges W. M. Hayes was and is a member of the firm of Major & Eldridge. The fifth paragraph alleges that the firm of Major & Eldridge, *i.e.* Major, Eldridge and Hayes, on 17th August, 1896, executed a deed acknowledging the debt of $18,000.00 to the Bank, and arrears of interest, and covenanting to pay the promissory note for $18,000.00 on demand, and interest thereon be paid at the rate of nine per cent. per annum, that principal and interest are still due. The sixth paragraph alleges that each of the defendants, including Hayes, severally promised to pay said note and interest; and the seventh paragraph alleges that the defendant Hayes is estopped by the deed of 17th August, 1896, from denying anything in said deed contained. The amended statement of defence delivered 9th December, 1896, traversed the amended statement of claim, and in the ninth paragraph alleges he, Hayes, was induced to become a member of the defendant firm by the false and fraudulent representations of the plaintiffs to him that the firm of Major & Eldridge

was on 1st December, 1895, solvent and carrying on a profitable business, though such was not the fact, to plaintiff's knowledge.

That the deed of 17th August, 1896, was not intended to be any more than a chattel mortgage to secure payment of $5,000.00, with respect to certain goods sold by defendants which were included in warehouse receipts handed over by the firm to plaintiffs as security for advances, and that the chattel mortgage was drawn up for that purpose, that it was not read over to him (Hayes) before execution, although he asked it should be read, Hayes being assured that it was simply an ordinary chattel mortgage drawn in accordance with the agreement mentioned in tenth paragraph of amended statement of defence.

That Hayes, relying on plaintiffs' assurance as to the nature of the document, executed the deed of 17th August, 1896; that Hayes had no independent legal advice and solely relied on the plaintiffs' solicitors; that the deed was not read over or explained to him at the time of the execution thereof, and he was not aware of its purport till long after the entry of the action, when he repudiated the same; that the deed relied on is not the conveyance he, Hayes, intended to give, but a totally different one; that he was induced by plaintiffs' fraudulent representations to execute same.

Judgment.

Thus at this stage of the proceedings and subsequent to the examination of the plaintiffs' manager, a practically new case is before the Court, especially with respect to the defendant Hayes, under the deed of August 17th, 1896. His defence is largely an attack upon that deed, which he repudiates, and unless examination before trial is to be reduced to being a legal mockery, he must have the right to examine the plaintiffs' manager on the new presentment of the case as against him. While it is true that orders for the re-examination of witnesses before trial should not be granted without the existence of special circumstances, still

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where those special circumstances exist it appears to me the order should be made, as otherwise it would be easy to launch a case on one statement of claim, and then after examination of the plaintiff to amend, and merely at the risk of some costs completely change front and put forward the real case relied on, and when re-examination was asked for, rely on the fact that examination had taken place ; such to my mind is not the true meaning of the rules on the subject. I think, as already pointed out, that the amended statement of claim herein is in many respects a new action, that the circumstances under which the deed relied on was given by Hayes may properly be enquired into before trial, and, in a word, that there are in this case such very special circumstances as warrant me in making the order asked for, in order that substantial justice may be done. In coming to this conclusion I have endeavoured to bear in mind *Laird* v. *Stanley*, 6 P.R. 322 ; *Rogers* v. *Manning*, 8 P.R. 2 ; *Thorburn* v. *Brown*, 8 P.R. 114 ; *Russell* v. *Macdonald*, 12 P.R. 458 ; and *Leitch* v. *G.T.R. Ry. Co.*, 12 P.R. 671.

Judgment.

I make the order asked for, and that the costs of this application and costs thereunder to be costs in the cause.

Order made.

BOWNESS v. THE CITY OF VICTORIA AND THE CONSOLIDATED RAILWAY COMPANY.

McColl, J.
[In Chambers.]
1897.
Jan. 14.
Bowness v. Victoria

Practice—Parties—Rule 94.

The statement of claim was so drawn as to charge the two different defendants with separate acts of negligence causing damage to the plaintiff. It appeared however, from the facts alleged, that, if the action lay at all, the two defendants each contributed to the injury in such manner as to make them joint *tort feasors*.

An application by one of the defendants to stay all proceedings in the action unless the other defendant was struck out, was dismissed.

SUMMONS by the defendant company to stay proceedings unless the other defendant is struck out.

Statement.

L. G. McPhillips, Q.C., for the summons, relied on *Sadler* v. *G.W.R. Co.* (1895), 2 Q.B. 688; 65 L.J.Q.B. 462; Ann. Prac. 1897, 358.

D. G. Macdonell, contra, cited *Baggot* v. *Easton*, 47 L.J. Ch. 225.

McColl, J.: The facts are imperfectly stated in the statement of claim. The charges of negligence as made are chiefly allegations of law.

I think there is a plain distinction between the cases of *Sadler* v. *G.W.R. Co. supra*, and *Smurthwaite* v. *Hannay* (1894) A.C. 494, and the present one. In either of those cases the *allegata probandi*, as they have been called, and the measure of damages would have been different as between the different parties. In this case they would I think be the same as between the plaintiff and the different defendants, assuming that the defendants are liable to the plaintiffs, as to which I of course express no opinion. I do not think that there are separate causes of action.

Judgment.

McCOLL, J.

[In Chambers].

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I have come to a clear conclusion, however, that this is a case in which the plaintiff ought to have the benefit of Order XVI., Rule 4.

I may refer to *Child* v. *Stenning*, 5 Ch. D. 695, 7 Ch. D. 413.

As the summons was invited by the way in which the statement of claim is drawn, the costs will be costs in the cause.

Order accordingly.

C. P. R. v. McBRYAN.

FULL COURT.

1896.

Dec. 11.

C.P.R. v. McBRYAN

Water and watercourses — Trespass — Right of landowner to relieve himself of flooding by backing water on to lands adjoining—Pleading—Amendment—Costs.

S. diverted water from a river on to his land for irrigation purposes. The water flowed thence on to the adjoining lands of the defendant, who thereupon erected a dam and penned the water back. The plaintiffs subsequently constructed their railway across the defendant's lands, between the dam and S.'s lands upon an open trestle, which did not interfere with the existing conditions of the water flow, but afterwards filled in the trestle with a solid embankment leaving an open culvert, the effect of which was to concentrate the waterflow from S.'s upon defendant's land, to meet which defendant raised and lengthened his dam, which had the effect of throwing the water back on plaintiffs' embankment so as to injure it.

The plaintiffs sued, claiming an injunction and damages, alleging "the defendant penned back water flowing through a natural water course running through his land by means of a dam throwing the water back on to and causing it to flood plaintiffs' right of way, etc."

The defence denied the allegation of "natural water-course" and set up that the injury was caused by the misconduct of S.

At the trial the plaintiff abandoned the allegation that the water-course was natural.

WALKEM, J., at the trial, upon the facts, gave judgment for plaintiffs.

Upon appeal to the Full Court, per DAVIE, C.J., and McCREIGHT, J.,

Held, That the facts proved suggested that the injury complained of by the plaintiffs was attributable to their own act in concentrating the waterflow so as to increase the previously existing mischief caused by it to the defendant, and that, if so, as against the plaintiffs, it was permissible for defendant to so enlarge his dam as to meet that trespass on their part, and that there should be a new trial to obtain proper findings on that question. That plaintiffs should pay defendant's costs of bringing witnesses to meet the allegation of natural water-course.

Per DRAKE, J., affirming the judgment of WALKEM, J.: That as the waterflow would not have injured the plaintiffs' embankment but for defendant's dam, he was liable, as S. was the primary cause of the mischief and not the plaintiffs.

Semble, The allegation that the water-course was natural was immaterial to the cause of action.

APPEAL by the defendant McBryan from the judgment Statement.

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of WALKEM, J., at the trial, pronounced on 9th April, 1896, in favour of the Canadian Pacific Railway Company, for $125.00 damages, for the flooding of their track by the defendant, by means of a dam erected by him on his land, thereby penning back water and throwing it on the track and yard of the Company. The facts sufficiently appear from the head-note and judgments. The appeal was argued before DAVIE, C.J., and MCCREIGHT and DRAKE, JJ., on 4th May, 1896.

Argument.

Charles Wilson, Q.C., for the defendant on the appeal: We say that we had a right to pen the water back so as to protect our lands. The only cause of action is against Sullivan, by whose misconduct the water was brought upon the land. The diversion occurred before the C. P. R. was built. No easement has ever been acquired by it over McBryan's land. He, like any other person, has the right to deal with his land as he pleases unless restrained by some servitude or easement. He had a right to build a wall around it if he wished. Immediately you strike out "natural water-course" there is no ground of action. McBryan is protecting himself against the wrongful act of a third party, and is in a position similar to that of the Canal Company in *Nield* v. *L. & N. W. Ry. Co.*, L.R. 10 Ex. 4. The C. P. R. should have protected themselves against Sullivan's wrong and prevented the water from coming on to our land, *Whalley* v. *Lancashire, &c. Ry. Co.*, 13 Q.B.D. 131, at p. 140. We could have maintained an action against the C. P. R. for permitting the water to come on our land, *Charles* v. *Finchley Local Board*, 23 Ch. D. 767. PEARSON, J., at pp. 774-777: "Are the Finchley Board allowing something to be done which they themselves can put a stop to?" Here the C. P. R. are allowing water to escape on our land when they should prevent it.

[McCreight, J., referred to *Toleman* v. *Portbury*, L.R. 5 Q.B. 288.]

E. P. Davis, Q.C. for the respondents: What we complain of

is the defendant's raising his dam up to the C. P. R. line. Without such raising the track would not have been injured, as the water would have escaped over defendant's land. He should have gone upon Sullivan's land and abated the nuisance, as he had a right to do, Addison on Torts, 7th Ed. p. 71; *Raikes* v. *Townsend*, 2 Smith's Reports, p. 9; Fisher's Digest, Vol. V. p. 814; Garrett on Nuisances, pp. 313-14. If a man abates a nuisance he must do so so as not to injure a third person and with minimum injury to the wrongdoer. He had the choice of going on Sullivan's land to abate it and thereby injuring no one, or of abating it by raising the dam as he has done, which has done injury to the C. P. R.. Hence, having employed the plan which has occasioned damage, in preference to that which would have caused none, he is liable, *Roberts* v. *Rose*, L.R. 1 Ex. 82, at p. 90. *Whalley* v. *Lancashire Ry. Co.*, *supra*, cited by the appellant, is in our favour. If an evil of any kind gets on my land I cannot transfer it to my neighbour, but no one can force me to remove it off my land. The C. P. R. took no active step to transfer water to McBryan and are not within *Whalley's Case*. There is a limit to the proposition that a man can do what he likes with his own land, *Hurdman* v. *N. E. Ry. Co.*, L.R. 3 C.P.D. 168. The statutory rights of the C. P. R. place them in a different position from private individuals. McBryan had no right to endanger the safety of the public way. He should have obtained an injunction against Sullivan. As to public ways, see Angell on Water Courses, 7th Ed. 124, *et seq.*

Argument.

Chas. Wilson, Q.C., in reply: *Roberts* v. *Rose*, at first sight against me, is distinguishable. All it decides is that we might have gone on the C. P. R. land (not as is contended on Sullivan's land) and stopped the water without making any ground of complaint for Sullivan. In *Roberts* v. *Rose*, the plaintiff stood in the position of Sullivan and the defendant in that of McBryan. Roberts owned a colliery and obtained permission from Rose and from one Lowe to

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build a water-course. Rose revoked his license and Roberts continued to pour water down the water-course, whereupon Rose went on Lowe's land close to the boundary and stopped the water. Lowe made no objection. Roberts brought his action against Rose for obstructing the water-course, for Rose could have stopped the water on his own land and had no right to go on Lowe's land, Lowe not having revoked his permission. *Held*, That Lowe not having objected to Rose going on his land to stop the water, what Rose did was fair and reasonable, and the plaintiff being the wrong-doer had no right to dictate where the water should be stopped. It was admitted by counsel that Lowe, who stood in the position of the C. P. R., could not have brought an action, see p. 89. If we went on Sullivan's land we should commit a trespass.

Argument.

There is a wide difference between the C. P. R. and a public road. The C. P. R. stands in no higher position than a railway company in England operating under a parliamentary charter. They could have gone on Sullivan's land and prevented the water from coming on their track and our land as well as we could, but instead they bring an action so as to obtain a perpetual easement on our premises.

Cur. adv. vult.

December 11th, 1896.

Judgment of DAVIE, C.J.

DAVIE, C.J.: The statement of claim in an action by the Canadian Pacific Railway Company, respondents, against the defendant, appellant, avers that the plaintiff company is the owner of a railway track and right of way running through Shuswap, in the District of Yale, and a station yard at Shuswap aforesaid, and that the defendant is the owner of land immediately adjoining the Shuswap station and the right of way there. The statement of claim, for cause of action, goes on to allege that "on or about the 1st

June, 1895, the defendant penned back water flowing through a natural water-course or channel running through defendant's said land, by means of a dam erected across said water-course throwing the water back on to and causing it to flood plaintiffs' said right of way and station ground at Shuswap aforesaid, and doing great damage and injury thereto." By the statement of defence the natural water-course is denied, but the defendant says that the water which flooded the plaintiffs' right of way was brought there by the operations of one Shaw, an occupier of neighbouring land as tenant of one Sullivan, who brought the water on to his own land for the purpose of irrigating, and then permitted it to flow on to the right of way, and from thence the water passed on to the defendant's land, whereupon he penned it back as it was causing him great loss and injury. In reply, the plaintiff company says that even if what the defendant says is true, he had no right to erect a dam or barrier in such a way as to pen back such water and throw it on to and cause it to flood the plaintiffs' track and right of way, as they allege was done by defendant. They further say that but for the action of the defendant in erecting or raising and extending the dam or barrier at the place and in the manner in which he did so erect or raise and extend the same, the water would not have been thrown back on to and flooded the plaintiffs' track and right of way, and they would not have suffered any damage or injury; and the plaintiffs also say that the defendant might have lawfully obstructed and penned back the water on Shaw's land, and by such means have more easily and effectually protected his own lands than by obstructing or penning back the water in the manner he did, and would thereby have caused the plaintiffs no injury.

Upon these pleadings the action was tried before WALKEM, J., without a jury, at Vancouver, on 31st March, 1896, and judgment was rendered on 9th April following against the defendant, for $125.00 damages, with costs of

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and incidental to the action, and it was further ordered that the injunction granted herein be made perpetual.

The terms of this injunction are not set out in the case on appeal, and the reasons for the judgment the parties have not brought before us, neither have they acquainted us with the facts found by the Court below. The appeal book contains only a copy of the pleadings, the short-hand notes of the evidence at the trial, the examination for discovery of the defendant, the formal judgment, and the notice of appeal. Whilst there are no findings of fact, or reasons, to guide the Court of Appeal, it is established, because distinctly admitted, that the alleged natural water-course had no existence. *Mr. Wilson*, counsel for the defendant, remarked during the trial, "that (the natural water-course) is the bight of the case"; and *Mr. Senkler*, also of counsel for the defendant, asks to have the fact noted that the defendant has brought witnesses from Shuswap to prove that it is not a natural water-course. There was no amendment at the trial. *Mr. Davis*, plaintiffs' counsel, remarking that it was unnecessary to amend, "the statement of claim simply goes further than we have proved, that is all."

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It thus appears that the plaintiffs and defendant came into Court to litigate the question of a natural water-course; the plaintiff gave up the point; whereupon judgment went against the defendant, who is condemned to pay not only his own costs, including those of the witnesses whom he has brought from Shuswap to prove there was no natural water-course, but all of the plaintiffs' costs as well

When conclusions of fact are arrived at in the Court of first instance they are not lightly interfered with in a Court of Appeal, but when there are no findings of fact it may be open to question how far the Court of Appeal is justified in itself acting as a Court of first instance, and endeavouring to ascertain the facts; it has not the witnesses before it, and has had no opportunity of judging of their manner and

demeanour. In a case such as this a description of the *locus in quo* from the witnesses themselves would be of advantage, and perhaps a view of the scene of dispute might be of greater advantage still. We could, of course, refer the case to the Court below for findings and reasons, but as delay over another high water might be injurious, perhaps ruinous, it is probably more in the interests of justice and in keeping with the policy of the Judicature Acts, that the Court should pronounce the best opinion it can upon the materials before it.

As nearly as I can gather the facts from the evidence reported to us, McBryan and one Walker, some twenty-six years ago or more, took up adjacent lands, Walker's lands abutting on the Thompson River, which, flowing about east and west, formed the northern boundary of Walker's land, whilst McBryan's ranch lay along the south boundary of Walker's land. Walker commenced irrigating, and as his land sloped from the river towards the foot-hills which lay to the south of McBryan's land, Walker's irrigation water was carried on to McBryan's land, there making a depression. In consequence of McBryan's complaint, Walker erected a flume and so carried the water off. Walker it seems sold out to Williams, who did more irrigating than Walker, with the consequence that McBryan was again troubled with the overflow, to protect himself against which, in the year 1883, he erected the dam, which, afterwards having been built higher and extended, is the dam complained of in this action. The dam so erected by McBryan effectually protected his land from the overflow from the irrigating operations carried on by Williams, and afterwards by Sullivan and Shaw who succeeded Williams, and continued to do so until McBryan built it higher and extended it, under the circumstances presently mentioned.

The Canadian Pacific Railway was located and constructed where it now runs through McBryan's land in 1885, and McBryan conveyed them the right of way, at about the

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dividing line between Sullivan's and McBryan's ranches. In 1883, when McBryan first erected his dam, the Canadian Pacific in that locality was not in contemplation, the route having been surveyed by the Tete Jeune Cache.

In running over that portion of the land where Sullivan's irrigation water flowed towards the dam, the Canadian Pacific was built on a trestle, through which, for about seventy-five feet, the irrigation water used to run towards the dam, which prevented its escaping any further, and had the effect of distributing it along the land severed by the trestle and back upon Sullivan's land until it would sink in the ground and disappear. This state of things continued for ten years, and until the spring of 1895, when the Canadian Pacific filled up the trestle and built an embankment in lieu of it, constructing a narrow culvert to carry the water from the Sullivan side of the track on to the other side. The immediate effect of thus confining the water formerly spread over a comparatively large area of land was to make a race through McBryan's land, which, breaking over his dam, rushed through the depression on his land for half a mile or so, until finally it again cut its way into the river, after carrying away, as he tells us, eighty feet of his land. To protect his land against this sudden inundation, McBryan immediately raised his dam and extended it, thus backing up the water and throwing it on to the track and on to Sullivan's land, and it is for this action on his part that the judgment has been given against him in this action.

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In *Whalley* v. *The Lancashire and Yorkshire Ry. Co.*, 13 Q.B.D. 131, an unprecedented rainfall had accumulated a quantity of water against one of the sides of the defendants' railway embankment, when, for the protection of their embankment, which was in danger of being washed away, the railway cut trenches or culverts in it, by which the water flowed through and went on to the land of the plaintiff, which was on the opposite side of the embankment

and at a lower level, and so caused the plaintiff injury. It was held by the Court of Appeal that, though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and, notwithstanding that without the trenches the water would eventually have found its way on to the plaintiff's land by percolating through the embankment, the railway company were responsible in damages. The jury in that case found as a fact that from the way in which the defendants let the water through it did more damage to the plaintiff's land than if it had been allowed to percolate through without their having done anything. That case would seem to shew the C. P. R. to have been in the wrong when they converted a comparatively harmless flooding of water for a space of seventy-five feet into a water race through the narrow culvert built by them through the embankment, unless it can be considered that in so doing they were doing no more than using their railway in the ordinary course a railway would be used, in which case they would be within their right according to the first principle stated by BRETT, M.R., in *Whalley's* case, and also laid down by LINDLEY, L.J., in *Hurdman* v. *U. E. Railway Co.*, L.R., 3 C.P.D. at p. 174, "that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface, to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land."

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As an example of this principle, the owner of the land next to a railway cannot recover because smoke which has

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come from the engines of trains without any negligence on the part of the railway company has destroyed or injured such fruit or trees, or in case of damage from sparks thrown by the locomotive, for those instances arise from using the railway according to the ordinary nature of railways. In *Whalley's* case, BRETT, M.R., remarks, "but it is impossible to my mind to say that to cut holes through a railway embankment is the ordinary use of it; on the contrary, the more holes are cut through it the less fit is it for use as an embankment." Of course that remark has no application to the facts of this case, but yet it shews that we are in the region of the principle about the ordinary use of property. A railway must throw up embankments and make culverts, and to that extent doubtless the Canadian Pacific in this case used their railway in the ordinary course of traffic; but it appears to me that what they did in this case can hardly be excused on that score, for whilst erecting their embankment and constructing their trestle they could have saved McBryan from injury by building a flume, or carrying the water off in some other way; or, possibly, they might have gone on to Sullivan's land and abated the nuisance there, *Roberts* v. *Rose*, L.R. 1 Exch. 82.

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They are excused only from annoyance caused by the natural user of their land, and it can hardly be considered a natural user if by the exercise of a little ordinary care the annoyance could have been prevented. This I think sufficiently appears from *Wilson* v. *Waddell*, 2 App. Cas. p. 95, where the defence was that the operations had been conducted in the ordinary mode, with due and reasonable care, and that the influx of water complained of was by natural gravitation; and see the passage from the judgment of the Lord Chancellor in *Fletcher* v. *Rylands*, L.R. 3 H.L. 338, quoted in the judgment of Lord BLACKBURN, in *Wilson* v. *Waddell*. See also *Hurdman* v. *N. E. Railway Co.*, L.R. 3 C.P.D. 168, and other cases there quoted. The Railway Act, 1888 (Can.), Sec. 90, authorizes the diversion

of water-courses and the making of drains and conduits, but by section 91 the Company is to restore the water-course as nearly as may be to its former state, and by section 92 the Company shall in its exercise do as little damage as possible, and is to make compensation to all parties interested for all damage sustained by reason of the exercise of its powers in these respects; and in view of the patent fact that McBryan had maintained this dam continuously for ten years, whilst the railroad was in operation, he had at least acquired a right to the protection of his land which the dam afforded. It was the Company's act which rendered the dam in its then condition an insufficient protection against the water. Can they then object to his strengthening his dam in order to meet the changed state of affairs which they themselves have brought about? I think not, when, as in this case, the strengthening and extending were only commensurate with the changes for which the Company were themselves responsible.

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I have read the judgment of my brother McCREIGHT. His general conclusions upon the facts are not very different from my own; but he thinks, basing his opinion upon *Roberts* v. *Rose*, that although McBryan was at liberty to throw back the water on to the C. P. R. the judgment of the Court below may be sustained on the ground that he could only do so upon notice, and that there was no proof of notice in this case. In dealing with this contention, it must be remembered that no such point was raised or seems to have been thought of at the trial, and consequently there was no evidence as to notice one way or the other. It is quite consistent with the facts that McBryan may have given notice. What kind of notice was required under such circumstances? Had not the Company for the last ten years constant notice that McBryan was protecting his property by means of this dam, and that if they themselves did anything to increase the volume or force of water to be guarded against, McBryan must necessarily raise this dam?

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What occasion then for notice? *Res ipsa loquitur.* If they did anything which rendered the dam insufficient, the patent facts of the case, in which they had acquiesced for years, sufficiently informed them that McBryan must necessarily protect his property.

I have also read the judgment of my brother DRAKE, and should agree in what he says, but that he treats McBryan as the original wrongdoer, which I think is a mistake. It was the Company who threw the water on to McBryan, not McBryan who first threw the water on to the track of the Company.

The question then is, what judgment ought to be given? As before pointed out, the facts of the case are not found, and I am sensible that I may be in error in the construction which I have placed upon the evidence as reported to us. Moreover, there is some question, bearing in mind the public character of the railway, and the decision in the case of *Vancouver* v. *the C. P. R.*, 23 S.C.R. 1, whether it was not incumbent upon McBryan to submit to the wrong and seek his remedy in damages, rather than protect himself at the risk of injuring the track, and possibly causing danger to property and life. I am not prepared to say to what extent it would be necessary or right to carry this principle. KING, J., in the case just cited, says, at page 23, "The principle of the Railway Act is that the *jus publicum* is to be subordinated to the rights given to the Railway Company by statute, so far, and so far only, as there is a physical inconsistency between the maintenance of the *jus publicum* and the doing of the thing which the Legislature has authorized to be done."

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Whether, or to what extent, this principle may be extended, so as to subordinate the enjoyment of private property to the maintenance of the railway, it is not for me now to express an opinion.

I think there ought to be a new trial. As already pointed out, the parties came into Court to litigate the natural water

course question, which was given up by the plaintiffs. I think, therefore, that McBryan is entitled to the costs of the first trial. The policy of the Judicature Acts is to conclude in one suit all matters in controversy relating to the subject matter, and for that purpose to bring before the Court all parties whose presence may be necessary in order to enable such matters to be finally determined. It seems to me, in view of what evidence we have, that Sullivan and Shaw were the primary wrongdoers in this matter, but we cannot condemn them unheard. They should be rather joined as defendants or brought in as third parties. As my brother McCREIGHT agrees in the following form for the judgment to take, the order of the Court will be that the appeal be allowed and the judgment of the Court below set aside, and a new trial had. Respondents will pay forthwith appellant's costs of the first trial, but, in deference to the judgment of McCREIGHT, J., limited to the expenses of the witnesses to disprove the natural water-course. Leave to both parties to amend as advised, and to plaintiffs (respondents) to add Shaw and Sullivan or either of them if so advised, and to defendant (appellant) to bring them in as third parties. As the appellant has not taken steps to bring the reasons for the judgment of the Court of first instance before us, nor its findings of fact, there will be no costs of this appeal. The costs of the first trial, except those which are to be paid by the respondents forthwith, will abide the event of the new trial.

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McCREIGHT, J.: In this case the Canadian Pacific Railway Company sue the defendant McBryan for that he penned back water flowing through, as alleged in the statement of claim, a natural water-course or channel running through his land, by means of a dam erected across said water-course, thus throwing the water back and causing it to flood plaintiffs' right of way and station ground at Shuswap.

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The defendant denies that the water was flowing through a natural water-course and says that the water that flooded

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plaintiffs' right of way was brought there by the action of one Shaw, an occupier of neighbouring land, who brought the water on to his own land for the purpose of irrigating, and then permitted it to flow on the plaintiffs' right of way, thence the water passed on to the defendant's land, when he penned it back, as it was causing him the defendant great loss and injury.

The plaintiffs' reply, that even if the above statement is true the defendant had no right to erect a dam so as to pen back such water and throw it on to and cause it to flood the plaintiffs' track and right of way; and further, that but for the action of the defendant in erecting or raising and extending the dam at the place and in manner, etc., the water would not have been thrown back and flooded the plaintiffs' track and right of way, etc. Further, the plaintiffs say that the defendant might have lawfully obstructed, etc., the said water by a dam erected on the said land occupied by the said Shaw, and thereby protected his own lands more easily and effectually than by obstructing or penning back the water as he did, and would thereby have caused the plaintiff no damage or injury, etc.. Though the statement of claim alleges that the water-course was a natural water-course and the statement of defence denies it, the point was surrendered by the plaintiff at the trial, and the trial Judge took it as admitted that it is not a natural water-course. I shall refer to this point presently, as it is important on the question of costs, and perhaps in some other respects. The evidence shows that the *locus* in question was near the Thompson River, where the railway track runs nearly parallel to the river. Shaw was occupying land as tenant to one Sullivan on the side of the railroad track nearest the river and irrigating his land. The surplus irrigation water had formed a water-course which passed under a trestle that the Company had made on their line in 1884 or 1885. The land of the defendant McBryan was principally on the other side of the line and at a somewhat lower level,

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so that the water-course after passing through the trestle passed down through the defendant McBryan's land. So far back as the year 1883 McBryan had constructed the dam on his own land, as he found the surplus irrigation water was, to use his own expression, washing his land away, and he could not induce the occupiers of the Sullivan ranch to turn off the water into another direction. Since then he did not move the dam but raised it higher, I presume as it became necessary to do so; but he says from the years 1883 till 1889 none of the irrigation water was running over his ranch to the South Thompson River. Some water may have gone below the dam, but none passed over it. It appears that in the year 1889 he, McBryan, and his partner rented the Sullivan ranch and held it till the spring of 1894, when Shaw took it, and is now the present occupier. McBryan then goes on to describe how Shaw complained that the dam was backing the water up and injuring his crop, and he replied by telling Shaw that "the water was running over his dam and washing his ranch into the river, etc." He then adds that finally the dam broke, and he then took his team and men and repaired the dam, raising it higher. This was in May or June of last year, *i.e.* 1895. He further says "it was overflowing again or likely to, and I got some Indians with me and carried it across to the C. P. R. fence." Again he says, "I ran the dam along the C. P. R. fence south-west as shewn in blue on the sketched Ex. A., and the effect of it was to make the water run along the C. P. R. track." He is then asked, "If it had not been for the extension the water would not have run over that C. P. R. track?" Answer, "No, it would have flowed on to my property and run down." Griffith, the engineer of the C. P. R. Company, says, "It (the trestle) was filled in the spring of 1895, and the damage was done in June, 1895, by his backing up the water." The Judge then says, "Then there could not have been a flow of water from Sullivan's place that would inconvenience

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either you or him, if you had not dammed it up by filling in the trestle?" To which the witness replies, "But there is a water-way left there, my lord, anyway." I cannot help thinking that the filling in of the trestle and substitution of the culvert had an injurious effect on the defendant's land, for he says, "The water going through this depression has washed part of my ranch; this year (*i.e.* 1895) it has washed eighty feet, and last year (*i.e.* 1894) about twenty feet. Of course this may have been in part through increased irrigation, by Shaw causing more water to come down, but it may also well be, as the trial Judge appears to have thought, that the confining of the water from the space of seventy-five feet, *i.e.* the length of the trestle, to the smaller dimensions of the culvert, may have greatly increased its velocity and consequent damage to the property through which it passed. It was contended for the plaintiffs that the defendant was not entitled under any circumstances to pen back the water, even on his own land, so as to cause injury to the Company, and for this proposition *Roberts* v. *Rose*, L.R. 1, Ex. 82, was relied on. This case, when the contemporaneous reports of it are perused, see 14 W.R. 225, 3 H. & Colt, 172, 33 L.J. Ex. 4, per CHANNELL, B., 35 L.J. Ex. 63 and 64, 13 L.T.N.S. 471, and 12 Jur. N.S. p. 78, will be found to warrant no such general proposition, but it does seem to require that the defendant before raising his dam and continuing it to the line of the track of the C. P. R. Company, should have first given them notice, so that they should be able to stop the injurious flow of water as they might be advised. In the report in the Weekly Reporter, at p. 226, Lord BLACKBURN, in giving the judgment of the Exchequer Chamber, is made to say: "If Lowe had had notice of the defendant's revocation he would have given notice to the plaintiffs and then the result would have been the same as that which has happened; but without giving notice to Lowe the defendant would not have been justified in turning his land into a

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pond, and to have done so would have given him a cause of action against the defendant." In 35 L.J. Ex. at p. 63, it is said, in the report of the same case, "Now if the defendant had come to Lowe and said to him, 'I can no longer allow this water to flow on to my land, therefore you must take care of yourself,' Lowe would doubtless have said to the plaintiffs, 'stop the water crossing to me unless you can make some arrangement to take it away from me,' etc." Again, in the same page 63, Lord BLACKBURN says: "Now could the defendant without giving Lowe notice have lawfully built a dam lower down and so have turned Lowe's land into a pond? It seems to me he could not; it would have been a wrong against Lowe, and there is nothing to justify an interference with his property; the cause of action which Lowe would have had would not have been the defendant's building a dam on his own land, but the doing it when the effect would have been without excuse to cause the water to flow over Lowe's land." In 13 L.T. at p. 473, we find, per Lord BLACKBURN: "Then could the defendant without having given Lowe notice turn his land into a pond. It seems to me, etc." In 12 Jur. at p. 78, Lord BLACKBURN is made to say: "No doubt if Lowe had been acquainted with the fact that the defendant had revoked his license, he would have revoked his, etc." In L.R. 1 Ex. at p. 90, the point as to the necessity of notice in such cases is more obscurely put, but still may be discerned. Complaints were made of the way cases were reported in the Law Reports of 1865, when that series of reports was commenced. I think as there is no proof or even allegation of such notice having been given by McBryan before raising and extending the dam that the decision may be affirmed on this ground. But I think it would be mischievous to have it supposed that a dam could not under any circumstances be built by a land owner on a water-course like the present, merely because it might be injurious to a proprietor higher up. That would be directly

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contrary to *Nield* v. *L. & N. W. R.*, L.R. 10, Ex. 4 Lord BRAMWELL, at p. 7, and *Rex.* v. *Pagham Commissioners*, 8 B. & C. 355. *Roberts* v. *Rose* is not even referred to in the *Nield's* case, or in *Whalley* v. *L. & Y. R.R.*, 13 Q.B.D. 131 (C.A.), and see 1 Sm. L. Ca. notes to *Ashby* v. *White*, referring to *Neild's* case at pp. 303-304, Edition of 1879. When *Roberts* v. *Rose* was before the Court of Exchequer, Baron CHANNELL said: "Now I agree that the defendant had a right to prevent the water coming on his land," 3 H. and Colt, p. 172; and in 33 L.J. Exch. the same learned Baron is represented as saying: "Now, I agree that the defendant had a right to obstruct the water coming on his land." In *Whalley's* case the C. A. by no means disagreed with *Nield's* case, and that of *Rex.* v. *Pagham Commissioners*, see page 136, and see Garrett on Nuisances, p. 91, note (1), where the case of *Whalley* is put on the ground of the water having come on to the defendant's land, whereas in the present case the water which did the mischief to the the C. P. R. track must necessarily have come down after the raising and extension of the dam, as appears by remembering that it was such raising and extension and that alone which caused the trouble. I think the judgment must in any event be varied to meet the case, which may happen, of McBryan giving a proper notice to the Company of his intention to build the dam. The statement of claim alleges that the water was flowing through a natural water-course, and the statement of defence denies this, and it was admitted that it was not a natural water-course, and dealt with accordingly. Counsel for the Company said it was not necessary to amend, but that is a mistake, as will be seen from *Bristow* v. *Wright*, 1 S. L. Ca., p. 570, Ed. 1862. In that case Lord MANSFIELD said: "The distinction is between that which may be rejected as surplusage and what cannot," or as Lord ELLENBOROUGH said in *Williamson* v. *Allison*, 2 East 452: "I take the rule to be that if the whole of an averment may be struck out without destroying

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the plaintiff's right of action it is not necessary to prove it, but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action, for then, though the averment may be more particular than it need have been, the whole must be proved or the plaintiff cannot recover." I mention these cases because they shew that as the statement of claim was framed and denied it was necessary to prove that there was a natural water-course, which could not be done, therefore amendment was necessary. But then comes the question, whether it would have been right to allow the plaintiff to amend. Now, in Taylor on Evidence, 9th Ed. 192, it is said: "No amendment ought to be allowed at *Nisi Prius* if its effect will be to afford reasonable grounds for a demurrer, for it would be obviously unjust to deprive a party of his right to demur, and thus possibly force him at a large increase of costs to move in arrest of judgment or *non obstante veredicto*." The case of *Martyn* v. *Williams*, 26 L.J. Exch. 117, and 1 H. & N. 817, is referred to for this doctrine, and amply proves it. Now in the present case, by the allegation of the plaintiff that there was a natural water-course, the defendant was not able to raise by his pleading the point that there being no natural water-course the plaintiffs' case was not sustainable, and so at a small cost determine the case. There certainly seemed on the argument "reasonable grounds" to suppose that if the expression "natural water-course" had been left out there might have been ground for demurrer, though it now appears to me to be a question whether the defendant should have alleged and been able to prove reasonable notice to the C. P. R. Company of his intention to erect and extend the dam. It seems, however, plain, as Mr. *Senkler* urged, that the defendant is entitled to his costs of bringing witnesses to shew there was no natural water-course.

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Since preparing my judgment I have perused that of the Chief Justice, and am impressed with the difficulty which arises in pronouncing any final judgment, owing to the want

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of findings by the Court of first instance. If the Chief Justice's view of the facts is the right one (and the more I compare it with the evidence at the trial, the more I am disposed to think that it is), it is open to serious question how far those facts do not displace the necessity of notice by McBryan of his intention to raise the dam. In view of the undisputed fact that McBryan had maintained the dam for the protection of his property for quite ten years without any objection, had not the Company thereby continuing notice that if they themselves did or caused anything which increased the volume or velocity of the water against the dam, McBryan must necessarily raise or extend his only method of protection, namely the dam, to at least the same extent as the Company might increase the water, and having then converted what was little more than a pond into a water-race by means of the culvert, was there anything to oblige McBryan to give notice that he must protect himself, and that, as the Company must have known, in the only way that he could protect himself, viz., by raising and extending his dam? Does not the principle *res ipsa loquitur* apply? I agree that instead of affirming the judgment, the justice of the case will better be met by directing a new trial.

It may be a material question on such new trial, and to be expressly decided, whether the substitution of the culvert for the trestle was not the main cause of the injury which the defendant McBryan sustained in the spring and summer of 1895, and whether the Company were not well aware that such would be the case, and, supposing the facts to be found, including the long usage and repair from time to time of the dam by McBryan, whether the necessity of notice referred to in the judgment in *Roberts* v. *Rose*, was not superseded; and again, whether such notice directly or indirectly, was not given by McBryan. I think there should be a new trial, either party having liberty to amend his pleadings, and the defendant having leave to bring in Shaw

and Sullivan as third parties, the plaintiffs paying the costs of the defendant's witnesses brought to disprove the alleged natural water-course. The costs of the first trial to abide the event of the second. No costs of the appeal. I may say that as long as Sullivan was exercising his water rights for irrigation purposes according to law and without negligence he could not be restrained, but this also might be properly inquired into upon a new trial.

DRAKE, J.: The action is brought to recover damages against the appellant, owing to his having erected a dam on his land, which has caused the plaintiffs' railway to be flooded. The judgment in the action was for the plaintiffs.

Both parties admit that the water came on to the defendant's land, not by a natural water-course or by an artificial one, but owing to a large quantity of water being brought on to the land of one Sullivan for irrigating purposes; this surplus water made its way along a depression in the soil, through a culvert under the railway on to the defendant's land. The evidence shews that in 1872, when Walker was in possession of Sullivan's land he commenced irrigating, and owing to the defendant complaining about the water coming on to his land, Walker carried it off in another direction by a flume.

Judgment of DRAKE, J.

In 1883 the defendant built a dam, as the flume was not apparently used, in order to stop the water injuring his land. This dam was 400 feet within his boundary, and this water thus penned back escaped through the porous soil without damage.

In 1895 the defendant raised the dam and extended it up to the plaintiffs' line of railway, the effect of which was to throw on to the railway the water which in other years did not touch their line, and damage was done to the permanent way, with a possibility of much more serious damage resulting in the future if the obstruction was continued.

FULL COURT.

1896.

Dec. 11.

C.P.R. v. McBRYAN

The defendant says he is entitled to use his own land and protect it from injury in the best way he can, and if in the performancee of these natural rights his neighbour is injured, it is a case of *damnum absque injuria*, and the plaintiff has no right to recover.

It is admitted that the *causa causans* of the water being on the defendant's land at all is the use of an irrigating ditch which supplies Sullivan, the owner of the land the other side of the railway, with water for irrigating purposes. The additional water which is thus thrown on to Sullivan's land finds its way across the railway on to the defendant's land and is of serious detriment to him.

Instead of restraining Sullivan from committing the nuisance, which the defendant would be justified in doing, he contents himself with protecting himself at the expense of the Railway Company.

Judgment of DRAKE, J.

The maxim *Sic utere tuo ut alienum non lædas* applies ; the defendant can protect himself in any way he pleases as long as in so doing he does not injure his neighbour who is no party to the nuisance.

He is at liberty to prevent the nuisance by going on to his neighbour's land and stopping it, but as such a course of proceeding would most likely lead to other difficulties he would be justified in preventing the water coming onto his own land, even if in so doing he threw it back on to Sullivan's; but he is not entitled, in his effort to protect himself, to do damage to his neighbour who is not the cause of the injury, and say to his neighbour, "You can protect yourself by stopping the water coming across the railway through the culvert you have placed there, and you ought not therefore to have a right of action against me."

It is true the defendant did not bring the water on to his lands, and therefore he does not come under *Rylands* v. *Fletcher*, L.R. 3 H. of L. 330, but he, by the erection of a dam, caused that which was innocent before, as far as the Railway Company was concerned, to become a source of

injury to them, and thus falls within the rule of *Hurdman* v. *North Eastern Railway*, 3 C.P.D. 168, where the Court laid down that if any one by artificial erection on his own land causes water, though arising from a natural rainfall only, to pass on to his neighbour's, and thus substantially to interfere with his enjoyment, he will be liable to an action. The Court there pointed out that there were many things which a man might do on his own land which were not actionable although they interfered with a neighbour's enjoyment, such as interfering with a view by building, etc. In the case of *Roberts* v. *Rose*, L.R. 1 Ex. 82, the Court held that in abating a nuisance, if there are two ways of doing it, the least mischievous must be chosen; and further, if by either of the methods a wrong would be done to an innocent third party or the public, then that method cannot be justified at all, although an interference with the wrongdoer might be justified.

Judgment of DRAKE, J.

I am therefore of opinion that the judgment appealed from is right, and the appeal should be dismissed with costs.

Judgment appealed from set aside and new trial ordered.

McCOLL, J.

[In Chambers].

1896.

Dec. 31.

CRANSTOUN v. BIRD, ET AL.

CRANSTOUN v. BIRD, *ET AL.*

Practice—Special Jury—Right to—Whether as of course.

The granting of a special jury under C.S.B.C. Cap. 31, Sec. 44, as amended by 58 Vic., (B.C.) Cap. 12, Sec. 11 and C.S.B.C. Cap. 64, Sec. 71, as amended by 52 Vic., (B.C.) Cap. 8, Sec. 5, and Order XXXVI., is not as of right, but is a discretion to be invoked upon special circumstances. As no special grounds were shewn, the application was dismissed.

Statement.

SUMMONS by the defendants for a special jury, and that the sum by which a special jury exceeds in cost that of a common jury be paid by the defendants in the first instance. The plaintiff had demanded a jury. No special grounds for having the case tried by a special jury were shewn upon the application.

M. Macgowan for the application.

J. H. Senkler, contra.

Judgment of McCOLL, J.

McCOLL, J.: It does not appear to me that the Statutes quoted and Rules of Court give an absolute right to a special jury, but that the granting or refusal of same is a discretion to be exercised by the Judge before whom the application is made upon a consideration of the character of the questions to be tried and other circumstances affecting the trial. As no special reasons why the case could not be properly tried before a common jury have been shewn, I must dismiss the application. As there appears to have been no settled practice the costs will be costs in the cause.

Application dismissed.

BELL v. COCHRANE.

McColl, J.

1897.

Jan. 6.

BELL v. COCHRANE

Solicitor and client—Contract between—Fraud.

Plaintiff being unable to raise money to pay off a mortgage upon his lands, applied to a solicitor, who, in consideration of certain interest and commissions, agreed to advance the necessary amount, and also to obtain time from defendant's unsecured creditors, and took as security a conveyance of plaintiff's equity of redemption in the property, with a short period for payment and redemption.

Upon the evidence it appeared that there was no fraud or improper dealing on the defendant's part.

Held, There is no principle upon which any agreement a solicitor and client choose to make in the circumstances of the particular case, is to be invalidated, if no deception is practised and no advantage taken, merely because of the existence of the relationship.

ACTION for an order that the defendant, a solicitor, re-convey to the plaintiff certain lands the equity of redemption whereof the plaintiff had conveyed to the defendant, and for an account. The facts sufficiently appear from the judgment. The action was tried before McColl, J., on 22nd December, 1896. Statement.

Thornton Fell for the plaintiff.

E. P. Davis for the defendant.

Cur. adv. vult.

January 6th, 1897.

McColl, J.: Although I did not doubt at the close of the trial what my judgment should be, I thought it a proper case in which to take time for consideration. Further Judgment.

McCOLL, J.

1897.

Jan. 6.

BELL v. COCHRANE

consideration has confirmed the opinion which I had formed.

The facts necessary to be here mentioned may be briefly stated. The plaintiff being heavily indebted upon mortgage of his property and also to unsecured creditors, and being pressed by his creditors and in imminent danger of having all his property sacrificed, applied to the defendant, in consequence of his advertisement of money to lend, for the loan of moneys to enable the plaintiff to settle with his creditors.

The defendant applied for this loan to Messrs. Drake, Jackson & Helmcken, through whom he had been in the habit of procuring loans and who had always acted as the plaintiff's solicitor. This application was declined owing to the security being deemed inadequate, and the plaintiff and defendant then agreed that the plaintiff's equity of redemption in his property should be conveyed to the defendant, who would provide the money necessary to pay off the then existing mortgage, and would also endeavour to induce the unsecured creditors to allow the plaintiff time for the payment of their claims, the plaintiff agreeing to pay the defendant certain interest and commissions. The plaintiff was to have a limited time to redeem, and in default the property was to become the defendants.

Judgment.

This action having been brought for redemption, to which the defendant has submitted, the plaintiff now claims that the agreements entered into between him and the defendant were not such agreements as the defendant in the proper discharge of his duty towards the plaintiff should have advised the plaintiff to execute, the relationship of solicitor and client having existed between them, as the plaintiff contends.

The plaintiff's application to the defendant was as a money lender, not as a solicitor, and there is not I think any pretence for the suggestion that at the time when the transaction was entered into between them the plaintiff

relied in any way upon the defendant as a solicitor, and everything which the defendant afterwards did was done in the performance of his agreement.

But assuming the existence of the relationship, why is the plaintiff not to be bound by his agreement? It was argued for him that it was unusual and unfair. But the transaction was in no sense a loan upon mortgage in the usual way, but an unusual agreement which no man of ordinary prudence would have entered into with the plaintiff, unless for special inducements. It is manifest that no provision which may be found in such an agreement can properly be said to be either unusual or usual. Then how was the transaction unfair? So far as appears, it was the only alternative to the total loss by the plaintiff of all his property, which, not improbably, might have been sacrificed so as to leave him still in debt. I can only say that the terms obtained by the defendant, apart from the time fixed for redemption, do not appear to me, in the light of the evidence, more beneficial to him than what would naturally be expected in the circumstances. It may have been that the possibility of the plaintiff not being able to redeem was a material circumstance inducing the defendant to enter into this transaction. But I am not aware of any principle upon which any agreement which the plaintiff and defendant chose to make in the circumstances of the particular case, is to be held not to be binding, even assuming the existence of the relationship of solicitor and client between them, if no deception was practiced or advantage taken.

Judgment.

I am quite satisfied that the agreements in question were fully explained to and thoroughly understood by the plaintiff before they were executed by him.

The plaintiff is not an illiterate man, and from a very close observation of him during the trial I believe him to be of more than ordinary intelligence, and upon one whom it would be difficult to impose.

McCOLL, J.

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There will be a reference to take the accounts upon the basis of the agreements.

The defendant having submitted to be redeemed will have his costs up to and including the trial. Further directions and costs are reserved.

Judgment accordingly.

McCOLL, J.

[In Chambers].

1897.

Jan. 7.

TOLLEMACHE v. HOBSON.

Practice—Rule 704—Examination of person for whose benefit the action is brought.

The debt to recover which the action was brought had been assigned to the plaintiff by C. in part satisfaction of a judgment debt due by him to them.

Held, That C. was a person for whose immediate benefit the action was brought "within the meaning of Rule 704," and that the defendants were entitled to examine them for discovery.

Statement.

SUMMONS by the defendant for an order to examine one Buxton, the assignor to the plaintiffs of the claim sued for, under Rule 704.

J. H. Senkler for the application.

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

Judgment of McCOLL, J.

McCOLL, J.: One Buxton having, as is alleged, a claim against the defendant for payment of certain moneys, the plaintiffs have brought this action under an assignment made towards satisfaction of a large sum for which judgment has been recovered against Buxton, and the defendant now

seeks to examine him as a person "for whose immediate benefit the action is prosecuted." Rule 704, taken from the Ontario Rules.

It is I think clear, from the materials before me, that the action is not prosecuted for Buxton's benefit at all, much less for his immediate benefit, though no doubt if the plaintiffs are successful he will be benefitted by the application of the amount which may be realized towards payment of the judgment against him. I should have thought the rule contemplated some relationship between the plaintiff and the person, such as that of trustee or agent.

But the cases of *Macdonald* v. *Norwich Insurance Co.*, 10 P.R. 462, and *Minkler* v. *McMillan*, *ibid* p. 506, are directly in point, and there the Court found a way to a more liberal construction of the rule.

I therefore think that although personally I would have had no hesitation in reaching a different conclusion, my better course will be to follow those cases, leaving the Full Court to decide finally which view is correct.

The order will be made costs in the cause.

Order made.

BOLE, L.J S.C.

1897.

Jan. 11.

TOLLEMACHE v. HOBSON.

Practice—Commission—Affidavit for.

A party desiring a commission for his own examination outside the jurisdiction should himself make an affidavit of the facts relied on.

TOLLEMACHE *v.* HOBSON

SUMMONS by plaintiff for an order for a commission to take his own evidence in England. The application was made upon affidavit of his solicitor.

Statement.

C. B. Macneill for the application.

J. H. Senkler contra.

BOLE, J.: The application herein is made to issue a commission to examine Mr. Parker, a plaintiff now in England, one of the grounds relied on being that he has to return to India to attend to important business there. But Mr. Parker himself has not made any affidavit, as *Light* v. *Anticosti Co.*, 58 L.T. 25 D., would seem to require; see also *Nadin* v. *Bassett*, 25 Ch. D. 21, (C.A.); *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137, (C.A.); *Ross* v. *Woodford* (1894), 1 Ch. 38. I have not sufficient material before me to warrant me in granting the application, which is therefore dismissed with costs to be defendant's costs in any event.

Judgment.

Summons dismissed.

IN THE COUNTY COURT OF VANCOUVER.

BOLE, CO. J.

1897.

Jan. 13.

STRONG v. HESSON.

STRONG
v.
HESSON

Novation.

There may be a complete verbal novation; neither the discharge of the original debtor on one side, nor the assumption of the new debt on the other, need be evidenced in writing.

Statement.

ACTION to establish a novation and recover the amount of the debt transferred.

W. J. Bowser for the plaintiff.

R. W. Harris for the defendant.

Judgment.

BOLE, Co. J.: The action herein is brought to recover $354.90, under the following circumstances: The plaintiffs are loggers and worked for the firm of Dickinson & Airey; a boom of logs was sent down to Vancouver and finally sold to Robertson & Hackett of that place by Dickinson & Airey, for $519.00. The plaintiffs had, I gather, come down to Vancouver to get paid their wages out of this boom, or failing payment to place a woodman's lien on these logs, under the Act. But after the sale to Robertson & Hackett, Dickinson & Airey requested them to pay the money to Hesson & Irving instead of themselves.

Hesson & Irving, at Dickinson & Airey's request, as plaintiffs allege, undertaking to pay the plaintiffs the wages due them as per the time bills presented Hesson & Irving; and the plaintiffs releasing Dickinson & Airey from their claims for wages, and looking alone to Hesson & Irving for payment thereof, according to their promise. The entire history

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of the transaction seems to indicate that these men who got out the boom were getting uneasy about their wages, knowing the necessity of putting a lien on these logs within thirty days from 27th November, 1896, before they were cut up.

They pressed Dickinson & Airey for payment, and then at a time the liens might still be fyled and while the boom was *in esse*, Dickinson & Airey arrange with Hesson & Irving that they, Hesson & Irving, receive the proceeds of the boom and pay plaintiffs their wages, to which Hesson & Irving agree, and the plaintiffs accept them as their debtors, releasing Dickinson & Airey from further liability. For notwithstanding Mr. Hesson's denial of his promise to pay the men, which he explains as being only a promise that there would be a settlement, I think his actions in paying Brown and McFee (two of the men), promising to pay the captain of the Sunbury for his services *re* this boom (because he had already promised to do so), and taking the time bills from the plaintiffs, coupled with his failure to recollect having told the captain of the Sunbury that he (Hesson) got rid of the men by paying off two of them, or that Anwyl, one of the plaintiffs, threatening to fyle a lien unless he was paid, go far in my mind to indicate Mr. Hesson's memory is not perfectly reliable. Now the defendants, besides traversing the alleged contract, alternatively rely on the Statute of Frauds, and that the contract being a promise to pay the debt of another should be in writing to bind them. The question to my mind is, does the evidence establish that there was a novation, a new contract, by which the plaintiffs accepted Hesson & Irving in lieu of Dickinson & Airey, and entered into a new contract with them. The elements necessary to constitute novation are fully set out in Pollock on Contract, page 193, 5th Ed.; *Lakeman* v. *Mountstephen*, 43 L.J.Q.B. 188 (H.L); *Scarf* v. *Jardine*, 7 App. Cas. 351; *Reg* v. *Smith*, 10 S.C.R. 55; *Henderson* v. *Killey*, 17 O.A.R. 461; and it is

Judgment.

unnecessary to further refer to them. And as I think that the defendants herein, at the request of Dickinson & Airey, assumed and directly promised plaintiffs to pay them the debt due them for wages by Dickinson & Airey, and the plaintiffs at Dickinson & Airey's request, knowing and relying on the arrangement between Dickinson & Airey and the defendants, consented and agreed to accept Hesson & Irving as their debtors in the place and stead of Dickinson & Airey, and released and discharged Dickinson & Airey (the original debtors) from all further liability with respect to said wages. The consideration mutually being the discharge of the old contract. I find there was a novation.

Judgment.

Judgment will be entered for the plaintiffs for the sum of $354.90 and costs.

Judgment for plaintiffs.

FULL COURT.

1897.

Feb. 1.

REGINA v. ALDOUS.

Practice — Appeal — Abandonment — Time — Setting down — Supreme Court Amendment Act, 1896, Sec. 16—B.C. Rule 678.

REGINA v. ALDOUS

The Supreme Court Amendment Act, 1896, Sec. 16 (*a*), regulating the time for appeals must be read with Rule 678 (*b*), and an interlocutory appeal which has not been set down two days before the day for the hearing of the appeal will be treated as abandoned, and will be dismissed on motion by the respondents.

Semble, A motion to quash the appeal is proper practice.

Quære, whether "days," in Rule 678, means clear days.

Statement. MOTION to strike out an appeal to the Full Court by the

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NOTE (*a*.) "16. Rule 673 of the Supreme Court Rules is hereby repealed, and the following substituted therefor: "Notice of appeal to the Full Court from any final judgment or order or decree shall not be less than a fourteen day notice; and if the judgment, order or decree is made more than fourteen days before the sittings of the Full Court, it shall be for the then next sittings of the Full Court, but if the judgment, order or decree is made within fourteen days of the sittings of such Court, then for the second sittings next after such judgment, order or decree; but on an appeal from any interlocutory judgment, order or decree, the appellant shall give forty-eight hours' notice of such appeal, and shall duly set down the same for hearing for a day not more than twelve days from the time when the judgment, order or decree appealed from is signed, entered, or otherwise perfected, or in case of refusal, from the date of such refusal; and the appeal last mentioned shall be brought by giving notice of appeal within eight days from the time of signing, entry, perfection, or refusal, as the case may be; and such periods of eight or twelve days shall not be enlarged except by leave of the Full Court or of the Judge appealed from."

NOTE (*b*.) "678. The party appealing from a judgment or order shall leave with the Registrar a copy of the notice of appeal to be fyled, together with a *præcipe* for hearing the appeal, two days before the day for hearing, and such officer shall thereupon set down the appeal to be heard, and the party appealing shall at the time of the fyling of the *præcipe* deliver to the Registrar ten copies of the Appeal Book, if printed; if written, five copies."

defendant Aldous, from an order of DRAKE, J., of the 16th November, 1896, for a writ of prohibition to SPINKS, Co. J., restraining him from proceeding with the hearing and adjudication of an appeal from a conviction of the defendant. The order was perfected on 25th November; the notice of appeal was given on 2nd December, 1896, the notice stating that the Full Court would be moved "forty-eight hours after service." The appeal books were mailed at Vancouver to the Registrar at Victoria in time to arrive at Victoria on the night of Thursday, 3rd December. Owing to a mistake in the post-office the papers did not arrive at Victoria until Friday night, 4th December, and were received by the Registrar on Saturday morning, 5th December, too late to be set down for the December Full Court, which sat on Monday, 7th December. On 12th December the appellants moved the Full Court for an extension of time, the motion being refused. The appellant then set his appeal down for the February Court. The motion to strike out the appeal was heard by the Full Court, DAVIE, C.J., and MCCREIGHT and DRAKE, JJ., on 1st February, 1897.

Statement.

E. P. Davis, Q.C., for the motion: This must be treated as an abandoned appeal. The appellants, after giving their notice of appeal, should have set the appeal down for hearing for a day not more than twelve days from the time when the order was perfected, Supreme Court Amendment Act, 1896, Sec. 16. The appeal books should have been deposited with the Registrar with a *præcipe* to set down the appeal two days before the day for hearing, Supreme Court Rule 678, *Webb* v. *Mansell*, 2 Q.B.D. 117; *Re Oakwell Collieries*, 7 Ch. D. 706; *Charlton* v. *Charlton*, 16 Ch. D. 273; Ann. Prac. 1897, pp. 1056, 1066, 1069. The Full Court have already refused to extend the time.

Argument

Charles Wilson, Q.C., contra: The respondents should not move to strike out the appeal, but raise the question by a

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preliminary objection. The delay was not owing to the default of the appellant, but to the mistake of the post-office.

E. P. Davis, Q.C., in reply: The proper course to get rid of an appeal which has been abandoned and irregularly entered on the list, is to move to strike it out, *Charlton* v. *Charlton*, *supra*, Ann. Prac. 1897, p. 1066. If we had waited for argument we might have waived objection, *In re McRae*, 25 Ch. D. at p. 19.

DAVIE, C.J.: It is the duty of the appellant, under Rule 678, to set down his appeal two days before the day of hearing, which, in interlocutory appeals, must be not more than twelve days from the time the order appealed from is signed, entered, or otherwise perfected. Here the appeal books could not have been received by the Registrar, even if there had been no delay in the post-office, before Friday, the 4th, in which case the Registrar would have had to set the appeal down for hearing for a day two clear days after, and Sunday not counting in periods less than six days, that day would be Tuesday the 8th, more than twelve days from the perfecting of the order appealed from. The Rules should be strictly adhered to. The appeal must be struck out with costs.

Judgment of DAVIE, C.J.

McCREIGHT and DRAKE, JJ., concurred.

Appeal struck out with costs.

TOLLEMACHE v. HOBSON.

FULL COURT.

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TOLLEMACHE v. HOBSON

Practice—Appeal — Abandonment — Time—Setting down—Supreme Court Amendment Act, 1896, Sec. 16—S.C. Rule 678—Waiver of irregularity by appearance of counsel—Costs.

Supreme Court Amendment Act, 1896, Sec. 16, regulating the time for setting down and bringing on appeals for hearing, is imperative, and an appeal set down for the Full Court next after the entry of the order appealed from, being more than twelve days thereafter, is out of time and will be struck out.

Appearance of counsel to take such an objection is not an appearance upon the appeal so as to waive the irregularity, *In re McRae, Forster* v. *Davis*, 25 Ch. D. 16, distinguished; *Bevilockway* v. *Schneider*, 3 B.C, 88, not followed.

The Court will not extend the time for appealing except on substantial grounds.

Omitting to give notice of a preliminary objection to an appeal is not a sufficient ground for depriving a respondent who succeeds in dismissing the appeal thereon, of his costs.

APPEAL to the Full Court, by the defendant, from an order of McColl, J., (judgment reported *ante* p. 214) perfected and entered on 9th January, 1897, ordering that one Buxton should be examined for discovery. The notice of appeal, given on 9th January, was to "The Full Court at its next sittings . . on Monday the first day of February, A.D. 1897," and the appeal was, on 20th January, set down for argument for that day. The appeal came on for argument before Davie, C.J., McCreight and Drake, JJ., on 1st February, 1897.

Statement.

Charles Wilson, Q.C., for the respondent: We take the preliminary objection that the appeal is out of time. Section 16 of the Supreme Court Amendment Act, 1896, requires an appeal to be set down for hearing for a day not more than twelve days from the time when the order appealed from is

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perfected. The notice is given and the appeal set down for a day more than twenty days from the entry of the order.

E. P. Davis, Q.C., for the appellant: The difference between this case and *Regina* v. *Aldous*, *ante*, p. 220, is that we set the appeal down for the next Court, while the appellants in that case did not. Because no Full Court happens to sit within twelve days from the perfecting of the order the appellant should not lose his right of appeal. It would be absurd to give notice of appeal and set the appeal down for a day when the Court is not sitting. The notice of appeal was in time, and the only question is whether the appeal was abandoned as not being set down in time. The appellants should have moved to strike out the appeal; by not doing so they have waived the irregularity, *In re McRae*, 25 Ch. D. 19; *Bevilockway* v. *Schneider*, 3 B.C. 88. In any event the Court should now extend the time, *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; *In re Manchester Economic Society*, 24 Ch. D. 488.

Argument.

Charles Wilson, Q.C., in reply: The appearance of counsel to take an objection is not an appearance on the appeal so as to waive the irregularity, *Edison General Electric Co.* v. *Bank of B.C.*, 5 B.C. 34. The appellants do not shew special grounds for extending the time. The application to extend the time should be in the first instance to a single Judge, Rule 686.

Judgment of DAVIE, C.J.

DAVIE, C.J.: I have no doubt about the case. The appearance by counsel to take an objection is not a waiver of the irregularity to which he objects, *Edison General Electric Co.* v. *Bank of B.C.*, 5 B.C. 34, distinguishing *In re McRae*, 25 Ch. D. 19; *Steedman* v. *Hakim*, 22 Q.B.D. 16. The provision in the statute as to setting down and bringing on the appeal is imperative. There are no grounds shewn for now extending the time, see *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368. The appellant might have set his appeal down to be brought on for hearing within the

prescribed time, as the Full Court will sit at any time to hear interlocutory appeals, Supreme Court Amendment Act, 1896, Sec. 13. The appeal should be dismissed.

McCREIGHT, J.: I concur. The Court will not extend the time unless the party applying shews special grounds indicating that it would be unjust not to do so.

DRAKE, J.: I concur. There must be some substantial ground shewn for extending the time. The party applying must shew some equity. The omission to give notice of a preliminary objection is not a sufficient ground for depriving a respondent of costs, *Ex parte Shead*, 15 Q.B.D. 338 *(a)*.

Judgment of DRAKE, J.

Appeal dismissed with costs.

NOTE *(a)*—Since this decision, it was provided by Supreme Court Amendment Act, 1897, Sec. 12: "No motion to quash or dismiss an appeal, and no preliminary objection thereto shall be heard by the Full Court unless notice specifying the grounds thereof shall have been served upon the opposite party at least one clear day before the time set for the hearing of the appeal."

FULL COURT.

1897.

Feb. 2.

REINHARD v. McCLUSKY.

REINHARD v. McCLUSKY

Practice — Appeal — Time — Extending — Supreme Court Amendment Act, 1896, Sec. 16—S.C. Rule 684—County Court Amendment Act, 1896, Sec. 6.

Section 16 of the Supreme Court Amendment Act, 1896, (made applicable to County Court Appeals by the County Court Act Amendment Act, 1896, Sec. 6), supersedes Supreme Court Rule 684, and exclusively governs as to the time for bringing appeals from final judgments. The time for bringing such an appeal will not be extended unless strong circumstances in favour of such extension are shewn.

On respondent's succeeding on a preliminary objection as to the appeal being out of time, the appellant will not be given an opportunity of procuring material to support an application for such an extension. He should be prepared with such material on the argument.

APPEAL by the defendent to the Supreme Court from a judgment of SPINKS, Co. J., pronounced on 31st August, 1896. The notice of appeal was dated and served on 15th October, 1896, and gave notice that the Court would be moved fourteen days after the date thereof, or so soon thereafter as the Court should sit. The appeal was set down on 10th November for argument before the Full Court, which sat on 7th December, when the appeal stood over until the next Full Court, coming on for argument before McCREIGHT, DRAKE and McCOLL, JJ., on 2nd February, 1897.

Statement.

W. J. Taylor, for the appeal.

P. Æ. Irving, for the respondents: We take the preliminary objection that the appeal is out of time. The County Court Amendment Act, 1896, Sec. 6, provides: "The Rules, Orders and Statutes from time to time regulating appeals in the Supreme Court to the Full Court shall govern the

Argument.

practice and procedure upon similar appeals from a County Court;" and by the Supreme Court Amendment Act, 1896, Sec. 16, "Notice of Appeal to the Full Court from any final judgment or order or decree shall not be less than a fourteen day notice; and if the judgment, order or decree is made more than fourteen days before the sittings of the Full Court, shall be for the then next sittings of the Full Court; but if the judgment, order or decree is made within fourteen days of the sittings of such Court, then for the second sittings next after such judgment, order or decree." By section 13 of the Supreme Court Amendment Act, *supra*, no Full Court sits in the month of September. The Full Court next after the judgment appealed from was on the first Monday in October, but the appellants did not give notice of appeal until 15th October, and did not set the appeal down until 10th November, when it was entered for hearing before the December Full Court.

Argument.

W. J. Taylor for the appellants: The respondents have waived the right to take this objection, as the appeal came up at the December Court and was adjourned until the next Court without the objection being taken. [*Per Curiam*—There is no memorandum in the books of the appeal coming on for argument. It is merely marked to stand over until next Court.] Section 16 of the Supreme Court Amendment Act, *supra*, does not limit the time within which appeals from final judgments should be brought, but only deals with the notice to be given. That it was not the intention of the Legislature to reduce the time for appealing from a final judgment is clear, as section 16, *supra*, repeals Supreme Court Rule 673, which related only to the notice required, leaving Rule 684, prescribing the time for appeal, untouched. [Drake, J.: Section 16 limits the time for hearing an appeal.] No, the statute does not vary Rule 684. It says that "Notice of appeal" shall be a fourteen days' notice, and to the next Court, not that the appeal shall be brought on at that Court. [McColl, J.: Section 21

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of the Supreme Court Act Amendment Act, 1896, retains the rules "as amended by this Act." Does not this, if there is any conflict between section 16 and Rule 684, do away with that rule, as to the time for bringing appeals?] In any event the Court should allow me to procure material to make an application to extend the time.

Judgment.

MCCREIGHT, J.: We must be bound by the statute. Section 16, enacts that notice of appeal must be given for the next Court after the judgment, order or decree, and we cannot set aside the law. The time cannot be extended unless some strong circumstances are shewn, such as *In re Manchester Economic Building Society*, 24 Ch. D. 488, so that it would be unjust and hard not to extend the time. The appellant should be ready with all materials to support an application for such extension. The appeal must be dismissed.

DRAKE and MCCOLL, JJ., concurred.

Appeal dismissed.

KINNEY v. HARRIS.

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KINNEY v. HARRIS

Practice—Appeal—Time—Extending—Abandonment—Mining Law—Form of case on appeal—C.S.B.C. 1888, Cap. 82, Sec. 29.

Owing to the nature of the subject matter the Court requires stronger grounds for extending the time for appealing from judgments in mining cases than in other matters.

The provision in Sec. 29 of Cap. 82, C.S.B.C. 1888 (*a*), that appeals from judgments of mining Courts "may be in the form of a case settled and signed by the parties," is not imperative, but such appeals may be brought in the same form as in ordinary cases.

Defendants gave notice of appeal from a judgment of a County Court in a mining cause rendered 11th March, 1896, within the time provided by section 29, *supra*, for the next Court, but being unable to procure the notes of the trial Judge, did not set it down for that Court. In December, 1896, they obtained the notes, and in January, 1897, gave notice of moving the Full Court to extend the time for setting down the appeal, shewing that the Registrar refused to enter the appeal without appeal books containing the Judge's notes being fyled.

Held, by the Full Court (Walkem, Drake and McColl, JJ.): That the appellants were bound to set the appeal down for argument at the next Full Court, or to move that Court for an extension of time for setting it down, and that the neglect to take either course constituted an abandonment.

Statement.

APPEAL by the defendants from the judgment of SPINKS,

NOTE (*a*). "29. An appeal shall lie from any judgment of a Mining Court to the Supreme Court at Victoria sitting as a Full Court. The appellant shall, within ten days from the date of such judgment, give notice of the appeal to the other party, and also give security, to be approved of by the Judge of the Court appealed from, for the costs of the appeal, and for fulfilling any orders which may be made in the course of such appeal by the Supreme Court; and the said Supreme Court may either order a new trial on such terms as it shall think fit, or order judgment to be entered for either party, or try the cause *de novo*, and make such order as to costs as may be deemed proper. The appeal may be in the form of a case settled and signed by the parties or their solicitors; and if they cannot agree, the Judge of the Court appealed from may settle and sign the same upon being applied to by the parties or either of them."

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Co. J., at the trial, entered on 11th March, 1896, in favour of the plaintiffs, declaring that the plaintiffs' mineral claim, "Slocan Sovereign," which had been located on 28th June, 1889, over part of the defendant's mineral claim, "Omega," was a valid and subsisting mineral claim, on the grounds that at the time of the locating of the Omega mineral claim on 26th October, 1892, that part of the ground covered by it was already located as the "Apex" and "Toughnut" mineral claims, located on 1st November, 1891, and the "Belle Isle" mineral claim, located on 12th May, 1892, which were valid and subsisting mineral claims at the time of the location and record of the "Omega," but not at the time of the location and record of the "Slocan Sovereign." Security for the appeal was deposited on 11th March, 1896. Notice of appeal was given on 18th March, 1896, "to Her Majesty's Supreme Court of British Columbia at Victoria, sitting as a Full Court, at the next sittings of said Full Court." The defendants could not procure the notes of the learned trial Judge until December, 1896, and being unable therefore to make up appeal books did not set the appeal down for the July Court. On 26th January, 1897, the defendants gave notice of motion for leave to set their appeal down for argument at the February Full Court, upon the grounds that they were unable through no fault of their own to obtain from the trial Judge a copy of his notes of evidence and proceedings at the trial, such notes being necessary to be obtained before the defendants could set down the appeal, it being the practice of the Court that appeals should not be set down without five copies of such notes and proceedings being fyled, and the Registrar of the Court when asked refusing to set down the appeal without same. It appeared from the affidavits fyled by the defendants that from the day of the trial repeated applications had been made to the trial Judge for his notes. On 25th February, 1897, the defendants duly entered their appeal for hearing before the March Full Court. The appeal and motion came

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on together for hearing before the Full Court, WALKEM, DRAKE and MCCOLL, JJ., on 4th March, 1897.

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Robert Cassidy, for the appeal: The defendants may now bring their appeal on for hearing. The County Courts Amendment Act, 1896, by section 4, does not apply to proceedings already taken, and section 19 of the Supreme Court Act, 1896, also excepts from the operation of the Act appeals from judgments given in the Supreme Court prior to the passing of the Act. This appeal is governed by S.C. Rule 684, which provides that appeals from final judgments shall be brought within one year; see County Court Amendment Act, 1896, Sec. 6. In any event the time should now be extended. It was not the fault of the defendants that the appeal was not set down before. The affidavits shew that constant attempts were made to procure the Judge's notes, without which the appeal could not be entered.

Argument.

L. P. Duff, contra: The defendants' appeal is under C.S. B.C. 1888, Cap. 82, Sec. 29, and should be "in the form of a case settled and signed by the parties or their solicitors." By not bringing on their appeal for argument before the July Full Court according to their notice the defendants have lost their right to appeal, and it must be treated as abandoned. The grounds shewn are not sufficient to warrant an extension of the time to bring on the appeal.

Robert Cassidy, in reply: Abandonment is a question of intention, and the conceded facts clearly shew that the defendants had no intention of not proceeding with their appeal. The words of the statute as to the form of the case are permissible only.

Judgment.

MCCOLL, J.: The ordinary practice as to the form of bringing County Court appeals applies to mining cases, which by section 29, *supra*, may be brought by case stated if the parties so desire; but the defendants by not duly setting down the appeal pursuant to their notice, for the July Full Court abandoned that notice and must now apply

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to the discretion of the Court, which will only be exercised on the strongest grounds. They should have applied to the Court for which they had given their notice, to extend the time when they found that they could not procure the Judge's notes. It is to the interest of the litigants and the public that mining cases should be quickly determined, and stronger grounds are required to procure an extension of time therein than in ordinary cases. Those shewn here are not sufficient. The appeal must be struck out and the motion dismissed with costs.

Judgment.

WALKEM and DRAKE, JJ., concurred.

Appeal struck out and motion to extend the time dismissed with costs.

KILBOURNE v. McGUIGAN.

DRAKE, J.
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Feb. 22.

FULL COURT.
March 11.

KILBOURNE
v.
McGUIGAN

Practice—Time—Extending—Appeal—Service of notice on agent of solicitor of party to proposed action—Whether sufficient—Mining Law—Adverse claim—Estoppel—Mineral Act, 1891, Secs. 21, 126; Mineral Act Amendment Acts, 1892, Sec. 14; 1893, Sec. 9, Sub-sec. (h), and Sec. 10; 1894, Sec. 6.

The Mineral Act, 1891, Secs. 21 and 126 (*a*) provides that adverse claims should be fyled in the office of the Mining Recorder, while the Act of 1894, section 6, gives a form of notice of application for certificate of improvements which sets forth that adverse claims must be sent to the Gold Commissioner.

The proposed defendants made an application for a certificate of improvements for the mining ground in question and published the notice prescribed by section 6, *supra*, whereupon the proposed plaintiffs, in accordance with the terms of the notice, fyled their adverse claim with the Gold Commissioner. Within the prescribed time they gave instructions to their agent to commence action, but he by mistake omitted to do so, the omission not being discovered until some time afterwards when negotiations for settlement were pending. Prior to and during these negotiations the proposed defendants knew that no action had been instituted. Finally, one of the proposed defendants refused his assent to a settlement which had been agreed to by all the other parties. The proposed plaintiffs moved to extend the time to commence action.

Held, per DRAKE, J.: By the Mineral Act Amendment Act, 1892, Sec. 14 (*b*), the fyling of an adverse claim in the office of the Mining Recorder is a condition precedent to the right of action, and that there is no jurisdiction to extend the time.

Quære, Whether, if there were such a jurisdiction, the grounds shewn were sufficient.

Upon appeal to the Full Court:

Held, per McCREIGHT, WALKEM and McCOLL, JJ., affirming DRAKE, J.: (1) That the adverse claim was not properly fyled. (2). That, owing to the nature of the subject matter, the Court requires stronger ground for extending time in mining cases than in other matters.

The notice of appeal was served on the agent of the solicitor for the proposed defendants.

Held, sufficient.

Statement.

APPEAL from a judgment of DRAKE, J., rendered on 22nd

SEE Notes *(a)* and *(b)* next page.

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Statement.

February, 1897, dismissing a motion by the proposed plaintiffs to extend the time for commencing action to sustain an adverse claim notwithstanding the expiration of such time. The proposed defendants, as owners of the "American Boy" mineral claim, on 27th December, 1895, published in the British Columbia Gazette a notice of intention to apply to the Gold Commissioner for a certificate of improvements, for the purpose of obtaining a Crown grant of the above claim, and further gave notice "that adverse claims must be sent to the Gold Commissioner and action commenced before the issuance of such certificate of improvements," the notice being in the precise form given in section 6 of the Mineral Act Amendment Act, 1894. The proposed plaintiffs were the owners of the "Treasure Vault"

NOTE (*a*). "21. Upon the establishment of a mining division, and the opening of a Mining Recorder's office therein, under the authority of this Act, such office and none other shall be the proper office for recording all mineral claims within such mining divisions and making all records in respect thereof."

"126. Upon the establishment of a mining division, and the opening of a Mining Recorder's office therein, under the authority of the last preceding section (*a*), such office and none other shall be the proper office for recording all claims, records, certificates, documents, or other instruments affecting claims, mines held as real estate, or mining property situate within such mining division; and whenever, by this Act, or any Act amending the same, anything is required to be done at or in the office of the Gold Commissioner or Mining Recorder of the district, it shall, if the same affects or concerns any claim, mine held as real estate, or mining property situate within a mining division, be done at or in the office of the Mining Recorder of the mining division wherein such claim, or other mining property, is situate."

NOTE (*b*). "14. Section 37 of the said Act is hereby repealed, and in lieu thereof be it enacted as follows:—

"37. (1.) No adverse claim shall be fyled by the Mining Recorder after the expiration of the period of publication in the next preceding section mentioned; and in default of such fyling no objection to the issue of a certificate of improvements shall be permitted to be heard in any Court, nor shall the validity of such certificate when issued be impeached on any ground except that of fraud."

and "Ajax" mineral claims, the boundaries of which conflicted with those of the "American Boy," and caused an adverse claim to be fyled in the office of the Gold Commissioner on 26th February, 1896, before the expiration of the sixty days. It appeared from the affidavit of the agent of the proposed plaintiff that he instructed J. B. McArthur, his agent, to commence proceedings in the County Court of Kootenay to establish the adverse claim, and that he attended at the office of the Registrar of that Court at Nelson with Mr. McArthur, about 12th March, 1896, within thirty days after fyling the adverse claim, when Mr. McArthur informed him that he was fyling the necessary papers and leaving instructions with the Registrar to enter the plaint and issue the necessary summons thereon; that, until about July, when the Registrar informed him the plaint had not been entered, he believed that the proceedings had been commenced; but at that time he was negotiating a settlement with the proposed defendants, during which they disclosed to him, by their solicitor, their knowledge of the fact that proceedings had not been commenced; notwithstanding which, all but Joseph Boss, husband and business agent of Eva Boss, on 27th October, 1896, agreed to a settlement, which was subject however to the ratification by Boss, who was then in England, but had before leaving expressed his willingness to settle. After Boss' return he, on 18th December, 1896, finally refused his assent to the settlement. The applicants also brought in an affidavit of J. B. McArthur that he prepared the necessary papers and attended at the office of the Registrar to enter the plaint and was convinced that he had done so, and that afterwards, by consent of the proposed defendants' solicitor, he caused a successive summons to be issued. The proposed plaintiffs, on 6th January, 1897, gave notice of motion to extend the time to commence action. The motion came on before DRAKE, J., on 19th February, 1897.

Statement.

A. E. McPhillips, for the motion: The Mineral Act, 1896,

Argument.

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does not apply to this case. If the adverse claim was fyled with the wrong officer the applicants should not be prejudiced, having followed the notice inserted in the Gazette, which is in the form contained in section 6 of the Mineral Act, 1894: *Kane* v. *Kaslo*, 4 B.C. 486. There is a discretion to extend the time under circumstances such as those shewn here, where the conduct of the proposed defendants has been such as to estop them from setting up that the adverse claim was not properly fyled, as they had knowledge of all the facts during the negotiations. The negotiations were continuous [DRAKE, J.: You were not, by the negotiations for settlement, prevented from bringing action]. We thought until July that Mr. McArthur had instituted the proceedings. The grounds shewn are sufficient: *Re Good Friday*, 4 B.C. 496; *Cusack* v. *L. & N. W. Ry. Co.* (1891), 1 Q.B., Lord ESHER, at p. 348, practically overruling *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368, is in my favour, *Re Maple Leaf and Lanark Mineral Claims*, 2 B.C. 323. [DRAKE, J.: The decisions in this Court go to this, where there is some inability to bring action or to serve writ, and the time has expired but a few weeks, it may be extended, here more than a year has elapsed.]

Argument.

Gordon Hunter, contra: There is no jurisdiction to entertain the application. By the Mineral Act, 1891, Secs. 21 and 126, the adverse claim, the due fyling of which is a condition precedent to the right of action, should have been fyled in the office of the Mining Recorder of the district where the claim was registered. Unless this is done the proposed defendants' title cannot be impeached. The applicants might as well have fyled their adverse claim in the Land Registry Office. A direction of this character in a statute must be strictly followed: Maxwell on Statutes, Ed. 1883, 453. The form is repugnant to the statute and must give way: Hardcastle on Statutes, 287; *Institute of Patent Agents* v. *Lockwood* (1894), App. Cas. 347; *Wood* v. *Boozey*, L.R. 2 Q.B. 340, BLACKBURN, J., at p. 353. As to extending

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time, the grounds shewn are not sufficient to warrant an exercise of the discretion. Much stronger grounds are required for extending the time after than before the expiration thereof: *Ex parte Lovering*, L.R. 9 Ch., MELLISH, L.J., at p. 590; as to mistake, see *Re Helsby* (1894), 1 Q.B. 742, *per* Lords Justices HALSBURY and LOPES; *Trask* v. *Pellent*, 5 B.C. 1.

A. E. McPhillips, in reply: Where there has been an accident or mistake, as here, the time should be extended, Ann. Prac. 1896, 1062-3. [DRAKE, J.: There is no hard and fast rule, each case must be decided on its own merits.] The form is contained in the section, and is therefore in a higher position than a schedule. The Act says the adverse claim must be fyled with the Mining Recorder; the Amending Act of 1894 sets forth the form, and according to the form it must be fyled with the Gold Commissioner. It is misleading and a trap; see ARMOUR, C.J., in *Truax* v. *Dixon*, 17 Ont. 366. [DRAKE, J.: Take it in its broadest sense, there are two duties, one imposed by the Act itself to fyle the adverse claim with the Mining Recorder, the other under the form in section 6, *supra*, to fyle it with the Gold Commissioner.] *Cusack* v. *L. & N.W. Ry. Co.*, *supra*, shews that the time should be extended, when upon the facts it is in the interests of justice; and it is submitted that this is a proper case for the exercise of discretion.

Argument.

Cur. adv. vult.

February 22nd, 1897.

DRAKE, J.: Thomas McGuigan and another, as recorders of the claim "American Boy," on 27th November, 1895, gave notice in the Gazette of their intention to apply for a certificate of improvements, and that notice follows the form of notice in section 6 of the Mineral Act Amendment Act, 1894, and states that notice of adverse claims must be sent to the Gold Commissioner and action commenced before the issuance of such certificate of improvements. This was substituted for the notice set out in section 17 of

Judgment of DRAKE, J.

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the Act of 1893, by which notice was to be sent to the Mining Recorder and not the Gold Commissioner, and that section was substituted for Form F. to the Act of 1891, where the term "Gold Commissioner" was used.

It appears by the affidavit of J. B. McArthur, mine owner, that he was instructed by E. J. Matthews, who is stated to be the agent of Frank H. Kilbourne and William Braden, the claimants, that adverse claims on behalf of the "Ajax" and "Treasure Vault" had been fyled in the office of the Gold Commissioner at Nelson previous to 27th February, 1896. These claims I presume were fyled as adverse claims to the "American Boy."

The "American Boy" is a claim situated within the New Denver mining district, and there is a Mining Recorder there, but no notices of such adverse claims were fyled at the office of New Denver.

Judgment of DRAKE, J.

Kilbourne and Braden contend that notice having been given to the Gold Commissioner at Nelson, they have sufficiently complied with the Act to establish their right to bring an action.

I do not think they have. By section 21 of the Mineral Act of 1891, mineral claims are to be recorded in the Mining Recorder's office within whose district the claim is located; and by section 126 all documents affecting claims held as real estate or mining property shall be recorded in the Mining Recorder's office of the district; and whenever anything is required to be done at the office of the Gold Commissioner or Mining Recorder, it shall be done at the office of the Mining Recorder of the mining division wherein such claim is situated.

Section 9 of Cap. 29, 1893, says: "At the expiration of the term of the publication, provided no adverse claims shall have been fyled with the Mining Recorder, he shall forward the documents to the Gold Commissioner."

Section 14 of Cap. 32, 1892, enacts, "that in default of . .

fyling an adverse claim . . no objection shall be permitted . . to be heard in any Court."

The claimants there allege that they were misled by the statutory notice into giving notice to the Gold Commissioner and not to the Mining Recorder; but the Act is clear that whether or not notice is given to the Gold Commissioners it must be given to the Mining Recorder of the district. This has not been done, and no adverse claim can now be set up.

The claimants contended that as negotiations for settlement of boundaries had been pending for a considerable time but eventually failed, that that is a sufficient ground to permit me to exercise the discretion now to give time. I do not think it is. If a proper notice of adverse claim had been given in time, and good reasons were shewn why the period for commencing the action should be extended, I have no doubt that the Court could exercise a discretion, but when no proper notice of adverse claim has been given I have no such discretion. The motion must be refused with costs.

Judgment of DRAKE, J.

Motion dismissed with costs.

From this judgment the applicants appealed to the Full Court, and the appeal was argued before McCREIGHT, WALKEM and McCOLL, JJ., on 11th March, 1897.

Gordon Hunter, for the respondents: We object that a proper notice of appeal has not been given. The notice of appeal was served on me as agent of the solicitor of the respondents; there being no action there is no authority for service on the solicitor, it should be on the party personally; service on the agent of a solicitor is not sufficient.

Argument.

Per Curiam: We are of opinion that the service is good.

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Argument.

A. E. McPhillips, for the appellants: We were misled by the form prescribed by the statute. Where the mistake arises from the misleading provisions of the statute it should be relieved against. If the adverse is irregular the Court may in a proper case hold the adverse claim fyled as sufficient, *vide* Mineral Act Amendment Act, 1893, Sec. 10. The fact that no certificate of improvements has yet been issued shews that the respondents have not been vigilant and did not intend to take advantage of the statutory provisions. There was a mistake: Lord BOWEN, in *McNair* v. *Audenshaw Co.* (1891), 2 Q.B. 502; *Cusack* v. *L. & N.W. Ry. Co.* (1891), 1 Q.B. 347. Until July we believed that action had been commenced; it was then too late and the negotiations for settlement were proceeding, and later an agreement of settlement was executed by all the proposed defendants except one.

Gordon Hunter, contra, was not called on.

Judgment of McCOLL, J.

McCOLL, J.: We have already decided in *Kinney* v. *Harris*, *ante*, p. 229, that the rules as to time governing ordinary cases are to be more stringently applied to mining cases. It is of the first importance that mining cases should be quickly determined and the statutory time not extended, except on very strong grounds. The grounds shewn are not sufficient. The judgment appealed from is correct, and the appeal must be dismissed with costs.

McCREIGHT and WALKEM, JJ., concurred.

Appeal dismissed with costs.

NOTE.—An application was made by the appellants for leave to appeal to the Privy Council, the motion coming on before a sitting of the Full Court, consisting of DAVIE, C.J., McCREIGHT and DRAKE, JJ. The motion was refused.

IN THE COUNTY COURT OF NEW WESTMINSTER.

BOLE, CO. J.

1897.

Jan. 18.

GRAY v. PURDY. ARMSTRONG (Garnishee).

GRAY v. PURDY

Attachment of debts—Whether money in the hands of a Receiver a debt.

Money in the hands of a Receiver is not a debt due from him to the persons interested in the estate, and cannot be attached by garnishing process.

SUMMONS by the plaintiff to attach money in the hands of T. J. Armstrong. The defendant, Purdy, obtained a judgment against the Dominion Pulverizing Company, Limited, and an execution against the Company being returned *nulla bona*, T. J. Armstrong was appointed Receiver of the assets of the Company by way of equitable execution, and realized some of such assets. The plaintiff, Gray, then commenced action against Purdy for the amount alleged to be due under a covenant in a mortgage, and, before judgment, issued a garnishing summons to attach the money in the hands of the Receiver in *Purdy* v. *Dominion Pulverizing Company*.

Statement.

G. E. Corbould, Q.C., for the summons, cited: *In re Cowan's Estate*, 14 Ch. D. 638.

Argument.

E. A. Jenns, contra: Money in the hands of a Receiver is not attachable: *De Winton* v. *Mayor of Brecon*, 28 Beav. 200; *Russell* v. *East Anglian Railway Co.*, 3 McN. & G. 104;

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In re Cowan's Estate, supra, is distinguishable. There, the plaintiff had the leave of the Court.

BOLE, Co. J.: In this case it is sought by an ordinary garnishee summons to attach a sum of money in the hands of the Receiver in the cause. As no authority overruling *De Winton* v. *Mayor of Brecon*, 28 Beav. 200, referred to with approval *In re Greensill*, L.R. 8 C.P. at p. 27, was cited to me, I must dismiss the application to garnishee the debt with costs.

Judgment.

Summons dismissed.

CANADA SETTLERS' LOAN CO. v. RENOUF.

WALKEM, J.

[In Chambers].

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Jan. 20.

CANADA SETTLERS' LOAN CO. v. RENOUF

Mortgage—Practice—Foreclosure—Affidavit of non-payment.

The certificate of the Registrar upon taking the accounts under the mortgage in a foreclosure action directed that the balance found due should be paid by the mortgagor at the office of the agent of the plaintiff (foreign) Company in Victoria.

Upon motion for final decree upon the affidavit of non-payment as directed, made by the agent:

Held, per WALKEM, J.: That the affidavit of both principal and agent was necessary.

MOTION for final decree of foreclosure. The Registrar had taken the accounts certifying the amount due, and appointing as the place of payment the office of the authorized agent of the plaintiffs, who were a foreign Company doing business in British Columbia through him.

Statement.

H. E. A. Robertson, for the motion, produced the affidavit of the agent that the default had been made in payment at the time and place appointed.

P. Æ. Irving, contra: The affidavit is insufficient. There should be an affidavit made by both principal and agent, Daniells' Ch. Prac. p. 894, 5th Ed., and see form, Daniells' Ch. Forms, p. 1319, 2nd Ed.

The mortgagor might have paid the Company at their head office in England.

H. E. A. Robertson, in reply: The agent is the only person authorized to receive the money, and the plaintiffs, being an incorporated Company, could only receive it through an agent, *a fortiori*, being a foreign Company. The certificate of the Registrar, made on the taking of the accounts, in the presence of counsel for both plaintiffs and defendant, appointed the office of the agent as the place of payment.

Argument.

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WALKEM, J.: Although the contention of the plaintiff is reasonable, yet the practice is that both principal and agent should prove non-payment, and for greater safety this practice should be carried out. I will adjourn the motion, to enable the plaintiffs to procure an affidavit of non-payment to the Company itself.

Order accordingly.

BOLE, L.J.S.C. 1897. Jan. 21. IN RE MAJOR

IN THE MATTER OF THE LAND REGISTRY ACT.

IN RE MAJOR *ET AL.*

Title to Lands—Merger.

A conveyance of the equity of redemption by a mortgagor to a mortgagee of lands does not constitute a discharge of the mortgage by merger, unless it is made to appear that such a result was intended by the parties; and when a mortgagee applies to register a conveyance of the equity of redemption the Registrar should not mark the mortgage merged unless at the request of the mortgagee.

APPEAL from Registrar of Titles, by petition under the Land Registry Act, Sec. 67.

Statement. On 18th February, 1889, John Patterson, the owner in fee, mortgaged certain lands in the City of New Westminster to one William Clarkson. William Clarkson died in 1894, and probate of his last will was duly granted to C. G. Major *et al.*, the executors thereof, on 3rd December, 1894. Subsequent to the death of William Clarkson, Patterson

executed a conveyance in fee of the lands comprised in the mortgage to Major *et al.*, the executors, and the deed was duly registered. Several judgments had been registered against the lands of Patterson, between the date of the mortgage and the date of the deed, and the then Registrar of the Land Registry Office endorsed the certificate of title issued on the registration of the deed, with the judgments then registered against Patterson, and treated the mortgage as merged, it being the practice in the Registry Office to mark all mortgages merged where the mortgage registered a quit claim or conveyance of the equity of redemption to himself from the mortgagor. On 23rd September, 1896, Major *et al.*, acting under the power of sale in the mortgage, conveyed a portion of the lands included therein to one J., and, upon applying to register the same in the purchaser, free of incumbrances, the Registrar refused to register, on the grounds: (*a*) That the mortgage had merged. (*b*) That, by the deed executed in December, the grantors, Major *et al.*, had become owners in fee, subject to all judgments registered against Patterson, and that, consequently, those judgments attached to the lands conveyed to J., and he could only be registered subject to the judgments.

Statement.

H. F. Clinton, for Major *et al.*, the petitioners: There is no merger, *Forbes* v. *Moffatt*, 18 Ves. 384; *Adams* v. *Angell*, 5 Ch. D. 634; *Liquidation Estates* v. *Willoughby*, 55 L.J., Ch. 486.

Argument.

J. E. Gaynor (the Registrar): It has been the practice of the office to mark the mortgage merged. I do not think it is right, but object to alter the practice without the decision of the Court.

BOLE, L.J.S.C.: I am of opinion that the mortgage herein has not merged, but is still a good, valid, and subsisting security. The case of *Adams* v. *Angell*, approved of as it is by the House of Lords, in *Thorne* v. *Cann* (1895), A.C. 11, shews that merger is purely a matter of intention, and, in

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this case, even without the affidavits of Patterson and Clinton, it is quite clear that there could be no intention to merge the mortgage, and so let in judgments for several thousand dollars against this estate. When a mortgagee applies to register a conveyance of the equity of redemption, the Registrar should not mark the mortgage merged, unless at the express request of the mortgagee or his duly authorized agent.

Order accordingly.

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IN RE A CERTAIN STATUTE OF THE PROVINCE OF BRITISH COLUMBIA, INTITULED "AN ACT TO CONFER LIMITED CIVIL JURISDICTION UPON STIPENDIARY MAGISTRATES AND POLICE MAGISTRATES."

Constitutional law—B.N.A. Act, Secs. 92 (Sub-sec. 14), Secs. 96 to 101.

A Provincial Statute providing that Stipendiary Magistrates and Police Magistrates shall have jurisdiction to hear and determine actions of any kind of debt where the sum demanded does not exceed $100.00, is *intra vires.*

REFERENCE to the Supreme Court of British Columbia, sitting as a Full Court, pursuant to the Supreme Court Reference Act, 1891, of the following case: "Has the Legislature of the Province of British Columbia jurisdiction to pass the Act passed in the 58th year of Her Majesty's reign, chapter 13, intituled 'An Act to confer limited civil

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jurisdiction upon Stipendiary Magistrates and Police Magistrates,' or any and which of the sections of the said Act, or any and what parts thereof?"

The question was argued before McCREIGHT, WALKEM and DRAKE, JJ., on 21st, 22nd and 23rd October, 1896.

Robert Cassidy, against the Act: The cardinal principle of the British North America Act is, that every power not expressly or by necessary inference relegated to the Provincial control remains in the Dominion authority. Since the decision of the Privy Council in the *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (1892), App. Cas. 437, it must be conceded that the prerogative and executive powers of the Crown are resident in the different Provinces of Canada, in the persons of the Lieutenant-Governors and Executive Councils respectively, to a degree co-extensive with the proprietory rights and legislative powers conferred upon the Provinces by that Act.

Argument.

The right of appointing Judges is a prerogative of the Crown. It is commonly exercised under the Constitution upon the advice of Ministers, but it is not an executive, still less a legislative power. Where there is no express relegation, there is no inference in favour of the assumption of any prerogative power by the Provincial authority, except where it is a necessary incident of some item of proprietory right or legislative power conferred upon the Provinces, in the sense that if it is not conceded the right or power would for lack of it be necessarily incapable of being exercised, in which cases the prerogative power is included as an accessory, and passes into the Lieutenant-Governors by necessary inference and intendment.

The first question therefore is, whether, upon a survey of the entire distribution of Governmental machinery in Canada, Dominion and Provincial, as provided by the B. N. A. Act, it can be said that there is any legislative power given to the Provinces which would be ineffective

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and baulked in its operation, unless this prerogative be held to have passed into the Lieutenant-Governors as a necessary complement of it. The only legislative power given to the Provinces by the Act which can be invoked for the purpose is contained in section 92: "The Provincial Legislatures shall exclusively have power to legislate in regard to (sub-section 14) the administration of justice in the Provinces, including the constitution, maintenance and organization of Courts both of civil and criminal jurisdiction." The power to organize and constitute Courts by legislation does not, *ex vi termini*, include the power of appointing Judges to preside in such Courts, nor does it do so by inference. The powers are separate in their nature and each complete in itself; the one legislative, the other prerogative; the one Provincial, the other Dominion. The fact that a Court when constituted cannot go into operation without the appointment of a Judge, does not shew that

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the legislative power is therefore incomplete. This is not the only illustration of the existence of a Provincial legislative power controlled as to carrying the statute into operation by the necessity for the intervention of the Prerogative of the Crown in the right of the Dominion. The granting of a charter for a purely Provincial Work interfering with navigation in a public harbour is another. If, without attributing the power to the Lieutenant-Governors, there were no constitutional fountain of the prerogative which could be looked to for the appointment of Judges, it might be held that it existed in the Lieutenant-Governors by inference, *ex necessitate rei*, but on the assumption that the power is not in the Lieutenant-Governors, the Provincial legislative power is not baulked, for the Governor-General fills the requirement, and it becomes a mere contest between the exercise of his available prerogative and the substitution of that of the Lieutenant-Governor in the particular case, with no sound reason drawn from the policy of the Constitution in favour of the latter, but quite the reverse.

If, therefore, the B.N.A. Act made no provision expressly locating the power to appoint Judges, *i.e.*, if section 96 had not been passed, the result, it is submitted, would be that the power of appointing all Judges would be left in the Governor-General.

The next question is, whether the provision in section 96, that the Superior, District, and County Court Judges shall be appointed by the Governor-General, operates on the theory of *expressio unius exclusio alterius*, to denude the Governor-General of the power of appointment in regard to all Judges not therein enumerated, and to clothe the Lieutenant-Governors therewith. The last mentioned rule of construction is a weak one. It is only resorted to where there is no better guide. Its application here would negative the fundamental principle of the Constitution as to the locality of the residuum of power not expressly distributed. The reasons of MARSHALL, C.J., in *Cohens* v. *Virginia*, 6 Wheaton, 375, in delivering the judgment of the Supreme Court of the United States, dealing with the argument of counsel that the provisions of the American Constitution giving to the Supreme Court of the United States certain appellate jurisdiction, and also original jurisdiction in a few specified cases, excluded the inference of its possessing original jurisdiction in any other cases than those enumerated, are applicable here. He says: "It is we think apparent that to give this distribution clause the interpretation contended for, *i.e.*, to give to its affirmative words a negative operation in every possible case not enumerated, would in some instances defeat the obvious intention of the article. It must therefore be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words and promote its general intention. The Court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention." At page 398, *ibid*, the same learned Chief Justice discriminating the decision of the Supreme

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Court of the United States, in *Marbury* v. *Madison*, 1 Cranch, at p. 174, which decision was in the following language: "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them or they have no operation at all," says page 401. "The reasoning sustains the negative operation of the words in that case, because, otherwise, the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is to apply the conclusion to which the Court was conducted by that reasoning, in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative or exclusive sense is sought to be used so as to defeat some of the great objects of the article. To this construction the Court cannot give assent." We suggest also that the enumeration of

Argument.

Judges contained in section 96 included all Judges properly so called existing at the time of Confederation, and that the Courts mentioned occupied between them the whole of the judicial area, and that the only other so called Courts were presided over by magisterial officers having a jurisdiction and performing duties associated with the administration and enforcement of certain Provincial laws imposing the sanction of penalties and punishments for their observance, and therefore not Judges in any proper sense of the term. It is conceded that the Provincial authority has power to appoint magistrates or other officers to administer and execute any Provincial laws creating offences and penalties as safeguards for the maintenance of such laws, with power to hear charges, convict offenders and impose punishment in the name of Her Majesty in the right of the Province, and also has power to appoint other *quasi* judicial officers, such as fence viewers, certain classes of arbitrators, etc.; but such magistrates and officers are arms of, and are responsible to, the Provincial Executive; are liable to

dismissal, or to withdrawal of their commissions by it with or without cause, and are not Judges in the proper sense of the term. To confer judicial powers in ordinary civil cases, whatever the amount involved, upon such officers is a subversion of the fundamental principle, and safeguards of the Judicial Office. It is a constitutional principle that the Judges shall be independent of the executive and of all political influence. A Judge is the delegate and representative of the Sovereign Power of administering justice between subjects of the realm, which is devolved upon him by letters patent under the Great Seal. He is not responsible, except to Parliament, and in the case of County Court Judges to the Governor-in-Council, in each case sitting as a High Court in which the Sovereign is represented, and only upon impeachment for cause. To support the Act is to affirm the fallacy that a Provincial Legislature can by an Act, without more, create a Judge out of a minor officer directly responsible to the Provincial Executive.

Argument.

This being a question of constitutional limitation the area of constitutional power must be delimited distinctly. The solution of the constitutionality of an Act of this kind should not be left to an enquiry as to the extent of the judicial jurisdiction conferred, or whether it is a more or less serious encroachment upon the jurisdiction of Courts of record, otherwise this Court would be making the constitution by a process of expansion or contraction to meet the local exigencies or supposed convenience of the particular case, instead of interpreting it by once for all drawing the line which exists.

Counsel also cited the following authorities among others: *Burk* v. *Tunstall*, 2 B.C. 12; *Ganong* v. *Bayley*, 2 Cart. 509; Pope's Confederation Documents, 54; Potter's Dwarris Construction of Statutes, 660; *Dobie* v. *Temporalities' Board*, 1 Cart. 351; Judgment of ARMOUR, C.J., in *Wilson* v. *McGuire*, 2 Cart. 665.

A. G. Smith, Deputy A.-G., for the Provincial Government:

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The magistrates upon whom jurisdiction is conferred by the Act are not judges, and the granting of the jurisdiction given to them is not an infringement of the rights of the Dominion to appoint Judges, under section 96 of the British North America Act. Neither is the Small Debts Court included either in terms or by implication in the Courts referred to in that section. The general right to constitute, maintain and organize Provincial Courts, including *ex vi termini*, or by necessary implication, the power to appoint the Judges is, by section 92, sub-section 14, in the Provincial Legislatures, and section 96 is an exception therefrom and must be strictly construed. The policy and effect of the Act was not to prevent the Provinces from appointing officers to preside in small Courts having a limited jurisdiction suitable to local requirements, which Courts they have an undoubted right to create, and the presiding officers in which would almost of necessity not be Judges of the class the appointment of which is reserved to the Dominion. Justices of the Peace have had a limited civil jurisdiction given to them by many statutes of this Province, Fence Ordinance, 1869, R.L. 1871, No. 113, C.S. 1877, No. 74 ; Cattle Act, R.L. 1871, No. 114; Indian Reserve Ordinance, 1869, R.L. 1871, No. 125 ; Ferry Ordinance, 1867, R.L. 1871, No. 72, C.S. 1877, No. 17 ; Volunteer Ordinance, 1869, Sec. 16, R.L. 1871, No. 117 ; Land Ordinance, 1870, R.L. 1871, No. 144, section 48; Land Act, C.S.B.C. 1888, Cap. 66, Sec. 101. Subsequently they have acted under Consolidated Acts, 1877, Cap. 167 ; and C.S.B.C. 1888, Cap. 114. They have had jurisdiction in civil matters conferred upon them by Dominion legislation: The Seaman's Act, R.S.C. Cap. 74, Sec. 52 ; Inland Waters Seaman's Act, R.S.C. Cap. 75, Sec. 30 ; The Pilotage Act, R.S.C. Cap. 80, Sec. 101.

Argument.

There is nothing in a suggestion that the policy of the Act was to protect the interests of the Dominion by leaving the appointment of the Judges in it. The assumption is that Judges are appointed to carry out the law, and that

they will do so, see STREET, J., in *Reg.* v. *Bush*, 15 O.R. 405. As to the argument that the Act is an infringement of the prerogative right of the Crown to appoint Judges: *Burk* v. *Tunstall*, 2 B.C. 12, was not argued for the Province. The reasoning of the judgment is the same as of that of the minority of the Court in *Ganong* v. *Bayley*, 2 Cart. 509. The true view is expressed in Clement on the Canadian Constitution, pp. 228, 255, 302, 306 and 471; *The Attorney-General for Canada* v. *The Attorney-General of Ontario*. 19 O.A.R. 38, 23 S.C.R. 458; *Liquidators of Maritime Bank* v. *Receiver-General of New Brunswick* (1892), A.C. 437, 4 Cart. 409.

The question has been dealt with in Ontario, in *Reg.* v. *Reno*, 4 P.R. 281, 1 Cart. 810; *Wilson* v. *McGuire*, 2 Ont. 118, 2 Cart. 668; *Reg.* v. *Bennett*, 1 Ont. 445, 2 Cart. 634; *Gibson* v. *McDonald*, 7 Ont. 401, 3 Cart. 319; *Richardson* v. *Ransom*, 10 Ont. 387, 4 Cart. 630; *Reg.* v. *Amer*, 1 Cart. 722. In New Brunswick, in *Ganong* v. *Bayley*, *supra*; *Ex parte Williamson*, 24 N.B. 64; and *Ex parte Perkins*, 24 N.B. 66. In Nova Scotia, in *Johnston* v. *Poyntz*, 14 N.S. 193, 2 Cart. 416. In Quebec, in *Reg.* v. *Coote*, L.R. 4 P.C. 599, and 1 Cart. 57; *Reg.* v. *Horner*, 2 Step. Dig. 450, 2 Cart. 317; *Ex parte Duncan*, 16 L.C.J. 188, 2 Cart. 297, and *Theberge* v. *Landry*, 2 Cart. 1. Counsel also cited *Hodge* v. *The Queen*, 9 App. Cas. 117; *Fredericton* v. *The Queen*, 2 Cart. 27; *Dobie* v. *Temporalities' Board*, 1 Cart. 351; Unorganized Territory Act, R.S.O. 1887, Cap. 91, R.S.O. 1877, Cap. 90, C.S.U.C. Cap. 128; Master and Servant Acts, R.S.O. 1887, Cap. 139, R.S.O. 1877, Cap. 133, C.S.U.C. Cap. 75; R.S.C. Appendix No. 1, p. 2324.

Argument.

Cur. adv. vult.

December 29th, 1896.

Judgment of McCREIGHT, J.

McCREIGHT, J.: The question submitted to the Court in this case substantially is whether the Small Debts Act, 1895,

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is constitutional or not. It professes to give Stipendiary Magistrates and Police Magistrates jurisdiction in, among other matters, actions of debt, where the sum demanded does not exceed one hundred dollars. The question, of course, turns on the true interpretation of section 92 of the British North American Act, sub-section (14), no doubt to be taken in connection with sections 96 to 101, inclusive, to the effect that the Provincial Legislature may make laws in relation to "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure and civil matters in these Courts." The words of this sub-section are so comprehensive that, taken alone, it seems clear they authorize the giving of the above jurisdiction to Stipendiary and Police Magistrates, or in other words, their statutory appointment as Judges, having jurisdiction in cases falling within the Small Debts Act, 1895. Further, whilst sections 96 to 101, inclusive, authorize the Governor-General to appoint the Judges of the Superior, District and County Courts, they ought not to be construed as if the words were to be read into section 96, "or Judges of other Courts having any portion of the jurisdiction belonging to the said Courts respectively," or similar words, and I believe neither the Government of the Dominion, or of any of the Provinces, have at any time adopted such a construction, which would cast upon the Dominion Government the duty of selecting Judges of such subordinate Courts from the respective Bars of the Province (*see* section 97), and of providing for their payment, etc., under section 100.

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The constitutionality of an Act of the Legislature of New Brunswick, very similar in its provisions to the Small Debts Act, was determined in the year 1877, in *Ganong* v. *Bayley*, 17 N.B. 324, and 2 Cart. 509. The marginal note is as follows: "By an Act of the Legislature of New Brunswick since Confederation, 39 Vic. Cap. 5, it was pro-

vided that Courts should be established for the trial of civil causes before Commissioners appointed by the Lieutenant-Governor-in-Council. The jurisdiction of the Commissioners was limited to $40.00 in actions of debt, and $16.00 in actions of tort, and was further restricted in special cases. On an application to set aside a judgment obtained before a Commissioner appointed as above provided, on the ground that since the passage of the British North America Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid." [ALLEN, C.J., and DUFF, J., dissenting.] Mr. Justice WELDON, in giving judgment, says: "At the time of the passing of the Confederation Act there were Superior Courts in all the Provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were Districts of Gaspe, of Saguenay, and of Chicoutimi, there were the County Courts existing in Upper Canada, and subsequently were established in New Brunswick, Nova Scotia and Prince Edward Island. It appears to me that these were the Courts that the Governor-General was to appoint the Judges to, when established or as vacancies may occur, and to provide for them salaries, allowances and pensions."

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"There were also, at the time of the passing of the Confederation Act, Commissioners' Courts for the summary trial of small causes, in what is now the Province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act. The several Acts establishing these small Courts in the several Provinces, prior to Confederation, also provided for the appointment of officers thereof by the several Local Executives, and were not referred to or expressly provided for in the said Act."

"I am therefore of the opinion that the Local Legislature, in passing the Acts for the recovery of small debts in the respective parishes of the County, and providing for the appointment of persons to carry out the provisions thereof

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in the Local Executive, was within its powers, and in such case the executive authority continued as it existed at the Union, unless the same was altered by the provisions of the Union Act, which is not expressly done." He then makes remarks as to the autonomy of the Provinces, which are fully borne out by later decisions of the Judicial Committee. Indeed, it seems for a time to have been sometimes forgotten, if I may respectfully say so, that the Provinces within the classes of subjects mentioned in section 92 of the British North America Act, required a Legislature to make laws, a Judiciary to interpret them, and an Executive to enforce them, quite as much as the Dominion, with reference to the subjects mentioned in section 91, or referred to therein. Of course I do not now allude to the appointment of the Judges of the Superior, District or County Courts. FISHER, J., points out that obviously "It was the intention of the Act to rest in the Governor-General only, the appointment of the Judges of the County Courts, those of a more extensive or Canadian jurisdiction." And then he observes that "at the time of the Union there were in existence Courts, and Judges of Courts, answering the description given in these sections, having both civil and criminal jurisdiction. It being required that they should be appointed from the Bar, shewing that they must have received a professional education, evidences the mind of the Legislature, as referring only to Judges of a higher class. Then the charging the revenues of Canada with their salaries and pensions of itself shews that the sections all refer to a higher class."

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He then refers, as did Mr. Justice WELDON, to the fact, that when the British North America Act came into operation there were in Nova Scotia and New Brunswick, Courts for the trial of small causes in the different localities similar to those authorized by the Act in question; in *Ganong* v. *Bayley*, and I may add too the Small Debts Act,

1895, Mr. Justice WETMORE, in substance, gave similar reasons for holding the New Brunswick Act to be constitutional. The judgment of the two remaining Judges, *i.e.*, the Chief Justice and Mr. Justice DUFF, were based upon reasons which have been, I think, clearly displaced by subsequent judgments of the Judicial Committee ; I refer more especially to *The Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C., at p. 441, and it will be sufficient to deal with such portions of the judgment of the Judicial Committee as shew that the powers of Provincial Governments, as regards the classes of subjects assigned to them by section 92 of the British North America Act, continue as they were before Union. The Court in their judgment say, at page 441, the appellants "maintained that the effect of the statute has been to sever all connection between the Crown and the Provinces, to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the Provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority."

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It will be seen on perusal, that the *ratio decidendi* of the dissenting judgment in *Ganong* v. *Bayley*, is seriously affected by the above doctrine laid down by the Judicial Committee, as well as by other passages in their judgment.

The judgment further continues, page 441: "The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government, in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy, etc."

At page 442, the same judgment continues: "But in so far as regards those matters which by section 92 are

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specially reserved for Provincial Legislatures, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

Again, at pages 442 and 443, we find: "It (the Province) possesses powers not of administration merely, but of legislation in the strictest sense of the word; and within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme" and towards the end of page 443 we find it said: "A Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of Provincial Government as the Governor-General himself is for all purposes of Dominion Government."

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The above passages which I have noted, of course, fail to give the full effect of the judgment, which should be studied as a whole, but I have no doubt if the question of the constitutionality of the Small Debts Act was brought before the Judicial Committee, the answer would be in the affirmative, and I must hold accordingly.

WALKEM, J.: The Small Debts Act, 1895, appears to me to be constitutional. Opinions to the contrary are based on the notion which for some years prevailed, even in very high legal quarters, that the B. N. A. Act, in effect, transferred all the prerogatives of the Crown which, before its passage, were vested in the Governors of the several Provinces which now constitute the Dominion, to the Governor-General, as the head of the newly created central Government, and as sole representative in the Dominion of the Sovereign—the Lieutenant-Governors being regarded as mere ministerial heads of their respective Governments, and as appointees of the Governor-General and not of the Queen. The Provinces, it was contended, occupied a position subordinate to the central authority and analogous to that of a municipality; and such in effect is the conten-

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tion now. The best answer to all this is to be found in the following passages from Lord WATSON's judgment in the case of *The Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437: "Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one nor to subordinate Provincial Governments to a central authority, but to create a Federal Government (in which they should all be represented) entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces, all the powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion Government should be vested with such of those powers, property and revenue, as are necessary for the performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purpose of Provincial Government. But in so far as regards those matters which by section 92 are specially reserved for Provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

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"It is clear, therefore, that the Provincial Legislature does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its *status* is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word;

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and within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme."

Further on, the same eminent Judge makes the following observations with respect to the *status* of a Lieutenant-Governor: "By section 58 of the Act of 1867, the appointment of Provincial Governor is made by the Governor-General-in-Council, 'by instrument under the Great Seal of Canada,' or, in other words, by the Executive Government of the Dominion, which is, by section 9, expressly declared to continue and be vested in the Queen. There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much a representative of Her Majesty for all purposes of Provincial Government as the Governor-General is for all purposes of Dominion Government."

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From this clear and forcible exposition of the statute, the inference is irresistible that in respect of matters assigned to the Province by section 92, amongst which is "the administration of justice, including the constitution, maintenance and organization of Provincial Courts of civil and criminal jurisdiction," the Provincial Legislature has a jurisdiction as plenary as that of the Imperial Parliament, *Hodge* v. *The Queen*, 9 App. Cas. 117, and the Lieutenant-Governor, as representative of the Sovereign, for the purposes of Provincial Government, has, and may exercise, all requisite prerogatives of the Crown.

Where, therefore, the Legislature constitutes a Court, whether of superior or inferior jurisdiction, the power to appoint the Judge rests, exclusively, if section 96 does not interfere with it, with the Lieutenant-Governor. Moreover, the appointment being one of the incidents of the adminis-

tration of justice, and of the constitution of a Court, the same would be the result in view of the maxim that "whenever a power is given by a statute," as for instance in section 92, to constitute Courts, "everything necessary to the making of it effectual is given by implication," Potter's Dwarris on Statutes, 123.

Section 96 is as follows: "The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate of Nova Scotia and New Brunswick.

The section, obviously, has the effect of divesting the Lieutenant-Governor of the appointing powers specified, and vesting them in the Governor-General. It must, therefore, be construed strictly, in accordance with the rule with respect to statutes, that the Crown is not deprived of any of its prerogatives except by explicit or unambiguous language; "and where the language of the statute is general, and its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect," Maxwell on Statutes, 3rd Ed., p. 161. The Small Debts Court is not one of the Courts mentioned in the section, either in name or nature. It is not a Superior Court; nor is it a District Court, for that Court, within the meaning of the section, is a Court peculiar to the Province of Quebec; nor is it a County Court, as that Court is constituted here or in Ontario. Its jurisdiction is limited to claims for debt, not exceeding $100.00; and although it may trench upon the jurisdiction of the County Court, that is no reason, to my mind, for condemning the Act which creates it. It is certainly no reason for holding, in the face of the rule above stated, that section 96 deprives the Lieutenant-Governor of the power to appoint the Judge of it. Where is the specific language to that effect, or indeed any language, to use Maxwell's words, which "makes the inference irresistible," that the Imperial Legislature intended to extend the operation of the section to all Courts other

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than those specified in the section? The section must be restricted to its fair meaning; and in my opinion the Courts it refers to are Courts of a higher class, as appears by sections 97 to 101, whose Judges are to be selected from the bar and paid, and, when necessary, pensioned by the Dominion. The Small Debts Court is, admittedly, not of that class. The dividing line between Courts of the class referred to and those of lower degree, must depend on the circumstances of each case, and be determined by the Legislature; and that that body may act unwisely or exceed its powers, as was suggested, by increasing the jurisdiction of the Court so as to make it in effect a Superior or County Court is not to be assumed, *see* the observations on this point, of the Privy Council, in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

Judgment of WALKEM, J.

All that section 96 does is to curtail or abridge the Lieutenant-Governor's prerogative to the extent I have mentioned—namely, to divest him of the power to appoint Judges to the Supreme and County Courts, or to Courts of that high class, and vest it in the Governor-General. The section, moreover, would, obviously, have been superfluous if the power would have vested in the Governor-General as an incident of his office.

The Act in question directly assigns the jurisdiction of the Small Debts Court to Stipendiary and Police Magistrates—officers appointed to preside over their respective Criminal Courts by the Lieutenant-Governor. The increase of jurisdiction manifestly involves, in an indirect way, the power of appointment to the extent of that increase, hence the question as to the constitutionality of the Act. The Lieutenant-Governor's power to appoint the officers mentioned as well as Justices of the Peace has never been questioned here, and in some of the other Provinces it has been held to be undeniable, as being incidental to the administration of justice—a matter, as I before observed, assigned by section 92 to the exclusive control of the Province. Again,

it is well settled that the Legislature may, either in respect of subject-matter or area, increase, curtail, or even extinguish the jurisdiction of any Provincial Court.

It, consequently, may impose additional duties of a judicial character on any of the Judges of the Province, including those of the Supreme Court, as it indeed practically does in nearly every instance in which it sanctions a new statute, or amends an old one. What objection, therefore, can there be to giving the Magistrates mentioned the civil jurisdiction created by the new Act? A question of debt of $100.00, or less, seems to me to be of far less importance than many of the criminal matters that often come before them.

Judgment of WALKEM, J.

The Magistrates' Courts certainly do not become Superior Courts, or Courts of the high class referred to in section 96, merely because of the additional civil jurisdiction given to them. Hence, from a constitutional point of view, the Act is unobjectionable.

DRAKE, J.: By the Terms of Union, the Dominion Government contracted with this Province to defray the salaries and allowances of the Judges of the Superior and County or District Courts.

Under the B.N.A. Act, the Province may exclusively make laws for the administration of justice, including the constitution, maintenance and organization of the Civil and Criminal Courts. This includes the power to abolish existing Courts, and to establish other and different Courts, with or without an enlarged or restricted jurisdiction.

Judgment of DRAKE, J.

At the time of Confederation, the only Courts existing in this Province were the Supreme, County and Gold Commissioners' Courts.

By section 96 of the B.N.A. Act, the appointment of Judges to the Superior, County and District Courts, is vested in the Governor-General, and the obligation to pay

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the salaries and allowances of such Judges is imposed on the Parliament of Canada.

But neither the Terms of Union nor the principal Act imposed any obligation on the Dominion to pay the salaries of any other Judges than those mentioned, or, as I understand the scope of the Act, of any other Judges, except such as would fairly represent the Courts mentioned, with regard to the extent of their jurisdiction, because the Province could not, by abolishing the existing Courts, and establishing others under a different nomenclature with equal jurisdiction, escape from the supreme power vested in the Governor-General of appointing the Judges.

The obvious desirability of making the higher judiciary independent of Provincial politics is self evident; with regard to Inferior Courts with merely a local and restricted jurisdiction, the same reasons do not have equal weight, for the Legislature must be presumed to act for and in the interests of the Province, and would properly safeguard the administration of justice by well considered limitations.

Judgment of DRAKE, J.

By the B. N. A. Act, Sec. 101, the Dominion has power to establish Courts for the administration of Canadian law. This would only be exercised in extreme cases, such as are not likely to arise.

The Act in question is one of limited jurisdiction up to $100.00 in cases of contract, and although the machinery for carrying on the Court is similar to the procedure in force of the County Court, it does not thereby make it a County or District Court.

The chief argument addressed to us by *Mr. Cassidy* was, that the appointment of all the Judges was an exercise of Royal prerogative, and the Royal prerogative could not be taken away without express words. That may undoubtedly be true, but the Lieutenant-Governors of the Provinces exercise their functions as representing the Crown, to the extent necessary for giving effect to the laws which every Province is entitled by section 92 exclusively to legislate upon.

This principle was clearly recognized by the Privy Council in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, A.C. (1892), 437. Therefore the appointment of Justices of the Peace and Stipendiary Magistrates are within the Provincial prerogative. In the case of *Ganong* v. *Bayley*, 2 Cart. 509, a very similar case to the present, the majority of the Court held that the establishment of a Court with a limited but not exclusive jurisdiction was *intra vires*.

The dissentient opinions appear to be based on the ground that it was an interference with the prerogative of the Crown. At the time this case was considered, the case of *The Liquidators of the Maritime Bank* before referred to had not been decided.

Judgment of DRAKE, J.

In holding this particular Act *intra vires*, I do not intend to lay down any strict line of demarcation between the Courts over which the Dominion Government have the power of appointing and paying the Judges, and those other smaller and inferior Courts which the Provincial Legislature may establish. No line can be drawn ; every case must depend on the particular circumstances, and will be dealt with when the necessity to do so arises.

Act declared constitutional.

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CONSOL. RAILWAY CO. *v.* VICTORIA

THE CONSOLIDATED RAILWAY COMPANY

v.

THE CITY OF VICTORIA.

Highways and bridges—Right-of-way over for tramcars—Whether includes right to enforce sufficient repair to carry—Appeal—Obeying mandatory order, whether waiver of right of appeal.

The Company had a right under its Statutory Charter (Sec. 12 of 57 Vic. Cap. 63) to construct, maintain and operate a street railway along certain highways and bridges. One of the bridges over which the Company had lawfully run its cars under the Act was destroyed, and the City commenced the construction of another in its place which was of insufficient strength to carry the cars.

Upon motion for a mandatory injunction to compel the City to construct the bridge of sufficient strength to maintain the car traffic of the Company. *Held*, per DRAKE, J., that, as the Company had a right to run over any bridge at that point, they had a right to the injunction.

Upon Appeal to the Full Court (McCreight, Walkem and McColl, JJ.), it was objected that the appellants had obeyed the order complained of, and thereby waived their right of appeal. *Held*, (*per curiam*) that a party obeying a mandatory injunction, for disobedience of which he is liable to attachment, cannot be said to have exercised any election, or to have waived any right. Upon the main question, *Held*, per MCCREIGHT J. (Walkem and McColl, JJ., concurring): That the Company were merely grantees of the right of way and as such had no right to compel their grantors to repair the bridge, and that in the absence of a special agreement to do so the right did not exist.

The City were not liable for non-repair even if it amounted to a nuisance.

Statement.

MOTION by plaintiffs for a mandatory injunction to compel the defendants so to construct a bridge crossing the Victoria Arm at Point Ellice, then being erected in the place of a bridge which had broken down at that point, as to be of sufficient strength and stability to carry the cars of the plaintiffs in the ordinary and regular course of their business, and in

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case of doubt arising as to the strength of the proposed bridge giving the plaintiffs liberty to move on 24 hours' notice for an injunction to restrain the further construction of the said bridge until the defendants make satisfactory arrangements for compliance with the order.

The facts sufficiently appear from the headnote and judgments.

E. P. Davis, Q.C., and *L. P. Duff*, for the plaintiffs.

C. Dubois Mason, for the defendants.

DRAKE, J.: This is a motion by the plaintiffs for an injunction to restrain the defendants from proceeding with the erection of a wooden pile bridge over Victoria Arm at Point Ellice on the ground that the proposed bridge was insufficient for the purposes of tramway traffic and by consent the motion was turned into a motion for judgment.

Judgment of DRAKE, J.

From the evidence it appears that the Point Ellice Bridge collapsed on 26th May and instead of making any attempt to repair it, the Corporation commenced the erection of a pile bridge alongside of the existing dilapidated structure. The Dominion Government interfered and an injunction was obtained to restrain the further prosecution of the proposed work, which injunction was suspended in consequence of an agreement which the Corporation had entered into with the Attorney-General of Canada.

The defendants thus being in a position to prosecute the work of building the bridge, the plaintiffs commenced these proceedings.

The present plaintiffs are admittedly the legal assignees of the National Electric Tramway & Lighting Company, Limited Liability, subsequently known as the Victoria Electric Railway and Lighting Company, Limited, and by an Act, 57 Vic. Cap. 63, the previous existing Acts and a franchise were consolidated and amended and by section 1 an agreement made between the Corporation of Victoria and certain parties who afterwards became a Corporation

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under the name of the National Electric Tramway and Lighting Company, Limited Liability, was ratified and confirmed, and the Company and Corporation were empowered to do whatever was necessary to give effect to the substance and intention of the provisions of the agreement.

The plaintiffs, by section 12, had power to construct, maintain and operate a street railway upon or along certain of the streets within the City of Victoria, subject to the approval and supervision of the City Engineer as to the location of poles, tracks, and other works of the Company, or upon the lands and highways and bridges lying between the City of Victoria and the Town of Esquimalt, V.I.

This is the statutory authority which enables the Company to lay their tracks on or over any street mentioned in the schedule to the agreement, or over any bridges, and the duty of the Corporation is limited to supervising and controlling the location of poles, tracks, and other works, but they cannot prevent the Company from laying tracks on any such street, but subject as mentioned in section 1 of the agreement.

Judgment of DRAKE, J.

By section 33 of the agreement the plaintiffs may lay, construct and operate a single line over and along any bridges in the said City upon laying a new flooring over the whole of any bridge so crossed.

The defendants contend first that at the time the agreement was entered into, viz., 20th November, 1888, the limits of the City were much smaller than they are now and that the agreement must be read as only applying to the restricted area, in which case Point Ellice bridge would not be within terms of the agreement.

The terms of the agreement, read in the light of clause 1 of the Act, appear to me to be sufficiently wide to cover any bridge which might thereafter come under the control of the City; there are no words limiting its operation to then existing bridges. New bridges might be constructed or rebuilt within the old limits of the City, and it is hardly

arguable that in such cases the agreement would not be operative, but if the slightest doubt existed on this point under the agreement, section 12 of the Act gives the necessary power.

The other point taken by the defendants is that Corporations, in building a bridge, are not bound to consider the tramway requirements, and may construct a bridge too narrow or too slight for the purpose of the Company. The plaintiffs contend that under the Act and agreement the Company have a right to lay their track across any bridge which is constructed for vehicular traffic and which is in the line of their existing track, and the Corporation cannot avoid this obligation by erecting a bridge unfitted to carry the weight of the tramcars. It is true that no action would lie at the suit of the plaintiff against the corporation for non-repairs of the broken bridge, *Russell* v. *Men of Devon*, 2 T.R. 667; *Gibson* v. *Mayor of Preston*, L.R. 5 Q.B. 218; but it is quite within the bounds of possibility that other proceedings might be taken to compel the Corporation to fulfil their duties as trustees of the ratepayers in repairing or rebuilding this bridge, the want of which is most prejudicial to the community at large.

The question I have to decide is not one relating to non-repairs of the bridge or as to the statutory liability of the Corporation in respect thereof, as part of a public highway. The cases under this head are collected in the *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433.

But as the Corporation are now, after a lamentable loss of time, preparing to erect a substitute for the broken bridge, the plaintiffs say it ought to be of sufficient capacity for their requirements, which in one sense are the requirements of the public. The evidence clearly shews that the bridge now partially erected will not be of sufficient strength to take the tramcars, and so much is admitted by the Corporation engineer. Are the plaintiffs entitled under

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the agreement to utilize any bridge erected by the Corporation in lieu of an existing bridge for the purpose of their tram line? In my opinion the statute and agreement give them that right. Of course, such a right must be limited to bridges built for vehicular traffic, and does not apply to foot bridges, as the right must be read in a reasonable way. Whether or not the agreement sufficiently protects the interests of the City is not now to be considered. The plaintiffs in pursuance of the agreement have expended a large sum of money in the construction of their works and by reason of the intended new bridge, which is nearly completed, not being of sufficient strength, a large part of their line will be completely cut off from their power house and works, and thus practically renders it useless. I therefore grant the injunction asked for and until such time as a sufficient provision is made for the tramway traffic.

Order accordingly.

Statement.

From this judgment the defendants appealed to the Full Court and the appeal was argued before MCCREIGHT, WALKEM and MCCOLL, JJ., on the 9th and 10th December, 1896. The grounds of appeal were that the defendants were under no liability either by statute or by virtue of any agreements to maintain or repair the bridge in question.

Argument.

W. J. Taylor for the appellants.

E. P. Davis, Q.C. and *L. P. Duff*, for the respondents, raised the preliminary objection that the Corporation, by complying with the order of DRAKE, J., had waived the right to appeal, and the appeal was heard subject to the objection.

Cur. adv. vult.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: The decree in this case declares that

the plaintiffs are entitled to operate their tramway system and cars upon and over any bridge or bridges now existing or hereafter to be built over the body of water known as the Victoria Arm for vehicles, connecting Work Street with the Esquimalt Road.

Again, that the bridge now partially erected in the place of the broken bridge be made of sufficient strength and stability to carry the cars of the plaintiffs in the ordinary and regular course of their business, subject to the terms and conditions of the agreement between the Corporations. Further, it was ordered that if any doubt arises as to the strength of the proposed bridge, the plaintiffs are to be at liberty to move on twenty-four hours' notice for an injunction to restrain the further construction of the said bridge until the defendants make satisfactory arrangements for compliance with this order.

Judgment of McCREIGHT, J.

The defendant Corporation appeal against this order. A preliminary objection was taken by counsel for the plaintiffs that compliance with the order by the defendants prevents their appealing. I am not sure that there was compliance, for I understood that the alleged grievance still exists that the new bridge is not sufficiently strong for tramcar traffic, but the objection, I think, fails in other respects.

Three cases were cited in support of it: *Moir* v. *Corporation of Huntingdon*, 19 S.C.R. 363, where all the Court decided was that the Court would not entertain an appeal from any judgment for the purpose of deciding a mere question of costs. The next was *The International Wrecking Company* v. *Lobb*, 12 P.R. 207, where in the judgment, however, it is stated at page 210 that notwithstanding their appeal, the appellants proceeded to execute the judgment of which they complained, and this, the two proceedings being radically inconsistent, they could not do without abandoning the appeal, and *M'Connell et al* v. *Wakeford*, 13 P.R. at p. 458, where it was held that the

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irregularity of an order might be waived by compliance with it. The cases also of *Pierce* v. *Palmer*, 12 P.R. 308, and *In re Smart*, *ibid.* 638, only further shew that a party having elected to comply with an order, cannot appeal from it. It cannot be said that the defendants in this case exercised an election, for that pre-supposes a right voluntarily to choose which of two inconsistant courses a party will pursue. Here the defendants, by electing to disobey, would have rendered themselves liable to penal proceedings, for an injunction, whilst it stands, must be obeyed; see Kerr on Injunctions, 3rd Ed. 641. In other words, they had no choice. For these reasons I think the preliminary objection should be overruled.

With respect to the declaratory order appealed from, I think any discussion about it may be conveniently postponed until after the mandatory injunction is considered.

Judgment of McCREIGHT, J.

And the first thing to bear in mind with reference to the injunction is, do the circumstances exist which are requisite to entitle the plaintiffs to invoke this remedy. Briefly, have they any cause of action against the City, for in the words of Lord ESHER, then Lord Justice, in *North London Railroad Co.* v. *Great Northern Railroad Company*, 11 Q.B.D., at p. 38: "There is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right on the one side or no legal liability on the other, at law or in equity," or, to use the emphatic language of COTTON, L.J., at page 40: "In my opinion the sole intention of the section is this, that where there was a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right." The question then is, has the Company any such right, and before considering the Statute of 1894, Cap. 63, and the agreement in the schedule A, it will be, according to a

well-known canon of construction, proper to advert to the common law as to the rights and liabilities *inter se* of grantors and grantees of rights of way, because the Company have by the statute and agreement a right-of-way over the streets, highways and bridges therein referred to. Subject to the terms and conditions therein contained they have an easement, and that easement is a right-of-way. Now in the case of *Pomfret* v. *Ricroft*, 1 Saunders R., at p. 322, we find in the judgment of TWYSDEN, which was afterwards adopted by the Exchequer Chamber, the following passage: "As in the case where I grant a way over my land, I shall not be bound to repair it; but if I voluntarily stop it, an action lies against me for the misfeasance, but for the bare nonfeasance, viz.: in not repairing it when it is out of repair, no action at all lies." It seems plain then that if the Company had agreed with a private individual instead of the City Council, he would not be liable; to use the words of Lord MANSFIELD in *Taylor* v. *Whitehead*, 2 Douglas, 749, approving *Pomfret* v. *Ricroft*: "I entirely agree with my brother WALKER that by common law he who has the use of a thing ought to repair it. The grantor *may* bind himself, but here he has not done it." Now it is hardly necessary to say that it is even more difficult to make a Municipal Council liable in such cases than a private person. In the *Municipal Council of Sydney* v. *Bourke* (1895), A.C., at p. 435, the Lord Chancellor, in delivering the judgment of the Judicial Committee, says: "No complaint of misfeasance is made against them (*i.e.* Municipal Council). The sole charge is one of nonfeasance; that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the Legislature has imposed some duty upon them, for the breach of which right of action accrues to any person injured by it." Before

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examining the Victoria Electric Railway and Lighting Company, Limited, Act, 1894, and the agreement in the Schedule A to see whether the City Council have according to the above test incurred any liability to the Company, it seems proper to observe that the Legislature must have intended that the Municipal Act of 1892 and the provisions relating to the contracting of debts, section 110 and the following sections should not be interfered with. In other words, the rights of ratepayers were not to be affected, unless by distinct provisions. Now section 12 of the Act of 1894 says that in addition to the powers conferred by the agreement, the Company are authorized and empowered to construct, maintain and operate a single or double track, etc., and special reference is made to the bridges, and the approval and supervision in reference thereto, in a manner which is far from suggesting any liability on the part of the City towards the Company. Section 26 of the agreement makes the Company liable for all damages arising out of the construction or operation of the works, etc. I do not think section 33 of the agreement in Schedule A helps the Company. The provision as to the Company furnishing and laying at their own expense a new flooring over the whole of any bridge so crossed may be considered according to the maxim *expressio unius exclusio alterius* as negativing liability to strengthen or repair the bridge in other respects on the part of the Company (though this maxim is frequently misunderstood); but the real question is whether in accordance with the authorities to which I have referred, a liability in distinct language is imposed on the City Council as between them and the Company to repair the bridge and to repair it in such a manner as to render it suitable to carry tramcars. I may observe that the above maxim is, to use the expressions in the last edition of Maxwell on Statutes, "occasionally misapplied in argument," and its true application pointed out at pages 459–461 in such a way as to give no assistance to the

plaintiff Company in this case. The latter, or following part of section 33 of the agreement, contains nothing imposing liability on the City Council. I see nothing in the statute or agreement requiring the City Council to repair a bridge for the Company. In *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, part of the headnote is "*Cowley* v. *Newmarket Local Board* (1892), A.C. 345, followed, as establishing the principle that an action for damages will not lie for non-repair even in cases where non-repair constitutes an indictable breach of duty." I refer to this because it was argued that the decree might be supported on the ground that the conduct of the City Council amounted to a nuisance. But the argument is fully met by this case, where at page 443 the Judicial Committee say: "In the series of cases ending with *Cowley* v. *Newmarket Local Board*, *supra*, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise, the only question in controversy was whether an action could be maintained." But here it cannot be seriously contended that the City Council, by repairing the bridge so as to render it fit for vehicles and at the same time omitting to make it suitable for tramcar traffic, have acted contrary to the statute or the agreement or committed any breach of duty whatever. It follows that the declaration of right in the decree must, as well as the remainder of it, be reversed. I think it is clear the plaintiffs have no such right, and the judgment must be reversed and, as usual, with costs.

Judgment of McCREIGHT, J.

WALKEM and MCCOLL, JJ., concurred.

Appeal allowed with costs.

McCOLL, J.

1897.

Feb. 17.

TETLEY v. CITY OF VANCOUVER.

Municipal Law—Resolution reducing salary of officer—Vancouver Incorporation Act, 1886; Sec. 150, Sub.-sec. 13 and Sec. 154.

TETLEY *v.* VANCOUVER

Sub-section 13 of section 150 of the Act, requiring a two-thirds vote of the members present for rescinding previous actions of the Council, does not apply to a resolution of the Council altering the amount of salary payable to an officer whose engagement might, under section 154, have been terminated by one month's notice on either side.

CASE stated.

Statement. *E. P. Davis, Q.C.*, for the plaintiff.

A. St.-G. Hamersley for the defendant Corporation. The facts of the case sufficiently appear from the judgment.

McCOLL, J.: The plaintiff having some time previous to 29th December, 1890, been appointed to the office of City Accountant, at a monthly salary less than $125.00, had

Judgment. such salary increased to that amount by resolution of the Council passed on that day. The plaintiff apparently continued to hold the office till some time subsequent to the expiration of one month after 19th February, 1894, on which day another resolution was passed by the Council, fixing his salary at $100.00 per month.

The plaintiff, during the time he thereafter continued in office, received his reduced salary under protest, as it is said, claiming that the second resolution was illegal because of sub-section 13 of section 150, 49 Vic. Cap. 32.

This enacts that "no previous action of the Council on any matter shall be rescinded unless by a two-third vote of the members of the Council then present and no decision or ruling of the mayor or presiding officer, while in the chair, shall be overruled, except by a vote of two-thirds of the members of the Council present."

I was informed by counsel that no enactment similar to the one in question is to be found in any of the Municipal Acts of any of the other Provinces, and that no decision has been given as to its meaning in our Courts. I think, having regard especially to the peculiar wording of the enactment and to the latter part of the section, that it is not the intention to do more than prevent advantage being taken of the absence of any member or members of the Council who may have left after the transaction of some business at a meeting, but before the end of the meeting.

But it is unnecessary to decide this point, and I reserve to myself the right to decide it, if necessary, as it may appear upon further consideration on a future occasion.

Judgment.

Section 154 of the Act provides that the engagement of any officer appointed by the Council may, notwithstanding any agreement to the contrary, be terminated by one month's notice in writing, given by either party to the other of them.

I am of opinion that this section applies to the present case—I therefore answer the questions submitted, that the resolution in question is not illegal merely because of not having received a two-third vote of the members of the Council present when it was passed.

Judgment accordingly.

DRAKE, J.

HUGHES v. HUME.

[In Chambers].

1897.

Feb. 16.

HUGHES
v.
HUME

Practice—Judgment under Order XIV—Service of exhibit to affidavit.

Supreme Court Rule 84, providing that the summons for leave to enter final judgment under Order XIV., R. 1, must be accompanied by a copy of the affidavit and exhibits referred to therein, is imperative.

SUMMONS by the plaintiff for leave to enter final judgment under Order XIV.

J. A. Aikman, for the application.

Argument. *A. D. Crease, contra*, took the preliminary objection that the affidavit in support of the summons was served after the summons and that the exhibit referred to in the affidavit had not been served, citing Rule 84.

DRAKE, J.: The objection is fatal. The summons must

Judgment. be dismissed.

Summons dismissed.

IN RE WINDING-UP ACT.

McColl, J.

1897.

Feb. 20.

DOYLE v. ATLAS CANNING CO.

Doyle v. Atlas Canning Co

Winding-up Act—Practice—Creditors discontinuing—Whether other creditors entitled to be substituted.

In an application for a winding-up order petitioners may discontinue proceedings on settlement of their claims; and creditors other than the petitioners, who have not themselves petitioned, are not entitled to be substituted for such petitioners, for the purpose of continuing the proceedings.

APPLICATION for winding-up order. The petitioners having withdrawn from the proceedings upon payment of their claim by the Company, Robertson & Hackett, other creditors who had not petitioned, applied to be substituted for the purpose of carrying on the proceedings. Statement.

Charles Wilson, Q.C., for the applicants: Although there is no express provision in the Act authorizing a substitution such as that asked for, yet under the general practice of the Court, either as having been made applicable by the Act, or governing the proceedings independently, there is jurisdiction to make an order which is one that justice requires to be made. *Palmer on Company Precedents*, Ed. 1888, 674; Winding-up Act, Sec. 86, S.C. Rules, Order XVII.; *In re Dynevor Duffryn Collieries Co.*, W.N. (78) p. 199; *In re Commercial Bank of London*, W.N. (88) 214. Argument.

L. G. McPhillips, Q.C., contra.

McColl, J.: I do not know of any case in which a Judgment.

McCOLL, J.

1897.

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winding-up order has been made in favour of a creditor other than the petitioner, except as *In re Joseph Hall Man. Co.*, 10 P.R. 485, where the other creditors had themselves petitioned.

Nor do I think that the applicants are assisted by the practice relied upon, which seems to me to be clearly against any such right to intervene as is now sought to be established; *Canadian Bank of Commerce* v. *Tinning*, 15 P.R. 401.

Judgment.

I am of opinion that before the making of a winding-up order the proceedings may be discontinued by the petitioners.

I therefore refuse the application.

Application refused.

CORBIN v. LOOKOUT MINING AND MILLING COMPANY, (FOREIGN).

Practice—Jury—Rules 331-81—Mineral Act, 1896, Secs. 144 to 150.

McCREIGHT, J.
1896.
Dec. 23.

FULL COURT.
1897.
Feb. 6.

CORBIN v. LOOKOUT MINING CO

Held, by McCREIGHT, J. (The Full Court not dissenting), that sections 144 to 150 of the Mineral Act, 1896, refer only to procedure in the County Courts.

In an action to enforce an adverse claim and for a declaration that the plaintiff was entitled to the right of possession to that portion of the "Paul Boy" mineral claim in conflict with the "Lookout" mineral claim and that the "Lookout" be declared invalid, the defendants asked for a jury.

Held, by the Full Court, DAVIE, C.J., and DRAKE, J. (McColl, J., concurring), affirming McCREIGHT, J.:

(1) That as the relief prayed was such as could not have been obtained in a common law action prior to the Judicature Acts, the issues were not proper for trial by a jury.

(2) That the character of the action will be determined from the issues raised on the pleadings.

Statement.

APPEAL from a judgment of McCREIGHT, J., dismissing an application by the defendants for a trial by jury. The application was argued on 23rd December, 1896. The facts fully appear from the headnote and judgments.

W. J. Taylor, for the application.

E. V. Bodwell, contra.

McCREIGHT, J.: This is an action in the Supreme Court by the plaintiff to enforce his alleged right to a certain claim, and I gather would have been the subject of an equity suit before the Judicature Act.

Judgment of McCREIGHT, J.

The defendants claim that they are entitled to have the issues of fact tried by a jury under section 150 of the Mineral Act, 1896, and took out a summons before me for an order to that effect, but on consideration I think the group of sections commencing with section 144 and including section 150 deals only with County Courts, and according to the law laid down in *Hammersmith R. R. Co.'y* v. *Brand*, L.R. 4, H.L. 171, the headings of different

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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. This group of sections is headed County Courts. I cannot read into section 150 the words "Judge of the Supreme or County Court, as the case may be," or make a corresponding insertion in section 149. I think every section in the group deals with County Courts alone.

Further adverting to the well-known canon of construction that the state of the law, *i.e.*, before the year 1896, is important, I refer to rules of the Supreme Court, 329–333, which I think indicate that prior to the Act of 1896 this application for a jury would have been refused, and if the Act of 1896 was intended to make a different procedure as regards the trial of Supreme Court cases, *i.e.*, *quoad* mining cases, that we should expect explicit language would have been used.

Judgment of McCREIGHT, J.

I think the right to trial by jury in mining cases in the Supreme Court is not changed by the Mineral Act of 1896, and accordingly I must decide that the defendants are not entitled to a jury in this case.

Application refused.

From this judgment the defendants appealed to the Full Court on the grounds that the learned Judge erred in holding that in an action to enforce an adverse claim under the Mineral Act the parties are not entitled to a jury because it is an action of an equitable nature and that the defendants were entitled to have the action tried before a jury as a matter of right. The appeal was argued before DAVIE, C.J., DRAKE and McCOLL, JJ., on 6th February, 1897.

Statement.

W. J. Taylor, for the appeal.

E. V. Bodwell, contra.

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DAVIE, C.J.: This is an action to enforce an adverse claim. The plaintiff in his statement of claim prays "a declaration that he is entitled to the right of possession of that portion of the 'Paul Boy' mineral claim in conflict with the 'Lookout' mineral claim and that the said 'Lookout' mineral claim, in so far as the same conflicts with and overlaps the said 'Paul Boy' mineral claim, be declared to be without right and illegal and void and that the title thereto be forever vested in the plaintiff and (2) A further declaration that the defendants are not entitled to any rights therein whatever." In considering the scope of the action I propose to treat it as it is framed on the pleadings. Now prior to the Judicature Act the only Court which had jurisdiction to make a declaration of title, or a judicial declaration of any kind, was the Court of Equity. The Courts of Common Law exercised no such jurisdiction.

Judgment of DAVIE, C.J.

It is said that this is an action of ejectment, but it evidently is not so. The right of the grantee from the Crown of a mineral claim is not a right to the land or to the possession of it, as land. One person may be the owner of the land and another may acquire the right to the minerals thereunder, together with the incidental surface rights given by the Mineral Acts. It is possible that the frame of the statement of claim and of the relief asked for in an action to enforce an adverse claim might be such that the issues would be proper for trial by a jury. This is not such a case. It presents questions which before the Judicature Acts must have been tried without a jury. The English Rule 427 provides that causes or matters assigned to the Chancery Division shall be tried by a Judge, unless the Court or a Judge shall otherwise order. The words "or a Judge shall otherwise order" are left out of our rules.

The British Columbia Rule 330 leaves no discretion. I am therefore of opinion that this appeal should be dismissed.

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DRAKE, J.: I agree with the Chief Justice. What is asked is a declaration which could not have been granted by a Court of Common Law prior to the Judicature Acts. The action is for a declaration that the plaintiff has the right to possession of the ground in dispute to the extent to which such possession belongs to the grantee of a mineral claim under the Act. If the action were differently framed, either of the parties might be entitled to a jury. There is no hard and fast rule as to the form or frame of an action to enforce an adverse claim. This is a purely equity action and should be tried without a jury.

McCOLL, J.: I concur.

Appeal dismissed.

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SIDNEY EDWIN MATTHEWS, PLAINTIFF,

v.

THE CORPORATION OF THE CITY OF VICTORIA AND THE CONSOLIDATED RAILWAY COMPANY, DEFENDANTS.

Practice—Writ of Summons—Address of defendant—Amending writ by adding.

Held, by the Full Court (Davie, C.J., McCreight and Drake, JJ.) affirming McCOLL, J.: That the omission to state upon the Writ of Summons any address does not invalidate the writ, but is an irregularity merely and amendable.

Statement.

APPEAL by the defendants, the Consolidated Railway Company, from a judgment of McCOLL, J., dismissing an application of the Company to set aside the Writ of Summons and service thereof upon the Company on the ground that the writ omitted to state the address of the

Company. The Writ of Summons was served on the defendant Company on 21st November, 1896, and they entered an appearance under protest on 25th November, and on the same day served notice thereof on the plaintiff's solicitor. On 28th November the defendant Company gave notice of a motion to set aside the writ on the above grounds. The motion came on before McColl, J., on 3rd December, and was adjourned without being heard to a day to be fixed. On 8th December the plaintiff obtained *ex parte* from Bole, L.J.S.C., an order to amend the writ so as to supply the omissions complained of, and served the order and amended writ on the defendant Company, who took out a summons to rescind the order of Bole L.J.S.C. This summons and the adjourned motion to set aside the writ and service came on before McColl, J., on 16th January, 1897.

Statement.

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

O. L. Spencer, contra.

Cur. adv. vult.

January 19th, 1897.

McColl J.: In this case, after I had refused to entertain *ex parte*, an application for an order to amend the Writ of Summons by inserting the address of the defendant Company, such order was made *ex parte* by another Judge to whom the fact of the previous application was not then communicated, and he has given leave for the present summons which is to set aside that order.

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Mr. Spencer has explained his forgetfulness to disclose the previous application, and I am to deal with this summons (apart from the question of costs) as if a summons to amend.

Mr. McPhillips contended that a writ, though it may be amended in respect of a wrong or defective address, is not amendable for the purpose of the insertion of a defendant's

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address which has been wholly omitted, and he cited the case of *The W. A. Sholten*, 13 P.D. 8, and *Kimpton* v. *Thunder Hill Company*, a case decided by Mr. Justice DRAKE on 26th September, 1893, not reported.

I am not sure from the report of the first case whether or how far Mr. Justice BUTT was influenced by the fact which he states that the address had been purposely omitted, but this circumstance would, I think, have precluded the plaintiffs from invoking O. 70, R. 1, to which no reference was made, no leave to amend having been asked.

It was not suggested that the omission in the present case arose otherwise than from a slip and it was stated that it was too late to bring another action.

The questions I have to determine are whether there is power under O. 70, R. 1, to allow such an amendment as that now under discussion, and if so, whether it ought in the circumstances to be allowed.

Judgment of McCOLL, J.

I think that the cases cited in the Annual Practice, 1896, pp. 1200–1, show that I ought to answer, as I do answer, both questions, in the affirmative.

In the absence of any report showing the reasons for the decision in the other case cited, I cannot assume the intention to lay down any general rule, or that the decision would have been the same in the particular circumstances of the present case.

As the matter is of much importance, I suppose it will be brought before the Full Court, and I think it better to decide it, so far as I am concerned, upon my own view of the law.

The summons will be dismissed, but the costs will be costs to the defendant Company.

Summons dismissed.

Statement.

From this judgment the defendant Company appealed

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to the Full Court and the appeal was argued before DAVIE, C.J., McCREIGHT and DRAKE, JJ., on 5th February.

G. H. Barnard, for the appeal: The writ is a nullity and cannot be amended, *The W. A. Sholten*, 13 P.D. 8.

Frank Higgins, contra, was not called on.

DAVIE, C.J.: Under the practice before the Judicature Acts, under the Common Law Procedure Act, Sec. 20, it was held that the omissions to state the place where the defendant resided was an irregularity and capable of amendment on an application to set aside the writ. By S.C. Rule 1068, where no other provision is made by the rules, the existing practice and procedure shall remain in force.

Judgment of DAVIE, C.J.

The decision in the case of *The W. A. Sholten*, cited in argument, appears to have proceeded upon the ground that the address was purposely omitted in order to deceive the Court and may be taken as an authority that in such a case the discretion of the Court to grant an amendment will be exercised against the applicant. In this case it is not contended that the omission was other than a slip, and the amendment was properly made.

McCREIGHT and DRAKE, JJ., concurred.

Appeal dismissed with costs.

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QUEEN v. VICTORIA LUMBER CO

THE QUEEN, APPELLANT,

v.

THE VICTORIA LUMBER AND MANUFACTURING COMPANY, RESPONDENTS.

Taxes—Exemption—E. & N. Railway Act—"Alienated"—Res judicata Crown—Whether bound by.

By the Stat. B.C., 47 Vic., Cap. 14 (E. & N. Ry. Act), Sec. 22, it was provided that certain public lands granted by the Act to the Railway in aid of its construction "shall not be subject to taxation unless and until the same are used by the Company for other than railway purposes, or leased, occupied, sold or alienated."

In January, 1889, the E. & N. Ry. Co., by agreement, gave to H. the right to enter and select 50,000 acres of the said lands, to be paid for at the rate of $5.00 per acre, in certain instalments, with interest, etc., the lands to be conveyed so soon as the purchase money was paid, etc. H. in February, 1890, assigned all his interest under the agreement to the Lumber Company. The lands had been selected and surveyed, but the purchase money was not fully paid. The Provincial Government assessed the lands for the purpose of taxation, but the Court of Revision, upon the authority of *Victoria Lumber Company* v. *The Queen*, 3 B.C. 16, discharged the assessment.

Held, by the Full Court, on appeal (*per* McCreight and Walkem. JJ., Drake, J., concurring), That the question was not concluded by *The Victoria Lumber Co.* v. *The Queen*, *supra*, as counsel for the Crown in that case did not press the point involved.

That the word "alienated," in view of the sense in which it is used throughout the Act, must be given a construction sufficiently wide to include such an agreement as that in question.

Semble, That, *proprio vigore*, the word included such a transaction.

Statement.

APPEAL by the Government of the Province of British Columbia from the decision of HARRISON, Co. J., Judge of the Court of Revision for the Districts of Comox, Nanaimo and Cowichan-Alberni, setting aside an assessment made by the Government for the purposes of taxation of lands of the respondent Company, which had been acquired from the E. & N. Railway Company by one Humbird, under an

agreement dated 14th January, 1889, Mr. Humbird having assigned all his interest under the agreement to the Lumber Company, in the month of February, 1890. The E. & N. Railway Company acquired the lands from the Dominion Government for the construction of the railway, as a part of their land grant under Stat. B.C. 47 Vic. Cap. 14, Sec. 22, which provided, "The lands to be acquired by the Company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the same are used by the Company for other than railway purposes, or leased, occupied, sold or alienated." The material clauses of the agreement under which Mr. Humbird took the lands were: (1) The said Company agrees to give the said purchaser or his assigns until the first November, 1890, the right to enter upon and select from the lands belonging to the said Company . . . 50,000 acres of timber lands, with the right and option to the said purchaser to select 50,000 acres additional timber lands from the aforesaid limits. (9) The said purchaser, for himself and his assigns, covenants with the said Company that he or they will on or before the first November, 1890, select and survey as aforesaid from the hereinbefore described lands, timbered lands to the extent of 50,000 acres, and will pay the said Company therefor the sum of $5.00 per acre, as follows: The sum of $25,000.00 on or before the first November, 1889, and the balance in ten equal annual instalments with interest. (11) And the said Company agrees with the said purchaser and his assigns that it will grant and convey to the said purchaser and his assigns the full amount of land so selected, more or less, as soon as the same shall have been selected and surveyed as aforesaid, and the whole of the purchase money, with the interest as aforesaid, shall have been paid." The evidence of E. J. Palmer, manager of the Lumber Company, shewed that lands amounting to 88,000 acres had been selected by the Lumber Company and surveyed, but were still in a state of

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nature, and that about $23,200.00 had been paid to the E. & N. Railway Company, but that the purchase money was not fully paid. He also stated in his evidence that the lands had never been occupied or used by the Lumber Company or any other person or persons on behalf of the Company or Humbird.

The appeal was argued before MCCREIGHT, WALKEM and DRAKE, JJ., on 28th and 29th October, 1896.

Gordon Hunter, for the Crown: Two questions are involved in this appeal; first, whether under the true construction of the Island Railway Act the lands in question are exempt from taxation; and second, if they are liable whether this Court is precluded from giving effect to the true construction by reason of a former decision that the lands were not so liable, reported in 3 B.C., p. 16.

As to the first question, the Crown submits that the lands are not now exempt within the meaning of the 22nd clause of the Act, and contends, first, that the lands are occupied by the Company within the meaning of the section; the closing words of the section when taken together are equivalent to "used for other than railroad purposes"; and to prevent any possible ambiguity as to what this expression would mean, the Legislature used first the expression, "used by the Company for other than railroad purposes," and then the expression, "leased, occupied, sold or alienated." It is submitted that the absence of the disjunctive 'or' between the words 'occupied' and 'sold,' shews conclusively that there are only two correlative members to this part of the section, that is to say, the expression, "used by the Company for other than railroad purposes," is correlative to the expression, "leased, sold, occupied or alienated," and that these two members taken together (from the comprehensive meaning of the verbs used) imply that any disposition of the lands which would result in the beneficial user of them by the Railway Company for other than railroad

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purposes, or by anyone else for any purpose, would at once render them liable to taxation.

Next, the Crown submits that whatever ambiguity may lurk in the word 'occupied,' there is none whatever in the word 'alienated'; that this word in this statute clearly includes a disposition of the lands by way of agreement for sale, for the reason that the statute itself so interprets the word—see the preamble and sections 5 and 6.

The use of the words 'or otherwise,' in the preamble, and section 5, taken together with the language of section 6, clearly shews that the Legislature intended by the use of this word to include all kinds of disposition which would result in any species of beneficial user which could be enforced in an action by the disponee and which can be suggested *apropos* to the several contexts in the Act where the word is found, or at any rate that it was intended to include the case of an agreement for sale.

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The context of the word 'alienate,' as used in the Terms of Union, Sec. 11, referred to in the Island Railway Act, also shews that the word was used to include any kind of disposition of the lands; the word as used in the Consolidated Railway Act, 1879 (Canada), Sec. 7, which Act is in terms incorporated by section 17 of the Act now in question, also shews that any kind of enforceable disposition is included. Section 7 of Consolidated Railway Act appears re-enacted and adopted in the B.C. Railway Act, 1890, Secs. 5, 9, see the same language in old Consolidated Railway Act, 1859, Sec. 9.

The parallel legislation of a foreign legislative body and the judicial decisions thereon can be looked to to find out the meaning of the cognate legislation, see *Casgrain* v. *Atlantic and North-West Railway Co.*, 11 R. 464.

It would be a mistake to confine the word 'alienation' to alienation of the legal estate, in fact it is evident that the word includes an alienation of the beneficial interest. The true position of the parties is shewn by the remarks of

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TURNER, L.J., in *Hadley* v. *London Bk.*, 3 D.J. & S. at p. 70; per CAIRNS, L.C., in *Shaw* v. *Foster*, L.R. 5 H.L. 338; see JESSELL, M.R., in *Cave* v. *Mackenzie*, 37 L.T. 219; *Rose* v. *Watson*, 10 H.L. Cas. 672, which shews that a vendor becomes a trustee to the extent of the money paid of the estate for the purchase; and clearly it is an alienation when a man creates himself a trustee of an estate in favour of another. As to the rules of construction to be adopted: The particular section is to be first referred to. *Spencer* v. *Metropolitan, etc.*, 22 Ch. D., at p. 162, per JESSELL, M.R.: If the particular section is not conclusive, then the whole Act is to be considered and taken together: *Ib.*, per CHITTY, J., at pp. 148, 149; per JESSELL, M.R., at p. 162; per COTTON, L.J., at p. 167; *Colquhoun* v. *Brooks*, 14 App. Cas., per Lord HERSCHELL, at p. 506: "It is beyond dispute, too, that we are entitled and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature, and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act," and see Endlich-Maxwell, Secs. 25, 40.

It is submitted that the Court on the former occasion erred in referring to the legislation of other Provinces, and *a fortiori* by referring to decisions on those statutes; see *Ex parte Blaiberg*, 23 Ch. D. at p. 258, per JESSELL, M.R.; *Spencer* v. *Metropolitan*, 22 Ch. D. at p. 157, cited *supra*; *Grey* v. *Pearson*, 6 H.L. Cas. 106, 108; or as it is otherwise put, "what is written must be expounded by itself," per WILLIAMS, J., in *Shore* v. *Wilson*, 9 Cl. & Fin. at p. 540.

Further, the Act ought to be construed so as to avoid inconsistency, and all parts should be compared to prevent this—*Constauld* v. *Legh*, L.R., 4 Ex. 130; Hardcastle on Statutes, p. 186; *In re National Savings Bank Association*, 1 Ch. App. at pp. 549, 550. Per TURNER, L.J.: "I do not consider that it would be at all consistent with the law, or

with the course of this Court, to put a different construction upon the same word in different parts of an Act of Parliament. Without finding some very clear reason for doing so, and having looked through this Act of Parliament many times, and with so much care as I have been able to bestow upon it, I am quite satisfied that no sufficient reason can be assigned for construing the word 'contributory,' in one part of the Act in a different sense from that which it bears in another part of the Act." A corollary to this principle is the statement of SELBORNE, L.C., in *Caledonia Railway Co.* v. *North British Railway Co.*, 6 App. Cas. at p. 122: "The more literal construction ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

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It is submitted that the Legislature has provided the dictionary, to adopt the language of CAIRNS, L.C., spoken of a will, in *Hill* v. *Crook*, 42 L.J. Ch. at p. 716.

If it is argued that the interpretation contended for would be to make the Legislature say something different from what was intended, then another Act should be passed, see per Lord BROUGHAM, in *Crawford* v. *Spooner*, Beauchamp, p. 760, VI. Moo. P.C. 1; see also *Ex parte Blaiberg*, 23 C.D., cited *supra*, at pp. 259, 260.

Acts creating privileges or monopolies are strictly construed: see remarks of STRONG, C.J., in *La Compagnie, etc.* v. *La Compagnie, etc.*, 25 S.C.R. at pp. 173, 174.

The burden is on the party claiming the exemption, Hardcastle, 132; Harrison's Municipal Manual, 712; *Speak* v. *Powell*, L.R. 9, Ex. 25.

The intent of the transaction should be looked at, *St. Paul & Sioux City Railroad* v. *McDonald*, 22 *A. & E. Ry. Cas.* 208. The mere form or terms of the instrument by which the title is affected should not alone determine the power to tax the lands. If the Railway Corporation has parted

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with its beneficial interest, even though it retains the legal title, the exemption which was created to benefit and serve the purposes of the railway should cease.

English decisions are inapplicable, as there is in British Columbia a positive law subjecting all property to tax; see *Mayor of Essenden* v. *Blackwood*, 2 App. Cas. 574; *West Wisconsin* v. *Supervisors*, 93 U.S. 597; *Vicksburgh, &c., Ry.* v. *Dennis*, 116 U.S. 665; *Yayzoo Ry.* v. *Thomas*, 132 U.S. 185.

As to the objection that the question is *res judicata*, by the decision reported 3 B.C. 16:

Assuming that the former decision was erroneous, can the Court give effect to the true construction? The answer must be, yes, unless it is prevented either by there being a *res judicata*, or by the doctrine of *stare decisis*.

The matter is not *res judicata*, for—1. The Crown is not bound by estoppel, Everest & Strode's Estoppel, pp. 8, 9. If not bound by deed, which is *actio volentis*, upon what

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principle can it be bound by a judgment of a Court *in invitum*, the two acts being of equal solemnity? See also Comyns' Prerogative, Vol. VII., p. 90. 2. The principle of *res judicata* does not apply to pure questions of law, see Bigelow on Estoppel, p. 100. 3. There is in this case no *res judicata*.

The cause of action is not the same as that in issue in the former suit, for it did not arise until the assessment levied in 1895, long after the termination of the former suit, which was in respect of taxes levied in 1891. One test as to whether or not the same cause of action is being litigated, is, could the Crown have recovered in the first action what it is seeking in the second, *Midland Railway* v. *Martin* (1893), 2 Q.B. 172; another test is, whether the same evidence would be adduced for the Crown in both cases, *Brunsden* v. *Humphrey*, 14 Q.B.D. 141.

Assuming such essentials as identity or privity of parties, contested litigation, etc., there seem to be three classes of cases in which the doctrine of *res judicata* is involved, viz.:

1. Where the same cause of action is put in suit. In this case judgment on the first suit, if on the merits, is final as to the demand in controversy, and is conclusive as to all matters which were litigated or which, *in esse* when action brought, might have been litigated for the purpose of defeating or sustaining the demand; in other words, neither party can advance or contest the claim in different ways in successive suits, see *Caird* v. *Moss*, 33 Ch. D. 22; *Connecticut* v. *Kavanagh*, 67 L.T. 508. 2. Where two different causes of action springing out of the same occurrence or transaction are put in suit, the *res judicata* which has occurred includes the grounds of the decision in the first suit, if such grounds can be clearly collected from the decision and were necessary thereto, and parol evidence is admissible to shew the grounds, *e.g.*, a determination that one of a series of coupons was illegally created would be conclusive as to the validity of another of the same series if brought in suit, but otherwise the second cause of action is as much open to investigation as if the first suit had not been brought, see *Brunsden* v. *Humphrey*, 14 Q.B.D. 141; *Cromwell* v. *County of Sac.*, 94 U.S. 351. 3. Where separate and distinct causes of action although wholly identical in character are brought in suit there is no *res judicata* in the second action except as to the validity of the first demand, and the judgment in the first action can have no greater weight than a precedent for the guidance of the Court in the second action, see *Keokuk* v. *Missouri*, 152 U.S., at p. 315, which was a suit for taxes.

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As to the doctrine of *stare decisis*. The true view seems to be that this doctrine is inapplicable to a case where the former decision is wrong, unless some general rule of property has been settled and acquiesced in by the community at large for a considerable period of time. Moreover, the utility of this doctrine seems to be questioned in the case of Colonial Courts of Appeal, by the Privy Council; see *Trimble* v. *Hill*, 5 App. Cas. 344, 345, where it

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is stated that a Colonial Court of Appeal ought to follow a decision of the English Court of Appeal in preference to its own prior decision. This principle was followed in *Mason* v. *Johnston*, 20 O.A.R. 414; *Hollenden* v. *Foulkes*, 26 Ont. 61. There are numerous instances, both in England and the United States, where a Court of Appeal has overruled its own prior decision or the decision of a co-ordinate Court of Appeal, *e.g.*, by the Court of Appeal: *In re Dewhirst's Trusts*, 33 Ch. D. 419, 55 L.T. 427, 55 L.J. Ch. 842, 35 W.R. 147, where COTTON, LINDLEY and LOPES, L.JJ., overruled the decisions of JAMES, BAGGALLAY and BRETT, L.JJ., in *In re Dalgleish*, 4 Ch. D. 143, which had been followed by JESSEL, M.R., *In re Crowe*, 14 Ch. D. 304; *Fowler* v. *Barstow*, 20 Ch. D. 240, overruled *Great Australian Gold Mining Company* v. *Martin*, 5 Ch. D., on one point, 30 W.R. 112, 51 L.J. Ch. 103; *In re Hallett's Estate*, 13 Ch. D. 696, which overruled *Pennell* v. *Deffell*, 4 D.M. & G. 372, on one point; *Thorogood* v. *Bryan*, 8 C.B. 115, overruled by *The Bernina*, 12 P.D. 58. By the Divisional Court: *Sandford* v. *Clarke*, 21 Q.B.D. 398, was overruled by *Bowen* v. *Anderson* (1894), 1 Q.B. 164, as to a question of law; *Sale* v. *Phillips*, 70 L.T. 559 (1894), 1 Q.B. 349, overruled *Lewis* v. *Arnold*, 32 L.T. 553, L.R. 10 Q.B. 245, which case shews that a Court is not bound by its former decision given *per incuriam*; *Vestry of St. Mary* v. *Goodman*, 23 Q.B.D. 154, overruled by *Fortescue* v. *Vestry of St. Matthew* (1891), 2 Q.B. 170. By the Privy Council: *Kielley* v. *Carson*, 4 Moo. P.C. 63, overruled *Beaumont* v. *Barrett*, 1 Moo. P.C. 59, PARKE, B., delivering both judgments. That case was as to legislative power to imprison for contempt. *Sydney* v. *Bourke*, 11 R. 482, overrules *Bathurst* v. *Macpherson*, 4 App. Cas. 256, on question of distinction between misfeasance and nonfeasance. By the U.S. Supreme Court: *Leisy* v. *Hardin*, 135 U.S. 100, known as the "original package" case, overruled *Pierce* v. *New Hampshire*, 5 How. 504, at pp. 146, 147, opinion by dissenting minority shews that the overruled

decision was carefully considered and was untouched by law for 40 years. *Telghman* v. *Proctor*, 102 U.S. 707, overruled. *Mitchell* v. *Telghman*, 19 Wall. 287; the validity of the same patent being in issue in both suits and the patentee being a party to both. *Killbourne* v. *Thompson*, 103 U.S. 168, overruled *Anderson* v. *Dunn*, 6 Wheaton 204, on the question of the authority of Congress to commit for contempt.

The Court will not enforce an erroneous decree in subsequent proceedings thereon: *Hamilton* v. *Houghton*, 2 Bligh 169; *O'Connell* v. *M'Namara*, 3 Dr. and War. 411; *Commercial Bank* v. *Graham*, 4 Grant 424; *Lawrence Manufacturing Co.* v. *Janesville Cotton Mills*, 138 U.S., at p. 561. *A fortiori*, it should not repeat the error in a fresh suit on a new and distinct cause of action.

Here, by the former decision, no general rule applicable to property was established and the respondent, having escaped just obligations to a large amount ought not now to complain if justice is done.

Argument.

E. V. Bodwell and *P. Æ. Irving* for the respondent Company: Where the principle has once been decided between the same parties, although it may not be *res judicata*, yet the Court will decline to interfere or change their judgment, but leave the parties to their right of appeal: *Beamish* v. *Beamish*, 9 H. of L. Cas. 274; *Re Hall* 8 O.A.R. 135. The matter has already been decided; 3 B.C. 16. [*Per curiam*: The decision reported in 3 B.C. 16 was arrived at owing to counsel for the Crown in effect withdrawing opposition, and therefore does not make the question *res judicata*.]

The meaning of the word "sold" has been decided by the judgment of the Supreme Court of Canada in *Cornwallis* v. *C.P.R.*, 19 S.C.R., at p. 702, and the only question remaining is whether the transaction is within the word "alienated." The *onus* is not on the Company to prove that they are within the exemption. The lands were exempt from taxation and this exemption must be shewn

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to be taken away by the Act itself. Tax Acts must be strictly construed, if the plain words of the Act do not impose the tax, the subject is not liable to it: Hardcastle on Statute Law, 132, and see TAYLOR, C.J., in *C.P.R.* v. *Burnett*, 5 Man. 395. The word "alienated" must be given its strict construction, it is stronger than "sold" and imports a transfer in addition to sale: *Master* v. *The Madison County Ins. Co.*, Barbour 628. The legal estate remains in the E. & N. Ry. Co., and if the Lumber Company made default in their payments, the land would not pass. It is the land of the Railway Company and cannot be taxed against the Lumber Company. How could judgment for the taxes be enforced? The lands, being the property of the Railway Company, could not be sold to satisfy the taxes.

Argument.

Gordon Hunter in reply.

Cur. adv. vult.

February 1st, 1897.

Judgment of McCREIGHT, J.

McCREIGHT, J.: This is a case which arises under 47 Vic. Cap. 14 (E. & N. Ry. Act), Cap. 51, Unconsolidated Statutes, entitled "An Act relating to the Island Railway, the Graving Dock and Railway Land of the Province." The case stated alleges that on 14th January, A.D. 1889, the Esquimalt & Nanaimo Railroad Company entered into an agreement with one John A. Humbird for the sale to him of lands comprised in the grant in the said Act mentioned upon the terms and in the manner set forth in the said agreement. It further adds that the above mentioned John A. Humbird afterwards assigned all his interest in the above agreement to the respondents, the Victoria Lumber Company, and it appears from the evidence of E. J. Palmer, the general manager and local treasurer of the Victoria Lumber Company, that the assignment from

Humbird to the Lumber Company was made with the consent of the Railroad Company. At the beginning of the year the question arose as to the liability of the Lumber Company to be assessed for the payment of taxes, having regard to the provisions of the said Railroad Act, and it being brought before His Honor Judge HARRISON, Judge of the Court of Revision for Nanaimo, Alberni, Cowichan and Comox, he decided, in conformity with *Victoria Lumber Company* v. *The Queen*, as reported 3 B.C. 16, that the Lumber Company was not liable, but there appears to have been some mistake in the report, for on sending for the note books of two of the Judges who sat in the Full Court in that case, it seems there was, practically speaking, no decision given by the Judges on that occasion, and this seems to render it unnecessary to consider the learned argument and the cases referred to by *Mr. Hunter*, counsel for the Crown, as to the extent to which the decision, as reported, is now binding upon us.

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The question then is as to the meaning of section 22 of the said Act, which reads as follows: "The lands to be acquired by the Company from the Dominion Government for the construction of the Railroad shall not be subject to taxation, unless and until the same are used by the Company for other than railroad purposes, or leased, occupied, sold or alienated." That is briefly whether under the said agreement the lands have been "leased, occupied, sold or alienated." Perhaps it would be difficult to conceive a more unmistakable expression of the intention of the Legislature than is to be found in the above words, especially when the previous words are taken into account "unless and until the same are used by the Company for other than railroad purposes." The Legislature, moreover, has repeatedly shewn in the said Island Railroad Act and in its reference to the Acts therein referred to (see the Consolidated Railroad Act of Canada, 1879, referred to in section 17, particularly section 7, sub-section 3) that the

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word "alienate" is to have a very comprehensive signification, and see the preamble of the Island Railroad Act, paragraph (*k*), referring to the terms of union, apparently section 11. The draftsman of the Island Railroad Act evidently had these measures before him, as appears from his use of the word "alienated" in paragraph (*b*) of the preamble. See also sections 5 and 6 of the Island Railroad Act, where it is evident the word "alienate" was meant to include a great deal more than a mere conveyance of the fee, and even specifically to include "agreement for sale"; see section 6.

At pp. 122 and 123 of Hardcastle on Statutes numerous cases are cited to shew that words are to be construed according to the maxim *ut res magis valeat quam pereat* and he quotes at page 122, *Rex* v. *Berchet* (A.D. 1688), 1 Show 188, the words: "It is said to be a known rule in the interpretation of statutes that such a sense is to be made upon the whole, as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent," and again, Lord HOLT is quoted at page 122 as saying in *Harcourt* v. *Fox* (1693), 1 Show 532: "I think we should be very bold men when we are entrusted with the interpretation of Acts of Parliament to reject any words that are sensible in an Act."

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I cannot, therefore, treat the words "sell or alienate" in section 11 of the terms of union, or "sold or alienated" in section 22 of the Island Railroad Act as merely equivalent expressions, or as limited to absolute conveyances, especially as to the word "alienate" when its collocation with reference to the other words is regarded. The words "leased, occupied, sold or alienated," when construed according to the authorities, obviously each relate to a different subject matter in section 22 and are not to be construed regardless of each other.

Lord HERSCHELL, in *Colquhoun* v. *Brooks*, 14 App. Cas.,

at p. 506, refers to the necessity of looking at the whole of a statute for the purpose of interpreting its terms, and see Endlich (Maxwell), Secs. 25 and 40. TURNER, L.J., *In re National Savings Bank*, L.R. 1 Ch. App., at pp. 549 and 550, points to the duty to construe words in the same sense throughout an Act of Parliament.

Lord CAIRNS, in *Hill* v. *Crook*, 42 L.J. Ch., at p 716, speaks of the testator in that case having provided a "Dictionary" for the interpretation of the instrument—certainly this remark seems to apply to the Island Railroad Act, Sec. 11 of the terms of union, and the Consolidated Railroad Act of Canada, 1879, as I have already referred to. The Legislature seems to have treated the word "alienate" as describing a "genus" containing several "species," one of which is an "agreement for sale," but I do not think it is necessary for the Government to invoke this doctrine, for the liability of these lands to be assessed does not depend primarily upon section 22 of the Island Railroad Act, but upon the Assessment Act, within the scope of which they unquestionably would have come upon conveyance of such lands by the Government of Canada to the E. & N. Railroad Company, were it not for the qualified and temporary immunity from taxation given by section 22; but I have referred to the point because it has been suggested that "a Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed"; see cases cited and the remarks of Lord CAIRNS, quoted in Hardcastle on Statute Law, p. 132. No one disputes this, but we must look for words authorizing the assessment in the General Act, which deals with the subject, and not section 22 of the E. and N. Railroad Act, which merely gives the qualified or temporary immunity from taxation, but at the same time it would not be right to overlook another point.

Judgment of McCREIGHT, J.

It was contended by counsel for the Crown that Acts

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creating privileges or monopolies are strictly construed, quoting the remarks of STRONG, C.J., in *La Campaigne, etc.* v. *La Campaigne*, 25 S.C.R., pp. 173 and 174. This, no doubt, is correct, and the cases with reference to exemptions from taxation and the strict construction which they ought to receive are referred to by TAYLOR, C.J., in the *C.P.R. Company* v. *Burnett*, 5 Man. 398; but the fallacy of applying that doctrine in that case (a case, I may say, very similar in its main features to the present) was exposed by that learned Judge. He points out at page 399 that "the land in question (taxed by a municipality in Manitoba, as against the Canadian Pacific Railway Company) was originally the property of Canada, and by section 125 of the British North America Act not liable to taxation," and he says, "the question is, 'has it ever become so ?' not 'has it, at one time liable to taxation, been exempted therefrom?'"

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He then points out, at page 404, that Manitoba received from the Dominion Legislature an addition "to her territory upon the express condition that the existing contract between the Dominion Government, the then owner of the land, and the plaintiffs (the Canadian Pacific Railway Company), that the lands granted the latter should for twenty years be subject to taxation only in the event of their being sold or occupied, was to be respected and acted upon by the Province," and he adds: "It was in the nature of a contract between the Dominion and the Province, which could be varied only by mutual consent," and he held, and the other Judges held, that the Provincial Legislature would not tax the land, except in accordance with the joint action of the Dominion and Provincial Legislatures.

I have referred to this judgment at some length, as it seems to have been adopted by the Supreme Court of Canada on the appeal as their "*ratio decidendi*," in *Cornwallis* v. *C.P.R.*, 19 S.C.R. 702. Perusal of the Esquimalt & Nanaimo Railway Act shows a contract between the Dominion and

Provincial Legislatures that section 22 could not be altered, except by mutual consent. The lands were not liable to taxation whilst in the Crown, and upon the grant to the Dominion, by agreement they were made free from assessment, except in accordance with section 22, and the remark of TAYLOR, C.J., at p. 399 of the report, applies: "The question is, 'has it ever become liable to taxation?' not 'has it, at one time liable to taxation, been exempted therefrom?'"

This seems to me to dispose of the argument that section 22 is to be construed as an exemption, so that in interpreting that section we are not troubled with the argument as to the construction of an exemption on the one hand, or as to whether that section contains necessarily words imposing a tax on the other, a subject which falls within the scope of the Assessment Act, as I have already pointed out.

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Section 22 is then to be construed by the ordinary rules governing the construction of Acts of Parliament, and, I think, leaves the Lumber Company liable to have their lands assessed.

I will only add with reference to the *Canadian Pacific Railway* v. *Burnett*, *supra*, that it seems the Company there made an agreement for sale of certain of the lands upon certain conditions, and the conditions not having been performed, the Company cancelled the agreement, as by the terms it was entitled to do. It would indeed have been a strong decision to hold that there was a sale, and see the remarks of PATTERSON, J., in *Cornwallis* v. *C.P.R.*, *supra*, at p. 711. I will only add that I think Palmer's evidence shews the Victoria Lumber and Manufacturing Company have *de facto* occupied the land; no facts have been found, but his evidence shews he has mistaken the meaning of "occupation," or understood it as a layman. See Wharton's Law Dictionary and the Imperial Dictionary.

I think the judgment of the Judge of the Court of

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Revision is wrong and should be reversed, but without costs, as the report in 3 B.C. probably misled the Victoria Lumber Company.

WALKEM, J.: I agree with the judgment just delivered and have very little to add to it. I was a member of the Full Court when the question came up in 1893, by way of appeal, as it does now, from a decision of the same County Court Judge, as to whether the Company was liable or not to taxation, he having then decided that it was. The case was not argued on behalf of the Government.

The late Chief Justice's note of it is: "Appeal allowed, Crown withdrawing resistance"; and my note, as well as Mr. Justice DRAKE'S, is to the same effect. The present case, therefore, is not one of *res judicata*. Moreover, the doctrine of *estoppel* does not apply to the Crown. Even if it did, this case involves the question of different taxation, founded on a different assessment from the former one.

The lands, according to section 22, are given for the purpose of railway construction and "Shall not be subject to taxation, unless and until the same are used by the Company for other than railroad purposes, or leased, occupied, sold or alienated." While fully agreeing with the above judgment, it appears to me that the test as to whether the Company has alienated or divested itself of the lands in question is this: Could the Company at the present or any future day use those lands for railroad purposes even if it so desired? There is only one answer to this, and that is that it could not, as it has parted with its control over them. What does this mean if it does not mean alienation?

The appeal must be allowed, with costs.

DRAKE, J., concurred.

Appeal allowed.

THE QUEEN, APPELLANT,

v.

THE VICTORIA LUMBER AND MANUFACTURING COMPANY, RESPONDENTS.

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Practice—Appeal to Privy Council—Leave by Court appealed from.

Under the Privy Council Rules the leave to appeal from a judgment of the Supreme Court of British Columbia may be granted by any quorum of the Full Court, although not constituted of the same judges as those who delivered the judgment proposed to be appealed from.

MOTION for leave to appeal to the Privy Council from the judgment of the Full Court reported *ante* p. 288. Within fourteen days the Victoria Lumber Company gave notice of motion to the Supreme Court for leave to appeal to the Privy Council, and the motion came on before DRAKE, J., who adjourned the motion to be heard before the Full Court. The motion was heard on the 1st of March, 1897, by MCCREIGHT, WALKEM, DRAKE and MCCOLL, JJ.

Statement.

P. AE. Irving for the motion.

NOTE (*a*).—1. Any person or persons may appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of British Columbia in such manner, within such time, and under and subject to such rules, regulations and limitations as are hereinafter mentioned; that is to say: In case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling (£300), or in case such judgment, decree, order, or sentence shall involve directly or indirectly any claim, demand or question to or respecting property or any civil right amounting to or of the value of three hundred pounds sterling (£300), the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty, Her heirs and successors, in Her or their Privy Council.

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Gordon Hunter for the Crown, *contra*: The application must be made to the Court appealed from, *i.e.* the Full Court constituted of the same Judges as those who delivered the judgment appealed from. The words "Supreme Court" in the Privy Council Rules, 1887, Rule 1 (*a*), means in this case Full Court.

Per curiam: We think the Court properly constituted, and leave to appeal should be granted, execution to be stayed on security being given in thirty days.

Order accordingly.

For NOTE *(a)* see page 305.

Noted "Coal Mines Reg. Act" 6 C. P. B. C.

IN RE THE COAL MINES REGULATION AMENDMENT ACT, 1890.

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Dec. 11.

Constitutional law—Ultra vires—Rights of aliens—Interference with trade and commerce—B.N.A. Act, Sec. 91.

RE COAL MINES REGULATION AMENDMENT ACT, 1890

The provision in section 4 of the Coal Mines Regulation Act, as amended by the Coal Mines Regulation Amendment Act, 1890, Sec. 1, that "No Chinaman shall be employed in, or allowed to be for the purpose of employment in, any mine to which this Act applies, below ground," is within the constitutional power of the Provincial Legislature as being a Regulation of Coal Mines, and is not *ultra vires*, as an interference with the subject of aliens.

Statement.

REFERENCE to the Supreme Court of British Columbia, sitting as a Full Court, pursuant to the Supreme Court Reference Act, 1891, of the following case: "Has the Legislature of the Province of British Columbia jurisdiction

to pass the Act passed in the 53rd year of Her Majesty's reign, Chap. 33, intituled An Act to Amend the Coal Mines Regulation Act?"

The question was argued before WALKEM, DRAKE and MCCOLL, JJ., on 11th December, 1896.

C. E. Pooley, Q.C., against the Act: The prohibition of Chinamen from working the coal mines is *ultra vires* as an interference with the subjects of trade and commerce and also of aliens, which are reserved to the Dominion Parliament by section 91, sub-section 2, of the B.N.A. Act. If the subject falls within any one of the sub-sections of section 92, the Provincial Legislature has jurisdiction. If not, the Dominion Parliament has sole control. *Parsons* v. *Citizen's Ins. Co.*, 1 Cart. 273., *Dobie* v. *Temporalities Board*, Ibid. 352.

Argument.

This is not a matter of purely local import. The prohibition is further void as discriminating against a class: *Reg.* v. *The City of Victoria*, 1 B.C., Pt. II., p. 331; *Reg.* v. *Wing Chung*, *Ibid.* p. 150; *Tai Sing* v. *Maguire*, 1 B.C., Pt. I., p. 101; *Reg.* v. *Taylor*, 36 U.C.Q.B. 183. The wholesale prohibition of Chinese from working in coal mines is, in the known circumstances of the industry, a substantial interference with that industry, which is principally dependent upon export, and therefore of trade and commerce. See *Low* v. *Routledge*, 11 Jur. 922, as to the rights of aliens and their reciprocal obligations, also Doutre, on Constitution of Canada, 186; Cooley on Constitutional Limitations, 491 to 493. If a Chinaman owns a coal mine, under this Act he cannot work it himself.

Charles Wilson, Q.C., contra: The whole field of legislative power is exhausted by the British North America Act. If section 92 does not cover the particular subject, then it is dropped into section 91. An interference with trade and commerce is necessitated in some degree by every law dealing with property and the regulation of

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industry, and yet, if the object and effect of the legislation be to regulate a purely local industry, it does not become *ultra vires* because incidentally and unavoidably it may be said in some degree to affect trade and commerce; see *Dobie* v. *Temporalities Board, supra.* The presumption is in favour of the validity of the Act: *Attorney-General of Ontario* v. *The Attorney-General of Canada* (1894), A.C. 189. Compare sections 4 and 11 of the Act. As to the question of Aliens, see Clement on the Canadian Constitution, p. 406. The legislation is an exercise of the right to deal with property and civil rights, *Citizen's Ins. Co.* v. *Parsons, supra*, and is a restriction of the right of contract, both of the owner and the Chinese, in relation to the employment of the latter: *L'Union St. Jacques*, v. *Belisle*, L.R. 6 P.C. 31. If Dominion legislation overlaps legislation of the Province, the Dominion governs. If the Dominion has not legislated, the Province may do so: *Tennant* v. *Union Bank of Canada* (1894) A.C. 31: *Re Adam*, 1, M.P.C. 460.

Argument.

H. D. Helmcken, Q.C., on the same side: The legislation is valid, as within sub-sections 10, 13, 16, of section 92. Local Legislatures have power to establish lawful restriction under which trade may be carried on: *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A.C. p. 348.

This is a mere matter of regulation and not of prohibition.

C. E. Pooley, Q.C., replied.

Cur. adv. vult.

February 3rd, 1897.

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WALKEM, J.: The question referred to this Court by His Honour the Lieutenant-Governor-in-Council is as to whether the Coal Mines Regulation Amendment Act, 1890. is constitutional or not.

The Act consists of two short clauses, namely, the Short Title Clause, and the clause impeached, which is as follows:

"Section 4 of the Coal Mines Regulation Act is hereby amended by inserting between the words 'age' and 'shall' on the second line the words 'and no Chinaman.'"

With the amendment, as shown in brackets, section 4 will read thus: "4. No boy under the age of twelve years, and no woman or girl of any age [and no Chinaman], shall be employed in, or allowed to be for the purpose of employment in, any mine to which the Act applies, below ground."

Thus, the employment underground of any of the persons specified is prohibited. Part, only, of this prohibition is objected to, viz., that referring to Chinamen. The objection is based on two constitutional grounds, viz., that the prohibition trenches upon the Regulation of Trade and Commerce, and also deals with Aliens—two matters assigned to the control of the Dominion by section 91 of the B.N.A. Act.

With respect to the first ground, it is said that the exclusion of Chinamen is not only unjust and oppressive in their case, but is equally so in the case of mine owners, as it materially lessens competition in labour and thereby increases the expense of the production of their coal, thus, in a measure, regulating its price, and to that extent interfering with it as a trade or business.

The exclusion of the women and boys, although not complained of, would, obviously, be open to the same objection. The exclusion of women, however, is in their interests, as it is evidently done on moral grounds; and the exclusion of boys is for their benefit on account of their youth, as well as for the protection of others, who might suffer from their inexperience. Sections 5 to 19 shew this to be the case, for they place a limit on the women's working hours above ground (where they may be employed), so as to save them from being over-tasked, and fix a scale of working hours for boys of varying ages between twelve and eighteen; and, moreover, define the class of work which the latter may, or may not, be put to.

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Section 79 consists of thirty-five rules, intended for the protection of life and property, such as rules regulating ventilation, fencing, signalling, blasting, and other matters; and, amongst them, rule 34 provides that "No Chinaman, or person unable to speak English, shall be appointed to, or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any person employed in or about a mine, viz.: As banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or to be employed at the windlass of a sinking pit."

This is the only enactment, save that under discussion, where Chinamen are specially mentioned; and I refer to it, as well as to sections 5 to 19, as affording some explanation of the reasons of the Legislature for prohibiting Chinamen from being employed below ground. There are also other parts of the Act, from section 80 onwards, which provide for the adoption by any mine proprietor of what are termed Special Rules, after they have been posted up in a conspicuous place and approved of, in amended form or otherwise, by the miners, and sanctioned by the Government Inspector. As a matter of notoriety, exceedingly few Chinese labourers understand our language, and this may account for Chinamen being bracketed in rule 34 with persons "who do not speak English." Special Rules would therefore, be unintelligible to them; and any orders or warnings requiring instant attention by reason, for instance, of danger would be equally so.

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In construing the enactment under discussion, I must be guided by the foregoing sections, as they are part of the principal Act in which that enactment has been incorporated. "It is beyond dispute," observes Lord HERSHELL, in *Colquhoun* v. *Brooks*, 14 App. Cas., at p. 506, "that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other

parts of the Act which throw light upon the intention of the Legislature, and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

Rule 34 is, as I have said, one of a group of thirty-five rules which are designed to protect life and property; and the present impeached provision, as well as the section it amends, and the fourteen sections which follow, are apparently regulations in the same direction.

Admitting, for the sake of argument, that any one of them is unjust and oppressive, that is no ground for declaring the Act in question invalid, if its subject-matter is within the jurisdiction of the legislature. "A Court can not declare,"—I am quoting from Cooley's Const. Lim., Chap. 7, Sec. 4—"a statute unconstitutional and void solely on the ground of unjust and oppressive provisions."

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The Act in question comes within sub-sections 13 and 16 of section 92 of the B.N.A. Act, by which the Legislature is empowered to "exclusively make laws in relation to . . .

"13. Property and civil rights in the Province; and

"16. Generally all matters of a merely local or private nature in the Province."

"The object of the British North America Act," as Lord WATSON points out in the case of the *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, 61 L.J. P.C., at p. 77, "was neither to weld the provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government, in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."

What possible common interest could the other provinces have with us in a set of coal mining regulations such as those before us? And yet it is only that common interest which would give them a federal character. Mining

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regulations, whether for gold or coal, must, surely, be exclusively a matter of local concern.

The contention with respect to the impeached regulation is, in effect, that the Dominion Parliament can alone prohibit an alien from working at any particular place in a coal mine here, or holding any of the positions, such as that of signalman, banksman, etc., that are mentioned in rule 34, as such a prohibition would, in an indirect way, be a regulation of trade and commerce, inasmuch as it would trench on that subject.

The meaning of the term "regulation of trade and commerce" is explained in the *Citizens' Insurance Company* v. *Parsons*, 1 Cart., at p. 278 (or 5 App. Cas., 98) to be a term which "would include political arrangements in regard to trade requiring the sanction of Parliament, regulations of trade in matters of inter-provincial concern, and

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. . . a general regulation of trade affecting the whole Dominion . . . but not . . . the power to regulate the contracts of a particular business or trade in any province so as to conflict or compete with the power over property and civil rights," or matters of a merely local nature, "assigned to the Provincial Legislatures."

This would seem to settle the question; for the employment of labourers or others in mines is necessarily a matter of contract, and therefore a matter which, in view of the above authority, is under the exclusive jurisdiction of the Provincial Legislature.

We have a Pharmacy Act on our statute book, and there is one of somewhat similar scope in the Province of Quebec. Both Acts restrict the right of selling drugs to persons possessing certain specified qualifications. To some extent this restriction must necessarily affect trade and commerce; yet, when for that reason, the constitutionality of the Quebec Act was questioned, the Act was upheld on the ground that it did not deal directly with trade and

commerce, but with pharmacy, which was a matter of a local nature, and also one involving civil rights. *Bennett* v. *Pharmaceutical Society of Quebec*, 2 Cart. 250.

The case of the *Citizens' Insurance Company*, and that of *Russell* v. *the Queen*, 7 App. Cas. 829, illustrate the principle "that subjects which in one aspect and for one purpose fall within section 92, may, in another aspect and for another purpose, fall within section 91." See *Hodge* v. *the Queen*, 9 App. Cas. 117. In this last case it was also held that in relation to the subjects enumerated in section 92, the Provincial Legislature has "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possesses; . . . within these limits of subjects and area the local Legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion." Again, "within the same limits the legislation of each Province continues to be free from the control of the Dominion and as supreme as it was" before Confederation, as stated by Lord WATSON in the case of the *Maritime Bank of Canada*, *supra*.

The case of the Quebec Pharmacy Act is an instance, as I have pointed out, of provincial legislation trenching upon a subject assigned to the Dominion; and *Valin* v. *Langlois*, 1 Cart. at p. 177, is an instance of the converse, that is to say, of Dominion legislation trenching upon a matter reserved to the Provinces, viz., procedure in civil matters in our Courts. Numerous instances are given in that case, in the judgment of RITCHIE, C.J., of Dominion legislation on subjects within its control, in which rules of civil procedure are enacted to meet the exigencies of the case. The legislation as to the Canadian Pacific Railway, which, as an inter-provincial line, is under the jurisdiction of the Dominion Parliament, includes a system of civil procedure which is to apply throughout the several Provinces of the Dominion in any litigation which the Railway Company

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may be involved in. The principle upon which these encroachments of jurisdiction by both Legislatures are permitted is that when an Act such, for instance, as the B.N.A. Act, "confers a jurisdiction, it impliedly grants also the power of doing all such Acts or employing such means as are essentially necessary to its execution." (Maxwell on Stats., 2nd Ed. 433.)

In the case of the *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1894), A.C. 192, counsel for the plaintiff, Mr. Blake, in the course of his argument, accurately and concisely sums up in the five following propositions the result of the decisions of the Privy Council in the cases I have referred to, and in the further cases of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *L'Union St. Jacques de Montreal* v. *Belisle*, L.R. 6 P.C. 31; and *Cushing* v. *Dupuy*, 5 App. Cas. 409, namely:

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"(1.) The presumption is in favour of an enactment:

"(2.) The enactment should be so construed as to bring it within the legislative authority"; (*Macleod* v. *Attorney-General of N. S. Wales* (1891), A.C. 455):

"(3.) The true nature and construction of the enactment must be determined in order to ascertain the class of subjects to which it relates:

"(4.) It must be ascertained if the subject falls within section 92, and if so, whether the Court is compelled by section 91, or other sections, to cut down the full meaning of section 92 so that it shall not include the subject of the impugned Act:

"(5.) Subjects which in one aspect fall within section 92, may, in another aspect and for another purpose, fall within section 91."

Applying the passages which I have quoted from *Hodge* v. *The Queen*, and the *Maritime Bank of Canada case*, to the present case, the Legislature could, in my opinion, if it had been considered expedient, have excluded any particular class of British subjects from working in the mines,—for

instance, non-residents of the district in which the mine is situated. *A fortiori*, it could have excluded aliens, as it has done; otherwise it would not have the plenary powers ascribed to it in *Hodge's case*.

A treaty between China and Great Britain was spoken of by Mr. *Pooley*, but was not produced. If one exists it cannot affect this question, inasmuch as it is impossible to conceive that the status of a Chinaman in any of the British possessions has been placed by it on a higher plane than that occupied by a British subject.

The Dominion Naturalization Act, Cap. 113, Rev. Stat. Can., is the only authority we have before us with respect to aliens; and in section 3 it states that an alien may acquire and hold real and personal property and dispose of it in all respects as if he were a British subject: "but nothing," it says, "in this section shall qualify an alien for any office, or for any municipal, parliamentary, or other franchise; nor shall anything herein entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly conferred upon him."

The section, although liberal, clearly shews that aliens in Canada are not placed on the same footing as British subjects. In this Province they are prohibited from acquiring Crown lands by pre-emption, from voting for, or becoming, members of the Legislative Assembly, and from being members of the legal profession. These circumstances are, of course, no authority one way or the other on the question before us; but as RITCHIE, C.J., observes in *Valin* v. *Langlois*, this class of legislation is valuable as being evidence of the opinion of the Legislature on questions affecting aliens.

It will be observed that section 3 of the Naturalization Act states that it is not to be construed as giving aliens rights of office or franchise. It, in effect, leaves the Province free to deal with those rights. See *Attorney-General of*

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Ontario v. *Attorney-General of Canada* (1894) A.C. 189. The object of the Act before us is to regulate the working of coal mines, and not to define the rights or disabilities of aliens. The latter subject, as dealt with in the Act, is merely incidental to the main object of the Act. In my opinion the Act is within the competence of the Legislature.

DRAKE, J.: The question submitted to the Court is, whether the restrictions against the employment of Chinamen, underground in coal mines, is within the legislative authority of the Province.

The argument against its validity was presented under different heads.

1st. As being an interference with the rights of aliens.

2nd. As an interference with trade and commerce.

3rd. Class legislation.

4th. Infraction of British treaties.

Judgment of DRAKE, J.

It is necessary to examine the Act in which this restriction appears. The Act is one making regulations with respect to coal mines and miners, and is divided into parts under different captions. In the first part we find regulations regarding the employment of women, young persons and children; then regulations as to payment of wages, the construction of shafts, and so on. The Act is strictly confined to regulating the manner in which coal mines are to be worked, in the interest of the employees and for their protection, as the occupation of miner is one of danger and risk.

The first portion of the Act is the one with which we are concerned. Section 3 prohibits the employment of boys under twelve years of age in or about a mine; section 4 prohibits the employment of women and girls, and also Chinamen, below ground; sections 5, 6, 7 and 8 regulate the hours of labour for boys, women and young persons.

Every one of these sections, in some sense, affect trade and commerce, but they are not thereby *ultra vires*,—the

protection of women and children is a subject which every Legislature is entitled to control, until such time as the Dominion Parliament passes a law applicable to the whole Dominion.

This protection is of dual character. In one sense it protects the women and children from being employed in work unsuitable to their sex and powers; and in the other, it protects the miners from the risk arising from want of skill and knowledge in persons employed with them in a dangerous occupation.

The Legislature has thought fit to place Chinamen in the same category, the reason of which is not obvious, for they are as able and as well fitted to work a mine, below ground, as men of any other nationality. The restriction, apparently, was imposed on the ground that by the employment of Chinese the wages of the white labourer were reduced, and that involves the larger question of right of employer and employee to absolute freedom of contract. It is a clear principle of law that the employer of labour may engage whom he pleases and that an employee is free to contract for his labour with whom and at what rate and upon what terms he chooses. But the Legislature has imposed a restriction on this freedom of contract; a restriction which may be supported on the ground that it deals with property and civil rights and is a merely local matter. Property and civil rights, the Privy Council, in *Citizen's Insurance Company* v. *Parsons*, 1 Cart. 274, held even sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts not included in section 91.

But if this is a matter affecting property and civil rights, then only so far as the Dominion Legislature has not under cognate powers affected the rights of the Province, the Province can legislate.

The Dominion, under the Naturalization Act, Chap. 113, Revised Statutes of 1886, has exercised a partial control over the rights of aliens by declaring that their rights to

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real and personal property shall be as free and as unfettered as if they were natural-born British subjects; and a naturalized alien shall, in Canada, be entitled to all political and other rights, powers and privileges of a natural-born British subject. This partial control does not, however, overlap the rights of the Provincial Legislature to deal with the subject as to who shall not be employed underground in a coal mine.

What the meaning of the language used in the Act is, or how it is to be construed, is not before us, but with regard to the question whether this is an infringement of the Dominion rights to deal with trade and commerce. The Privy Council, in the *Citizens' Insurance Company* v. *Parsons, supra*, laid down the principle upon which the words "regulation of trade and commerce" are to be construed. They mean, political arrangements as regards foreign trade; regulations of trade in matters of inter-provincial concern, or general regulations affecting the whole Dominion; but do nor include the power to regulate contracts of a particular business or trade.

Judgment of DRAKE, J.

The subject was considered in *Bennett* v. *Pharmaceutical Association of Quebec* 2 Cart. 250. At page 255, DORION, C.J., says: "The determining of the age or of other qualifications required by those residing in the Province to exercise certain professions, or certain branches of business, attended with danger or risk to the public, are local subjects in the nature of internal police regulations, and in passing laws upon those subjects, even if those laws incidentally affect trade and commerce, it must be held that this incidental power is included in the right to deal with the subjects specially placed under their control." Applying these principles to the present case we must come to the conclusion that this is not a case affecting trade and commerce, but a question of property and civil rights, and regulations of a particular business hitherto untouched by the Dominion legislation.

The cases cited by Mr. *Pooley: Reg.* v. *Corporation of Vic-*

toria, 1 B.C. Pt. I. 331; *Regina* v. *Wing Chong*, *Ibid.*, p. 150; and *Tui Sing* v. *Maguire*, 1 B.C., Pt. I. 101, all turned on the subject of special taxation imposed on the Chinese; and, although, incidentally, the powers of the Provincial and Dominion Legislatures were discussed, the points decided are no guide to the present case.

The question of how far treaty rights are involved in this legislation was not argued, and we were not referred to any treaties alleged to have been violated. We must, therefore, consider that no such objection exists.

Under the circumstances, I am of the opinion that the question put to us must be answered in the affirmative.

McColl, J., concurred.

Act declared constitutional.

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SHALLCROSS v. GARESCHE.

Parties—Receiver—Right of Action,

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Trustees having refused to bring an action to recover funds of the estate, certain of the beneficiaries brought the action in their own names and obtained an order removing the Trustees and appointing a Receiver in their place, with leave to substitute the Receiver as plaintiff. He was substituted accordingly by a subsequent order. Neither of the above orders was appealed from, but at the trial the defendants, while not objecting to the Receiver as plaintiff, objected that there was no cause of action in him, whereupon one of the beneficiaries previously struck out asked to be joined as plaintiff.

Per DRAKE J.: 1. That there was no cause of action in the Receiver.

2. That the Full Court alone had power to restore a plaintiff struck out by order of a Judge.

Held, by the Full Court (Davie, C.J., McCreight and McColl, JJ.) that the action should be carried on the names of the Receiver and one of the beneficiaries with leave to any of the other beneficiaries to apply to be added as plaintiffs.

Statement.

MOTION by the plaintiff the Receiver, and Florence Macaulay and Clara Laine, two of the beneficiaries of the estate, that such beneficiaries should be added plaintiffs and that the Receiver be directed to continue the action in his and their names, the defendants having objected at the opening of the plaintiff's case at the trial that there was no cause of action in the Receiver. The scope of the action more fully appears from the report of the case *sub nomine Garesche* v. *Garesche*, 4 B.C. 310–444.

Robert Cassidy, for the plaintiff and the beneficiaries proposed to be added.

A. P. Luxton and *L. P. Duff*, for the defendants.

Judgment of DRAKE, J.

DRAKE, J.: The Chief Justice on July 24, 1896, made an order on the plaintiff's application to substitute Mr. Shallcross as plaintiff in this action in the place of the existing plaintiffs. Mr. Shallcross had been appointed Receiver in this action.

On the action coming on for trial I found myself unable to make any order without the presence of the *cestuis que trustent*, and instead of dismissing the action, I adjourned the hearing in order that the necessary parties might be added with leave to all parties to amend.

Mr. *Cassidy* now moves to add Clara Laine and Florence Macaulay as plaintiffs. These were two of the plaintiffs in whose place Mr. Shallcross was substituted as plaintiff.

By so doing I should in fact be overruling an order of this Court which has been completed and entered. The order of the Chief Justice was the order that was asked for by Mr. *Cassidy* and made at his request. In making such a request he was instructed that George Garesche and Louis Garesche, two of the plaintiffs who did not desire to further prosecute the action against their brother, and in order to carry out his instructions he asked that Mr. Shallcross should be substituted for the other plaintiffs; but whether the order was made in error or not I cannot now alter it. The parties must go to the Court of Appeal: See *Preston Banking Company* v. *Alsup*, (1895) 1 Ch. 141.

Judgment of DRAKE, J.

In my opinion some of the devisees interested in the estate should be parties plaintiff, either in conjunction with Mr. Shallcross or without him.

The action is in the nature of an administration action claiming *devastavit* or breach of trust in respect of a trust estate. See *Re Hopkins*, 19 Ch. D. 61.

I will extend the time for appealing from the order of 24th July to the Court in February as I think a *bona fide* mistake has been made and in order that the expense already incurred should not be rendered entirely useless.

Order accordingly.

Statement.

From this judgment the plaintiff appealed to the Full Court and the beneficiaries renewed their application to be

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added as plaintiffs. The appeal was argued on 3rd February, 1897, before DAVIE, C.J., and MCCREIGHT and MCCOLL, JJ.

Robert Cassidy, for the plaintiff and for Florence Macaulay, one of the beneficiaries: No order as to parties can be said to be conclusive in the sense of tying the hands of the Court as to any future order adding or striking out parties. There is nothing adjudged by such an order between the parties. The Receiver here is in reality in the precise position of a trustee. The trustees were removed because they refused to institute and carry on this action and the Receiver appointed for the express purpose of doing so. *Garesche* v. *Garesche*, 4 B.C. 310. The whole estate is vested in the Receiver by order of the Court to the same extent as if he were trustee, and he has without objection been ordered to carry on the action. The only reason why he was appointed *sub nomine* Receiver was that he might be ordered to give security. As a mere receiver we concede that he would have no cause of action. *McGuin* v. *Fretts*, 13 Ont. 699, is authority for joining the beneficiaries with a Receiver and ordering the action to proceed in that form. A trustee is sometimes made Receiver: *Pilkington* v. *Baker*, 24 W.R. 234. See also *Utterson* v. *Mair*, 2 Ves. 95; S.C. Rule 91, *et seq.*

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A. P. Luxton and *L. P. Duff*, *contra:* A Receiver ought not to be permitted to carryon an action: *Re Hopkins*, 30 W.R. 601; *Stuart* v. *Grough*, 14 O.A.R. 299; *Dickey* v. *McCaul*, 14 O.A.R. 166 at p. 182; *Walcott* v. *Lyons*, 29 Ch. D. 584; *Ayscough* v. *Bullar*, 41 Ch. D. 341; *New West. Brewery Co.*, W.N. (76) 215. Without questioning the order allowing the Receiver to be plaintiff it is open to us to contend that he has no cause of action. The order of the Court could not endow him with that. The action should be dismissed and the beneficiaries left to bring an action in their own names.

DAVIE, C.J.: It would appear from the proceedings that the Receiver was put as far as possible, without naming

him so, in the position of the removed trustees; however, to avoid all doubt as to the form of the action the proper order is that Florence Macaulay, the beneficiary now represented by counsel, and desiring to carry on the action, be joined as plaintiff with the Receiver, with leave to any other beneficiary to move to be added as plaintiff. Costs reserved to the trial judge.

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McCREIGHT and McCOLL, JJ., concurred.

Order Accordingly.

WEBB v. MONTGOMERY.

WALKEM, J. 1896. June 24. FULL COURT. 1897. March 1. WEBB v. MONTGOMERY

Mineral law—Contract—Consideration—Accord and satisfaction.

An agreement for the sale of mineral claims provided for payment by instalments and contained a proviso that "failure to make any of the above payments to render this agreement void as to all parties thereto, and the said (vendees) can quit at any time without being liable for any further payments thereunder from such time on." At the request of the vendees the vendors, without consideration, extended the time for payment of one of the instalments. After the original, but before the extended period for making the payment, the vendees notified the vendors that they had quit.

In an action to recover the amount of the instalment,

Held, by the Full Court (McCreight, Drake and McColl, JJ.) overruling WALKEM, J., that the liability of the defendants, the vendees, to pay the instalment in question was absolute upon the day named in the original agreement, and remained unaffected by the voluntary concession of further time to pay.

APPEAL to the Full Court from a judgment of WALKEM, J., at the trial dismissing the action. The action was to recover $5,000.00, being $2,000.00, balance of second instalment of $3,000.00, and a third instalment of $3,000.00 of

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purchase money of a certain mineral claim bought by the defendants from the plaintiff under an agreement between them which contained the following provisions:

(1) The parties of the first part claim to be the owners of two certain mineral claims recorded at New Denver, B. C., as the "Fishermaiden" and "Silverton No. 1," and situate about seven miles from Silverton up Four Mile Creek, as shewn by the records made of said claim, that said claims are free from all incumbrances and that they will warrant and defend the same from all claims whatsoever and they, the said first parties, hereby agree to sell to the said second parties the above-mentioned claims on the following terms, to-wit: Six hundred ($600.00) cash in hand, three thousand ($3,000.00) on September 15th, 1894, six thousand ($6,000.00) on March 15th, 1895, and eight thousand four hundred ($8,400.00) on September 15th, 1895, making in all the sum of eighteen thousand dollars.

The parties of the second part agree to make the payments as above specified and also to further pay to Jap King for them at the time specified above, viz.: in hand, sixty-six dollars, sixty-seven cents ($66.67); on September 15th next, three hundred and thirty-three dollars and thirty-four cents ($333.34); on March 15th, 1895, six hundred and sixty-six dollars and sixty-seven cents ($666.67), and on September 15th, 1895, the further and final sum of nine hundred and thirty-three dollars and thirty-four cents ($933.34), making in all two thousand dollars to be paid to the said King; a failure to make any of the above payments to render this agreement void as to all parties thereto, and said second parties can quit at any time without being liable for any further payments thereunder from such time on.

Statement.

The said first parties shall at and upon the signing of this agreement execute a good and sufficient conveyance of a bill of sale to said second parties of the before-mentioned mineral claims, said bill of sale to be placed in escrow with Hunter & McKinnon at New Denver, and upon the faithful fulfilment of conditions of this agreement by the parties of the second part, said bill of sale shall be delivered to said second parties, their heirs or assigns. On making the first payment under this agreement, the parties of the second part are hereby authorized to enter upon and take possession of the said mineral claims and work them as to them may seem best, to ship and sell any ore taken therefrom, but the proceeds of the said ore, after deducting all expense (except for mining the ore), shall be applied in payment of the several sums due from the said second to the said first parties in the order in which said payments are to be made. All payments under this agreement (except the first) shall be made through Hunter & McKinnon and in current funds of Canada.

Before the date fixed for the payment of the second

instalment the defendants, having paid $1,000.00 of it, asked the plaintiff to grant them an extension of time within which to pay the balance. This was acceeded to by the plaintiffs. On the day before the lapse of the extended period, which was also the day before that fixed for the payment of the third instalment, the defendants notified the plaintiffs that they had quit work and abandoned the option. The appeal was argued before McCREIGHT, DRAKE and McCOLL, JJ., on 8th December, 1896.

Chas. Wilson, Q.C., and *R. M. Macdonald* for the plaintiffs (appellants).

E. P. Davis, Q.C., for the defendants (respondents).

Cur. adv. vult.

March 1st, 1897.

McCREIGHT, J.: I quite agree with the judgment of my brother DRAKE.

I think the defendants are liable to pay the sum of $2000.00, being the difference between the sum of $3,000.00, due on 15th September, 1894, and the sum of $1,000.00 then paid. The extension of time from September until the 15th March, 1895, was without consideration and a mere voluntary indulgence; see the case cited by DRAKE, J. There was no binding agreement, and an action could have been maintained at any time during the interval for the $2,000.00 It was due thus for six months anterior to 15th March and could not be repudiated as if only due on or after that date, and the defendants cannot invoke the following provision in the agreement of 4th April, 1894: "And said second parties can quit at any time without being liable for any further payments thereunder from such time on."

Judgment of McCREIGHT, J.

But though the defendants cannot rely on this provision as exempting them from payment of the $2,000.00, I think they can rely on it as excusing payment of the $6,000.00.

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I think the agreement was practically put an end to and the mine quitted on 14th March, and I am by no means sure that it would not have been sufficient for the defendants to have quitted at any time of the day on the 15th, for they were not called upon to pay till 12 o'clock at night of the 15th; see the authorities collected in *Clarke* v. *Bradlaugh*, 8 Q.B.D. 63; though I do not think the defendants need rely on this point.

With respect to Hunter and McKinnon, the agreement of 4th April, 1894, shews they were merely to hold the escrow and receive payments to be made to the plaintiffs. They were not parties to the agreement or trustees for the ore or the proceeds, nor do I understand that the judgment of the learned Trial Judge as to them is complained of. I believe Mr. Justice McColl also agrees in the decision of Mr. Justice Drake, though he has not seen either his judgment or mine. I think the plaintiffs are entitled to $2,000.00.

Judgment of McCREIGHT, J.

Drake, J.: The plaintiffs on 4th April, 1894, entered into an agreement with Montgomery & Mann, Geo. Hughes and Robert Ewart for sale and purchase of two mineral claims on the terms of $6,000.00 cash, $3,000.00 on September 15th, 1894, $6,000.00 on March 15th, 1895, and $8,400.00 on September 15th, 1895, and in addition to the above payments the sum of $2,000.00 was to be paid to J. King on certain specified dates; and it was agreed that a failure to make any of the payments was to render the agreement void as to all parties and "the second parties could quit at any time without being liable for any further payments thereunder from such time on."

Judgment of McCREIGHT, J.

The intention of the parties, to be gathered from the language used in this document, was that this was a conditional sale, and the purchasers, after having proved the mining claims, were to be able to withdraw at any time, and in case of withdrawal they were not to be liable for any further payments becoming due after the date of the

withdrawal. And it was further agreed that the proceeds of all ore, after deducting all expenses (except for mining the ore), should be applied in payment of monies due under the agreement and that all payments under the agreement were to be made through the defendants, Hunter & McKinnon. The plaintiffs claim payment of all monies due under the agreement and an account of all ore mined by the defendants.

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From the evidence it appears that the defendants paid the $600.00 and entered on the mine and expended considerable sums of money in testing the mine, some ore was got out and sold, but the defendants alleged that the proceeds did not recoup them their outlay in opening up the works. On 15th September, 1894, when the instalment of $3,000.00 became due, the defendants paid $1,000.00 and asked for and obtained an extension of time for the payment of the balance due until 15th March, 1895. The extension of time was given on the distinct understanding that the agreement should not be treated as varied in any other respect. The defendants contended that, the payment being thus postponed, if they quitted the mine before the date when the $2,000.00 was payable under the extended agreement, they were free from all liability.

Judgment of DRAKE, J.

In other words, they claim that the new agreement was an accord and satisfaction of the original contract. Accord without satisfaction is no answer, and there was no satisfaction here.

There was no consideration for the promise, it was a mere voluntary indulgence and in law the plaintiffs could have demanded the whole sum on 15th September, 1894: *McManus* v. *Bark*, L.R. 5 Ex. 65. The debt having become due when the time was given, the defendants cannot now be allowed to take advantage of the clause enabling them to terminate the agreement and thus become freed from the payment of this sum, although they can free themselves from the payment of all sums not then due

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under the original agreement by quitting the mine. I think the evidence is sufficiently clear to shew that the quitting took place on 14th March; a notice was given that day. The defendants, having told Popham that they would have to quit work if they did not get a new agreement, and when this was refused, they told the firemen to pack up everything, and the defendants, Mann and Hughes, both swear that on 14th March they notified the plaintiffs they were going to quit. Under the agreement no notice was necessary, but it was given and acted on, and although only given by Mann and Hughes, it was operative for all parties. The other branch of the case was charging Hunter and McKinnon with breach of trust in not paying over the proceeds of all ore to the plaintiffs.

Judgment of DRAKE, J.

There is no evidence of any trust, either expressed or implied, affecting these gentlemen, and although a good deal of evidence was adduced to prove what was meant by the term "mining the ore," I cannot see how the fact that ore was mined and sold from that claim can affect the defendants' liability. The clause in the agreement on which the plaintiffs rely is simply this, that the net proceeds of any ore sold shall be applied in payment of the instalments as they become due under the agreement. If such payments were to be made through Hunter and McKinnon, they were not parties to the agreement and undertook no duty to the plaintiffs, and there was no evidence that any money had come into their hands for the plaintiff. I therefore think the action was rightly dismissed against them.

In my opinion the judgment of the Court below should be varied and judgment for $2,000.00 entered for the plaintiffs against the defendants Montgomery & Mann, George W. Hughes and Robert Ewart, with costs here and of the Court below, and that the order stand as regards the other defendants.

McCOLL, J., concurred.

Appeal allowed.

Noted Fire Ins. Policy Act (B.C.) 1893

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COPE AND TAYLOR v. SCOTTISH UNION CO

Insurance—Application for Policy—Misrepresentation—Fraud—Warranty—New Trial—Statute subject to proclamation—Lieutenant-Governor functus officio when Act proclaimed.

The Fire Insurance Policy Act (B.C.) 1893, providing statutory conditions, was passed subject to a provision that "This Act shall not come into force until a day to be named by the Lieutenant-Governor-in-Council." The Lieutenant - Governor - in - Council named 1st November, 1893, and advertised the same in *The Gazette*, but before that date published a further notice, and afterwards other notices, postponing the day for the Act to come in force until a date after that of the making of the policy in question.

Held by the Full Court (McCreight, Drake and McColl, JJ.): (1.) That the Lieutenant-Governor was the delegate of the Legislature for the purpose only of proclaiming the Act in force, and upon his doing so the Act came into operation and he was *functus officio* and could not afterwards postpone the date.

(2.) Following *Citizens' Insurance Co.* v. *Parsons*, 7 A.C. 119, that the statutory conditions superseded the conditions in the policy, the latter not being indicated as variations therefrom in manner required by sections 4 and 5 of the Act.

(3.) That the statement of the insured in the application as to the value of the goods which was found by the jury to be incorrect, taken in connection with the statutory condition, No. (1), viz, "not to describe the goods insured otherwise than as they really are to the prejudice of the Company or misrepresent any material circumstance," did not amount to a warranty.

Per DRAKE, J.: That statements as to value being as to matters of opinion do not constitute a warranty.

The Court will not as a rule grant a new trial on the ground that the verdict is against the weight of evidence upon an issue of fraud, particularly where the charge involves a criminal offence, and the verdict is in favour of the party charged.

Statement.

APPEAL to the Full Court by defendants from the judgment of DAVIE, C.J., at the trial entering judgment for plaintiffs upon the findings of the jury.

The plaintiffs carried on business in Vancouver as coffin manufacturers and insured their stock in trade with the defendant Company in the sum of $1,500.00. The policy of

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insurance was effected by F. T. Cope, who as agent for plaintiffs made application for that purpose to the local agents of the defendant Company, and in the course of the preliminary negotiations informed the agents' clerk that he valued the stock in trade, etc., at between $4,000.00 and $5,000.00. F. T. Cope signed the application form, but did not fill in the answers to the questions therein contained, this being done by the agents' clerk, who to the question, "What is the present value of the property insured?" wrote the answer, "$5,000.00." The application form contained the following provision:

The undersigned hereby agrees that the answers above give a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured and said representation is the basis on which insurance is to be effected and is understood and agreed to as incorporated in and forming part of the policy to be issued thereon.

Statement.

Subsequently a policy was issued, on which was printed the following condition amongst others:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

But the conditions printed on the policy were not printed in the manner required by section 4 of the Fire Insurance Policy Act, 1893. (*a*.)

NOTE.—(a) This section reads as follows: "If a company or other insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the policy in conspicuous type, and in ink of different colour, words to the following effect:

VARIATIONS IN CONDITIONS.

This policy is issued on the above statutory conditions, with the following variations and conditions:

These variations (or as the case may be) are, by virtue of the British Columbia Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company."

The insured property, or a considerable part thereof, was afterwards destroyed by fire. At the request of the defendants, F. T. Cope supplied a detailed statement of the amount of damages sustained, and such statement contained various mistakes, inaccuracies and overcharges.

The plaintiff obtained a verdict from the jury for the full amount claimed and costs, upon which judgment was entered by the Chief Justice. From this judgment the defendant Company appealed, on the grounds that the statement of value of the property insured at the time of the application for insurance was a warranty, and that, as found by the jury, the goods were not of the value stated; and also further moved for a new trial on the ground that the verdict was against the evidence. The appeal was argued before McCREIGHT, WALKEM and DRAKE, JJ., on 2nd, 3rd, 4th and 5th November, 1896.

Statement.

Chas. Wilson, Q.C., for the appellants: Where there is a warranty, the question of misrepresentation is immaterial: *Newcastle Insurance Co.* v. *Macmorran*, 3 Dow 255–262, unless the misrepresentation touches the basis of the contract: *Thomson* v. *Weems*, 9 App. Cas. 671, and see *Macdonald* v. *Law Union Insurance Co.*, L.R. 9 Q.B. 328; and as to the filling in of the application by the agent of the Company, instead of the applicant in person: *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1892), 2 Q.B. 534, is distinguishable.

Argument.

E. P. Davis, Q.C., for the respondents: Statements of value are not a warranty: *Riach* v. *Niagara District Mutual Insurance Co.*, 21 U.C.C.P. 464; and as to misrepresentations of value see *Parsons* v. *Citizens' Insurance Co.*, 43 U.C.Q.B. 261, *Park* v. *Phœnix Insurance Co.*, 19 U.C.Q.B. 110; *Redford* v. *Mutual Fire Insurance Co. of Clinton*, 1 Robinson and Josephs' Digest 1811; as to the necessity to submit to arbitration refer to *Dawson* v. *Fitzgerald*, 1 Ex. Div. 260; *Viney* v. *Bignold*, 20 Q.B.D. 172, *Boss* v. *Helsham*, 4 H. & C. 649.

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Chas. Wilson, Q.C., in reply, referred to the powers of the Lieutenant-Governor-in-Council and cited *Doed. Anderson* v. *Todd*, 2 U.C.Q.B. 88.

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Cur. adv. vult.

March 1st, 1897.

McCREIGHT, J.: In this case the plaintiffs, respondents, sued the Company on a fire insurance policy effected with the defendant Company on 16th February, 1895, on caskets, coffins and implements and stock of patterns in Vancouver and which were burned on 7th March following.

The application for the policy by the plaintiffs after containing the usual questions, one of which was: What is the present cash value of the property insured? And the answer thereto "$5,000.00" (but which was on trial found by the jury to have been stated by Cope on the application to be be $4,000.00 or $5,000.00, or rather $4,000.00 by aggregating the items) had the following provision at the end of it: "The undersigned hereby agrees that answers above give a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured and said representation is the basis on which insurance is to be effected and is understood and agreed to as incorporated in and forming part of the policy to be issued thereon."

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The jury found the actual value at the time of the application to be $3,192.00 not $4,000.00.

The defendant Company accordingly contend that the above provision constituted a warranty as to the value, that the representation was the basis on which the insurance was to be effected, and to be taken as incorporated in the policy to be issued.

The plaintiffs in their reply invoke the Fire Insurance Policy Act of 1893, and the defendants by their rejoinder

say in substance that the said Act was not in force at the time of the issue of the policy.

The application for the policy by Cope was put in evidence by the defendant Company though not referred to in the pleadings, and the warranty was discussed at the trial near its close. It was therefore considered by the Full Court on the argument of the appeal and not objected to that the pleadings were to be amended by setting out the application, or as much of it as was necessary so as to raise the question of warranty for the defence, but of course justice required that the plaintiff should be placed in the same position as if the warranty had been referred to in the pleadings as a defence when no doubt he would have objected to it under Order XXV., Rules of the Supreme Court, and the question was thus neatly raised and argued whether the said Act was in force or not at the time of the issue of the Policy, *i.e.*, 16th February, 1895. If the Act was then in force it was doubtful whether the warranty could be successfully invoked, but otherwise if the Act was not then in force. The amendments, adopting the usual course, were not actually made.

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The Fire Insurance Act, 1893, was (see page 653, *B. C. Gazette* of 1893) at first directed to come into force on the 1st November of that year, and then, page 788, the period was extended till 1st January, 1894, and then, page 986 of the same volume, in due course the time was extended till 1st April, 1894, and see page 2 of Volume of *Gazette* for 1894, and at page 272 the time was extended till 1st April, 1895. As the policy was issued on 16th February of that year, 1895, we are not much concerned with further postponements, except to say that it will be found that there was a complete series of them till 1st April, 1896. See *Gazette* for 1895 at page 870 where an obvious clerical error is to be seen of 1895 instead of 1896, and which is of no practical importance. See *Wilson* v. *Wilson*, 23 L.J. Ch., at p. 703, Lord St. Leonards. I may observe that in the index

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to the volume for 1895 there is an omission of a postponement to be found at page 692. The question then arises whether these postponements were valid.

The Fire Insurance Policy Amendment Act, 1896, seems to imply that they are valid, as it declares by section 3 that the Act of 1893 with certain amendments, shall come into force on 1st July, 1896, but perusal of the cases on the subject as well as text books satisfy me that such postponements were invalid and that if the legislature has, by mistake, assumed that such postponements were valid when in truth they were not, then the observation in the judgment of the judicial committee, in *Mollwo March & Company* v. *Ct. of Wards*, L.R. 4 P.C., at p. 437, applies and governs this case. "The enactment is, no doubt, entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence" and on this point as to legislation founded on a mistake of law I will only further refer to what was said by COCKBURN, C.J., in 29 L.J.C.P. at p. 53 in *Earl of Shewsbury* v. *Scott*, and see this and the other cases referred to and commented on, in Hardcastle on Statute Law, pp. 465 and 466; Wilberforce on Statute Law, pp. 13 and 14, as to the effect of the erroneous declaration of law, and Maxwell on Statutes, 2nd Ed. pp. 379 and 380.

The other point as to the validity of the postponements seems to be covered by the *ratio decidendi* if not by the express language of the Court in *Reg* v. *Burah*, 3 App. Cas. at p. 889. The marginal note is that "where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend."

page 906 it is said in the judgment of the Lord Chancellor, "the proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now (and this expression is important) absolute, etc., etc. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it, etc."

The reasoning in this judgment, whilst of course shewing that the Lieutenant-Governor-in-Council could, under section 8 of the Act of 1893, fix the time for the Act to come into force, is quite inconsistent with his having power to postpone such period from time to time, which would in effect amount to a delegation by the legislature of its authority to repeal and re-enact or extend or fix the time for the Act to come into force and that from time to time. It is plain that section 8 never contemplated anything but that the Lieutenant-Governor-in-Council should exercise his authority but once, and then the conditional legislation should become absolute.

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If the Legislature considered in 1896 that the postponements by the Lieutenant-Governor-in-Council extending over a period of three years were legal, it was mistaken, and its mistake has not altered the law whereby such postponements were invalid, and the Act I think came into force in the month of November, 1893.

Acts which delegate subordinate legislative or other powers are to be construed strictly. See Maxwell on Statutes, 1st Ed., pp. 264 and 265; 2nd Ed., pp. 357 and 367.

I shall deal subsequently with the question of warranty and first deal with the motion for a new trial with respect

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to the issue of fraud. After hearing argument I cannot say that I am altogether satisfied that the verdict was such as a jury, viewing the whole of the evidence reasonably, could not properly find, or as put by Lord HALSBURY in *Metropolitan Railway Co.* v. *Wright*, 11 App. Cas. 154 at p. 156, "If reasonable men *might* find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges."

The question of fraud or no fraud is eminently a question for a jury, and especially in insurance cases. See per Lord SELBORNE in *Hoare* v. *Brembridge*, L.R. 8 Ch.App. 28; see also what is said by the Judicial Committee in *Phillips* v. *Martin*, 15 App. Cas. 193 where it was pointed out that questions dealing with fraud are pre-eminently for the jury to decide. Moreover the learned Chief Justice told the jury that he thought they ought to look upon the case very much in the same light as a criminal case and not to convict Cope and Taylor unless satisfied as reasonable men that they made these overcharges knowing them to be false, etc. There is no doubt the issue was one involving a criminal charge. If it had been found against Cope and Taylor, the Company would probably have prosecuted them for conspiracy, if not for some graver offences. Now it has long been the practice of the Court never to grant a new trial in a criminal case as against evidence where a verdict has been found for the defendant, but *aliter* where the verdict has been found for the plaintiff. In *Brook* v. *Middleton*, 10 East, at p. 269, Lord ELLENBOROUGH, C.J., said the rule had long been laid down not to grant new trials in actions on penal laws where the verdict was for the defendant. See also what is said in *Hall* v. *Green*, 9 Exch., at pp. 247 and 248. The same principle has been extended even to indictments for the non-repair of roads. Moreover, I think it is highly probable that on a second trial the same verdict would be returned. In *Frey* v. *Mutual Insurance Company*

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of the County of Wellington, 43 U.C.R. pp. 111 to 113, the cases are collected shewing the great reluctance of the Courts to grant new trials on issues of fraud in a case like the present.

I shall now deal with the question of warranty. Now, it appears from *Lothian* v. *Henderson*, 7 R.R., 829, 837, 840, 841, 845, 846, 857, 862, 865; and especially from *Pawson* v. *Watson*, Cooper, at p. 790: "That in order to make any statements binding as warranties they must appear upon the face of the instrument by which the contract of insurance is effected. They must be either expressly set out or by reference incorporated in the policy." See Bunyon on Fire Insurance, 69; and in *Pawson* v. *Watson*, Cowper, 785, at p. 790, Lord MANSFIELD says, the opinion of the Court was that to make written instruments valid and binding as a warranty they must be inserted in the policy.

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I am not sure that the policy complies with the law as above laid down; but as I think I have already shewn that the Fire Insurance Act of 1893 was in force when the policy was issued in February, 1895, the only necessary enquiry is as to the effect of the statutory conditions. This appears from the judgment of the Judicial Committee in *Citizens' Insc. Co.* v. *Parsons*, 7 App. Cas., at pp. 119 and 120. The marginal note at page 97 is "That whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter alone shall be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. Where a company has printed its own conditions, and failed to print the statutory ones, it is not the case that the policy must be deemed to be without any conditions at all."

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Here the Company evidently considered that the Act of 1893 was not in force when the policy was issued in February, 1895, and of course did not attend to the statutory conditions, or to the statute, and the result appears to be that the policy and its meaning is to be governed by the statutory conditions and those only.

The Ontario case of *Frey* v. *Mutual Fire Insurance Co.*, *supra*, is not in accord with that of the Judicial Committee, but of course the latter binds.

Mr. Davis, for the plaintiff, contended that the second statutory condition, "that after application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the Company points out in writing the particulars wherein the policy differs from the application," did not authorize Mr. *Wilson's* contention that there was a warranty, and referred to *Quinlan* v. *Union Fire Insurance Co.*, 31 U.C.C.P., pp. 618, 627, 636, which I think fully sustains Mr. *Davis'* argument for the plaintiff. In that case there was a variation of the second statutory condition to the effect "that such application or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured"; but Mr. Justice PATTERSON, at p. 627, disapproved of this variation and thought the first statutory condition was the only one on which the defendants were entitled to rely, stating that by the frame of that condition the Legislature had indicated the extent to which it was deemed just and reasonable that a representation or omission should effect the policy, and has confined the forfeiture to cases where circumstances omitted or mis-stated is material to be made known to the Company in order to enable them to judge of the risk they undertake, or is to the prejudice of the Company, and adding: "The other stipulations which I have quoted, which assume to set aside this limitation, I hold to be conditions which it is not just

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or reasonable for the Company to exact." On appeal, the Court of Common Pleas agrees with this, and says that "his opinion (Mr. Justice Patterson's) that the addition to the second statutory condition making the application a warranty would not be sustained as against the first statutory condition, which made it only a representation, we do not differ from. It would be unreasonable to make the entire application as is done here for a warranty," etc.

Of course in the present case there is no variation, but only the statutory conditions, according to the Judicial Committee the remarks of the learned Judges are cogent to shew that the second condition, even without variation, cannot be insisted upon as supporting the alleged warranty. The decision was reversed (see 8 O.A.R. 376) but the above *dicta* were left untouched, and they are in accordance with the law as laid down in the subsequent cases of *Parsons* v. *The Queen Insurance Company*, 2 Ont. pp. 45, 64, 65, 67; *Goring* v. *London Mutual Fire Insurance Company*, 10 Ont. 236, and *Graham* v. *Ont. Mutual Insurance Company*, 14 Ont., at pp. 365 and 367.

Argument.

Mr. Wilson relied on condition 16 as to arbitration, but this I think, applies only to cases where no fraud is imputed. See Bunyon on Fire Insurance, p. 108; and arbitration after a jury have found their verdict would be too late, and see *Scott* v. *Avery*, 25 L.J. Exch. 308. Moreover, the point does not seem to have been raised at the trial.

I think there should be no new trial, and the defense as to the warranty must be determined in favour of the plaintiff, and the appeal dismissed with costs.

WALKEM J., concurred.

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DRAKE, J.: The evidence is conflicting, but there is evidence on both sides as regards value of loss and value at time of application.

These questions are eminently for the consideration of

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the jury and I cannot say that the jury have come to a conclusion which is unsupported by evidence.

The main issue which was submitted to the jury was fraud on the part of the plaintiffs and that the jury have found in their favour, I have examined the evidence and although the special class of business which the plaintiffs carried on, may at first sight be considered as greatly in excess of the requirements of the locality, yet there was no evidence that the amount of stock was not there and some evidence that a considerable stock was there.

The defendants contended that there had not been enough lumber purchased to make the stock alleged to be on hand, and called Robertson and Mesher, who both considered that it would take twenty-two thousand feet of lumber, which is some four thousand feet more than the plaintiffs alleged they had purchased, but neither of these witnesses had any experience in the use of machinery in coffin making, or in the mode these coffins were made as shewn by diagrams, hand-made coffins would take more lumber, and this evidence was also before the jury and they found in favour of the plaintiffs.

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On the question of patterns the plaintiffs charged some $450.00. This is an estimate of the plaintiffs' idea of their value and can only partially be gauged by the labour and wood used on the completed patterns. The jury reduced the plaintiff's value to $200.00; the value was not of importance, it was the number of patterns destroyed which the defendants were to pay for, no pattern to exceed $2.00 each. This estimate of value of patterns is not a statement of fact on the plaintiffs' part, but only an opinion, and even as a matter of opinion, hardly a material fact. A mis-statement of fact is material; an erroneous opinion of something not a fact is hardly so.

As to tools the evidence of what was discovered after the fire would be valuable if the remains had been carefully guarded, but ten days elapsed before any charge was taken

of the ashes and many more days before a search, as the remnants found are no evidence of what was consumed.

The defendants urge that the error in twice counting in the material, which was converted into beading is evidence of fraud, and that any one could have discovered it, yet hardly two people would arrive at the same result as to what should be charged for the coffins complete. The defendants had the accounts of labour and material expended and the estimate of loss and yet did not discover the error, in fact there was no concealment of the mode the coffins were made, fraud could hardly be based on such facts.

I notice that the account of expenditure does not include taxes or interest on cash expended, which would have to be taken into account in order to arrive at the actual value of the materials destroyed. In *Park* v. *Phœnix Insurance Company*, 19 U.C.Q.B. 110, it was held that a plaintiff overstating the loss, unless it was done designedly for the purpose of obtaining a larger sum did not avoid a policy.

It being probable that the loss, though over-estimated, was within the sum assured and there being circumstances to explain the over-charge by *bona fide* mistake the jury were warranted in finding for plaintiff. *Britton* v. *Royal Insurance Company*, 4 F. & F. 905, shews that wilful misrepresentation of the value of the property destroyed will defeat the whole claim and the Judge says that if there is wilful falsehood and fraud in the claim the insured forfeits all claim on the policy. In *Chapman* v. *Pole*, 22 L.T. 306, COCKBURN, C.J., in summing up said: If the plaintiff knowingly preferred a claim he knew to be false, either with reference to quantity or value of goods, then he is not entitled to recover; a man may honestly make a mistake in his claim if he presses a claim he honestly believes to be true but in which he may turn out to be mistaken, the only consequence is that he can only recover the real value of the goods actually lost. I therefore do not consider, taking all the circumstances into consideration, that there should

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be any new trial on the ground that the verdict was against evidence. Juries are the judges of the value to be given to conflicting statements and where there is evidence both *pro* and *con* this Court will not interfere.

The remaining point is whether or not a warranty was in issue, and if so, whether the plaintiffs have failed in their alleged warranty. The defence nowhere relies on a warranty what is alleged a misrepresentation in the value at the time of the application for insurance. A warranty implies that the matter is as represented, therefore the materiality or immateriality signifies nothing, *Anderson* v. *Fitzgerald*, 4 H. of L. 484. It is not every answer that is a warranty. Answers may be of mere statements of opinion and not intended as a warranty or representation, *Anderson* v. *Pacific Ins. Co.*, L.R. 7 C.P. 65. The plaintiffs insisted that this policy was governed by the Fire Insurance Act, 1893. By section 8 "this Act shall not come into force until a day to be named by the Lieutenant-Governor-in-Council of which two calendar months' notice at least shall be published in the *B.C. Gazette*," the Lieutenant-Governor-in-Council did fix 1st November, 1893, for bringing this Act into force and gave two months' notice of it. A few days before the time mentioned a notice was published changing the period to another date and so on from time to time. I think, though with some hesitation, that the Lieutenant-Governor-in-Council having once named the date and given the statutory notice the subsequent postponements were not within the scope of the authority delegated by the Legislature. It is needless to remark that keeping an Act thus in suspense before the public, might prove a serious matter for those seeking to insure. The language of the suspending clause is equivalent to saying that the Act shall come into force on a day to be named, and when that day is named it is at once operative; such being the case the position of the plaintiffs is, under *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, that the statutory conditions

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alone are to be our guide in construing the conditions of the policy. By the second of these conditions any policy sent to the assured is intended to be in accordance with the terms of the application. The terms of the application contain this question and answer: "What is the present cash value of the property assessed? $5,000.00." This amount was filled in by the agent of the Company on the information of the plaintiff that the value was from $4,000.00 to $5,000.00. It was laid down in *Bawden* v. *London, Edinburgh and Glasgow Assurance Company*, (1892) 2 Q.B. 534, that the authority of the agent may be gathered from what he did; here the person obtaining the application was the agent of the Company when he applied to the plaintiff to insure. The agent himself could not make a contract. He applied to the plaintiffs to place a value on the property, they stated $4,000.00 to $5,000.00. He negotiated and settled the terms of the proposal and in that sense was the Company's agent and knew that the value was given at $4,000.00 to $5,000.00. He inserted the larger amount possibly to shew his principals that the insurance was a good one, but at the time he so inserted it he knew it was the extreme value and knowing this his knowledge must be the knowledge of the Company. The defendants accepted the policy knowing through their agent that the value was from $4,000.00 to $5,000.00 and they cannot now be allowed to say that the value $5,000.00 was a purposed misrepresentation which would avoid the policy.

Value is a merely relative term, it may be relative to cost of production, merits of the article on the market, cost of replacement, and therefore an estimate of value may become a mere opinion influenced by circumstances arising subsequently. A man may have 1,000 quarters of wheat valued for insurance at $1.00 a bushel; at the time of the loss the value may be 50 cents, the insurance cannot be repudiated as fraudulent because of difference in value. The duty of insurers is to disclose all material facts

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in order that a policy should not be obtained by misrepresentation or concealment, and the jury have found that the plaintiffs had honest belief in their estimate of value although erroneous or founded on an erroneous basis. The actual value as found by the jury still leaves a considerable margin over and above the amount of both insurances, for these reasons I am of opinion the appeal should be dismissed with costs.

Appeal dismissed and motion for new trial refused.

McLENNAN v. MILLINGTON.

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v.
MILLINGTON

Lessor and lessee — Agreement for lease—Uncertainty—Statute of Frauds—Damages.

In an action for damages for not delivering possession of premises the document set up as a lease was: "Received from J. C. McLennan the sum of $15.00, being part payment on premises now occupied as a barber shop, on west side of Fourth Street, between A Avenue and Front Street, said sum to apply on rent for premises aforesaid from November 1st, 1896. Rent to be paid in advance. 'S. Millington.'"

The only evidence of damages was that the plaintiff had purchased a tobacconist's stock in view of occupying the premises at the date mentioned, and being unable to get other suitable premises had made a loss on the goods.

FORIN, Co. J., at the trial, entered judgment for the plaintiff for $100.00, the amount of the full loss.

Upon appeal to the Full Court:

Held, per McCREIGHT, WALKEM, DRAKE and McCOLL, JJ. (allowing the appeal), that there was no evidence of legal damage.

Quære: Whether the agreement was not void under the Statute of Frauds as not stating the term.

ACTION to recover $15.00 paid by the plaintiff to the defendant on account of rent of premises upon above contract, and also for damages for not delivering possession of the premises upon the day named. Statement.

Geo. A. Morphy, for the plaintiff.

C. W. McAnn, Q.C., for the defendant.

FORIN, Co. J.: The tenancy created was from month to month: *Orser* v. *Vernon*, 14 U.C.C.P. 573; *Huffell* v. *Armitstead*, 7 C. & P. 56.

The memorandum between the parties is sufficient evidence, and the payment of rent additional evidence as to the creation of the tenancy. Judgment of FORIN, CO. J.

A parol lease need not commence at once, but must not assume to confer any interest to last three years from the time of making it: *Rawlins* v. *Turner*, Ld. Raymond 736.

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The custom of the country respecting monthly tenancies requires a month's notice.

In this case the plaintiff was advised about the 10th of the month, *i.e.*, November, that the property was sold, and although he suffered loss still I do not think he can expect the Court to give him two months' loss of profits, as he could have taken steps to prevent serious loss. In fact, this is what he did, but at the same time part of the stock which he purchased was a loss to him and he undoubtedly is entitled to damages for that and for loss of profits.

I will allow the plaintiff $100.00 damages in addition to the $15.00 rent, which is to be returned to him, and costs.

Judgment for the plaintiff.

From this judgment the defendant appealed to the Full Court as to the order for damages, and the appeal was argued on the 4th day of March, 1897, before McCREIGHT, WALKEM, DRAKE, and McCOLL, JJ.

Argument.

Robert Cassidy, for the appeal: A contract for quiet enjoyment is not implied by law from a mere agreement to let: *Messent* v. *Reynolds*, 3 C.B. 194; *Brashier* v. *Jackson*, 6 M. & W. 549; although it is implied where the demise is completed by taking possession: *Bandy* v. *Cartwright*, 8 Ex. 913. The headnote to *Coe* v. *Clay*, 5 Bing, 440: "He who lets agrees to give possession," is misleading if applied to a verbal agreement; see the report of the case in 3 M. & P. 57, from which it appears there was a written agreement containing words of present demise; see *Drury* v. *McNamara*, 5 El. & Bl. 612, from which case it appears that if an instrument amounts to an agreement for a lease only, and not to an actual demise, there is no right to recover as for breach of an implied covenant for quiet enjoyment. *Non demisit* is therefor a good plea to an action on an implied covenant for quiet enjoyment,

and the action consequently only lies on an agreement to let when it is in writing with express words amounting to such a covenant. In *Jenks* v. *Edwards*, 11 Ex. 774, it was held that the document in the form of an agreement operated as a lease. It is not clear that a lease without the word "grant" or express words will operate as or imply a covenant for quiet enjoyment. See the Editor's note to the last case citing with approval the language of TILLGHMAN, C.J., in *Cozens* v. *Stevenson*, 5 S. & R. 424: "We are all clearly of opinion that the law implies no promise to deliver possession from the words of this lease. It is a bare demise for two years without mention of the lessor's undertaking to deliver possession, although it is expressly said that at the date of the lease the house and wharf were occupied by Hugg. If a lease be made, by the words 'grant' or 'demise,' it amounts to a covenant by the lessor that he will make satisfaction to the lessee if he is lawfully evicted, etc." An action for not occupying will not lie upon a verbal agreement to take lodgings for two or three years upon certain terms, although the document would be good as a lease if occupation were taken: *Edge* v. *Strafford*, 1 Tyrwhitt, 295; 1 Cr. & J. 391; *Inman* v. *Stamp*, 1 Stark. 12; and we suggest that *e converso*, an action for not giving possession will not lie. See also Woodfall on Landlord and Tenant, 15th Ed. 94.

Argument.

If the action lies the damages are too remote. It was not open to the plaintiff to shew that he rented the premises for the purpose of there carrying on a certain business of which the landlord was aware, and that he could not procure other premises, and to claim the profits which he might have made in such premises: *Marrin* v. *Graver*, 8 Ont. 39. The agreement is void under the Statute of Frauds for not stating the duration of the term. There is no inference as to the duration of the term arising from the fact of the rent being payable monthly.

A. L. Belyea, contra: The Statute of Frauds is satisfied

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if, by looking at the document, you can gather the terms of the contract, *Orser* v. *Vernon*, 14 U.C.C.P. 573. The presumption is that the letting was by the month. An agreement to give possession is implied: Clarke's Landlord and Tenant, 178. *Jenks* v. *Edwards*, cited, is conclusive. [McCOLL, J.: The question of whether an action will lie for not giving possession under this agreement, if valid under the Statute of Frauds, seems a difficult one. We would suggest your confining your argument to whether there is any evidence of legal damages, on the assumption in the meantime that the action will lie.] As to loss of profits see *Jaques* v. *Millar*, 6 Ch. D. 153. From the written judgment it appears that there was also a loss on the goods purchased on the faith of the agreement, though no evidence as to that appears in the Judge's notes, which are defective in that respect. It was the duty of the appellant to see that the notes covered the facts on every point dealt with in the judgment, and if necessary to obtain a memorandum from the Judge upon the facts as proved on the latter point, if there was no note taken at the time.

Argument.

McCREIGHT, J.: Without dealing with the other questions raised, we think that the plaintiff was not entitled to recover damages for the loss of prospective profits from the sale of the goods purchased with a view to their sale in the premises in question. As to the question of loss upon the goods purchased, by reason of the plaintiff not being able to go into the business of a tobacconist at Kaslo at the time in question, owing to his inability to obtain other suitable premises in that city, there is no evidence before us to support any such claim.

Judgment of McCREIGHT, J.

The appeal must be allowed, but, to mark our disapproval of the apparent insufficiency of the notes, without costs.

WALKEM, DRAKE, and McCOLL, JJ., concurred.

Appeal allowed without costs.

REGINA v. CHIPMAN.

DRAKE, J.

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Summary conviction—Municipal Clauses Act, 1896, Secs. 81, 204, 212—Jurisdiction of Justices of the Peace in cities where there is a Police Magistrate.

An information was laid before a Justice of the Peace against the Police Magistrate for the City of Kaslo for a breach by him of one of the City By-laws, and the Justice of the Peace granted a summons thereon returnable at Nelson. By section 212 of the Municipal Clauses Act "No Justice of the Peace shall adjudicate upon or otherwise act in any case for a city where there is a Police Magistrate, except in the case of illness, or absence, or at the request of the Police Magistrate."

Section 213 saves the jurisdiction of Justices of the Peace for the several districts, in regard to offenses committed in any city situated within their respective districts in which there may be no Police Magistrate. The Police Magistrate was not ill or absent and did not request the Justice of Peace to act.

Upon motion for a prohibition against further proceedings upon the information,

Held, per DRAKE, J., dismissing the motion that, in the particular circumstances there was, for the purposes of the case in question, no Police Magistrate in Kaslo, and that section 212, *supra*, did not apply, and that the ordinary jurisdiction of Justices of the Peace of the district, exercisable over its whole area, applied.

The making of the summons returnable at Nelson was improper on the ground of inconvenience, but was within the jurisdiction of the Justice of the Peace.

Any person may properly lay an information for the infraction of a city by-law, though the fine goes to the city.

MOTION for an order for a prohibition upon the facts set out, *supra*, upon the grounds "That there being a Police Magistrate for the City of Kaslo, who is not ill or absent, the said charge could only be properly and lawfully laid and can only properly be heard and determined before such Police Magistrate for Kaslo, aforesaid, or by some other Justice of the Peace at his request, and that such hearing can only be properly and lawfully had at Kaslo, aforesaid,

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and that the said ELON E. CHIPMAN, being himself the Police Magistrate at Kaslo, aforesaid, refuses to request or consent to the hearing of the said charge before the said JOHN ANDREW FORIN, or at Nelson, aforesaid, but he has consented and offered to request two Justices of the Peace in and for the said district, resident at Kaslo, aforesaid, and upon the ground that it was not competent to the said G. O. Buchanan to lay the said information or to proceed as on behalf of the City of Kaslo for an infraction of the said By-law or recovery of the penalty."

Robert Cassidy, for the motion.
A. L. Belyea, contra.

Cur. adv. vult.

March 17th, 1897.

DRAKE, J.: Mr. *Cassidy* applies for a writ of prohibition to prevent His Honor, Judge FORIN, who is also a Stipendiary Magistrate, from further adjudicating on the above information.

Judgment of DRAKE, J.

The facts alleged are that CHIPMAN committed a breach of By-law No. 15 of Kaslo. He is the Police Magistrate and City Clerk of Kaslo.

One Stone, a Justice of Peace for the District of West Kootenay, residing at Kaslo, on the information of Buchanan, granted a summons, returnable at Nelson, against CHIPMAN, and on the return of the summons sundry objections were taken to the jurisdiction: First, that the summons could not issue in consequence of secs. 204 and 212 of the Municipal Clauses Act; second, that, the offence being punishable by a fine, the information should be laid by an official of the city; third, that the adjudication, being for a breach of the City By-law, should take place in the city.

By section 81 of the Municipal Clauses Act fines imposed

by the By-laws may be recovered by summary conviction before any Justice of Peace having jurisdiction in the Municipality, and by section 82 no Justice is to be disqualified by the fact that the fine goes to the Municipality or that the adjudicating Justice is a rate-payer or member of the Council.

Section 212 enacts that no Justice of the Peace shall act in any case for a city where there is a Police Magistrate, except in case of illness or absence or at the request of the Police Magistrate. In this case none of the exceptions are stated to have arisen, but the complaint is not for or on behalf of the city, but on behalf of a private person.

The Act authorizes the enforcement of By-laws by a Justice of Peace; the Police Magistrate cannot act or appoint a tribunal because he is the offender whose conduct has to be inquired into. In my opinion, section 212 does not apply to the circumstances of the present case.

Judgment of DRAKE, J.

The summons by Mr. Stone, I think, was rightly granted; the place of trial should be within the district where the offence was committed, and it must be within the territorial jurisdiction of the Magistrate; why the trial did not take place at Kaslo is not explained. In summary cases when the hearing is fixed at some place distant from the residence of the defendant it might result in the denial of justice, but if there is jurisdiction in the Justice who tries the case this Court will not interfere by prohibition.

The second ground of objection is that the offence was created by a By-law of the Municipal Council of Kaslo, and therefore must be enforced by the Corporation or some officer, is not a valid objection under section 81, which gives a Justice power to hear a complaint against a breach of a By-law. There is nothing to limit this power to an information laid by or on behalf of the city.

It has to be remembered that the writ of prohibition is a discretionary writ only, and will not be granted unless there is a clear failure of jurisdiction. I am not prepared

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to say that the adjournment to Nelson by Mr. Stone, though in my opinion improper, was in excess of his jurisdiction, as he was when issuing the summons acting within his jurisdiction. Neither am I prepared to say that Mr. FORIN, a Stipendiary Magistrate for the Province, when he heard the complaint was acting without his authority. The motion must be refused with costs.

Motion refused.

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Mineral claim—Whether interest in land—Statute of Frauds—Pleading—Partnership—Contract—"In on it."

Plaintiff having discovered "mineral float," communicated its situation to the defendant upon a verbal agreement by the latter that in the event of his thereby discovering the ledge and locating a mineral claim, the plaintiff should be "in on it."

Held, by WALKEM. J., at the trial, dismissing the action, that the transaction took place, but that the words "in on it" were too indefinite to found a contract.

Held, by the Full Court (Davie, C.J., McCreight and Drake, JJ.), overruling WALKEM, J., that the words "in on it" imported an agreement to give the plaintiff an interest in the nature of a partnership or co-ownership; that, in the absence of anything in a partnership contract to the contrary, the presumption of law is that the partnership shares are equal, and that the contract was not void for uncertainty.

Quaere, whether the right to a duly located and recorded mineral claim constitutes an interest in land within the meaning of the Statute of Frauds.

Per DAVIE, C.J.: That the defendant, upon finding the ledge and locating and recording the claim, became, under the verbal agreement, a trustee for the plaintiff of one-half share therein, and was incapacitated from setting up the Statute of Frauds as a defence.

Per MCCREIGHT, J.: That, if the title to a mineral claim is an interest in land within the Statute of Frauds, it is so only by reason of the Mineral Act, and that in order to take advantage of the defence of the Statute of Frauds, the Mineral Act should also be pleaded.

APPEAL from the judgment of WALKEM, J., at the trial dismissing the action. The facts sufficiently appear from the headnote and judgments.

The appeal was originally heard before MCCREIGHT, DRAKE and MCCOLL, JJ. MCCOLL, J., had been counsel in the action and sat only for the purpose of making a formal quorum and took no part in the judgment. MCCREIGHT, J., delivered judgment allowing the appeal, DRAKE, J., delivered judgment dismissing the appeal, which he subse-

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quently withdrew, whereupon the appeal was allowed with costs. Upon subsequent motion to the Court the appeal was ordered to be re-argued, and was heard before DAVIE, C.J., MCCREIGHT and DRAKE, JJ.

E. P. Davis, Q.C., for the appellant.

W. J. Taylor, for the respondent.

Argument.

The following authorities were cited by counsel on the use of ambiguous terms, and the admission of evidence of custom in the interpretation of contracts: *Ireland* v. *Livingston*, 5 H. of L. 395; *Fowkes* v. *Assurance Association*, 3 B. & S. 929; *Hindley's Case*, (1896), 2 Ch. 128; *Place* v. *Alcock*, 4 F. & F. 1074; *Robinson* v. *Mollett*, 7 H. of L. 815; Chitty on Contracts, 12th Ed. p. 116; *Figes* v. *Cutler*, 3 Starkie, 139; *Cooper* v. *Hood*, 28 L. J. Ch. 212; *Pearce* v. *Watts*, 20 Eq. 492; *Taylor* v. *Portington*, 7 DeG. M. & G. 328; *Coombe* v. *Carter*, 36 Ch. D. 348.

25th March, 1897.

Judgment of DAVIE, C.J.

DAVIE, CJ.: The learned Judge who tried this case without a jury finds "that the conversation alleged to have taken place as to 'float,' and as to its being agreed that the plaintiff 'should be in on it,' did actually take place."

This finding was not attacked upon the argument, and so we may fairly assume was right: *Colonial Securities Co.* v. *Massey*, (1896) 1 Q.B. 38. I wish to say that, having carefully perused the evidence, I thinkthat the learned Trial Judge could have arrived at no other conclusion.

The conversation to which reference is here made occurred on 11th May, 1895, at Three Forks. The plaintiff, in prospecting, had found some float galena, and the defendant asked him to show where he had found it, remarking "I will go and look for it" (meaning the ledge) "and if I find anything you will be in on it." The plaintiff thereupon, on those conditions, discovered to the defendant where he had found the float, and the defendant accordingly, within three

days afterwards, having found a ledge in the vicinity indicated to him by the plaintiff, located and recorded the ledge in his own name, but refused to give the plaintiff any interest in it. Hence the present suit. The defendant sets up the Statute of Frauds, and, if that statute is to be held applicable to transactions governed by the Mineral Act, I should agree with the learned Trial Judge that the plaintiff's action fails, were it not for the case of *Rochefoucauld* v. *Boustead*, 75 L.T.N.S. p. 502, to which our attention has been called by *Mr. Davis*, and which was decided since the judgment of the Court below, and reported since the case was first argued in the Appellate Court. In *Bartlett* v. *Pickersgill* 1 R.R. 1, parol evidence was deemed inadmissible to show that a party having agreed for the purchase of an estate in his own name had, in fact, purchased it on behalf of another person. That case has been followed in many subsequent cases, and is referred to as good law in *James* v. *Smith*, (1891), 1. Ch. 384, and seems a very strong case, because there the defendant, for denying the trust (successfully in point of law), was nevertheless indicted and convicted of perjury. If parol evidence would be incompetent to prove the defendant merely plaintiff's agent in making a purchase, equally so would it seem to be to prove him a trustee in making a pre-emption. *Bartlett* v. *Pickersgill*, however, is expressly overruled by *Rochefoucauld* v. *Boustead*, which proceeds upon the principle laid down in *McCormick* v. *Grogan*, 4 H. of L. 97, *Rose* v. *Peterkin*, 13 Can. S.C.R. 706 and other cases, that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it to have been so conveyed, to deny the trust and claim the land, and that consequently, notwithstanding the Statute of Frauds, it is competent for a person claiming land conveyed to another, to prove by parol evidence that it was so conveyed upon trust, and that the grantee knowing the facts, is denying the trust. I can see no reason why, so far as the Statute of Frauds is concerned,

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the same principle is not applicable to the location of a mining claim held, or partly held in trust.

The provisions of the B.C. Mineral Act are not pleaded. It may be a serious question whether, or how far, the provisions of the Mineral Act, so far as relates to rights governed by the Mineral Act, supersede or displace the Statute of Frauds. That question, however, does not arise here, for the reason, as before remarked that the Mineral Act is not pleaded, and, I take it, could not, any more than the Statute of Frauds, be relied upon to defeat a parol agreement unless pleaded: *James* v. *Smith*, (1891), 1 Ch. 384, as further answering the Statute of Frauds, and as pointed out by MCCREIGHT, J., the position of the plaintiff apart from his statutable rights and liabilities as a free miner, would be merely that of a licensee of the Crown, having no title whatever to land, and consequently no interest to be defeated by the Statute of Frauds. A number of witnesses were called at the trial, on both sides, to give their opinions as miners and experts as to the meaning and measure of the expression "You will be in on it." Some of these witnesses thought the expression "could only be satisfied with an equal partnership;" others again, considered that the expression would be covered by a smaller interest, but all agreed that the words pointed to an interest, to some extent, in the mine. I think, however, that quite independently of the opinion of the witnesses, the Court is bound to place a construction on these words. It is not as if the expression were of technical significance, or a term of art. In that case, of course, the evidence of experts would be requisite. It is clear and is admitted on all sides that "to be in on it" means an interest of some measure or another; and it seems to me that the well known maxim, "equality is equity," supplies that measure, when, as in this case there is no evidence showing that less than an equal share was stipulated for or intended. As an instance of the application, of this principle, the case of *Robinson* v. *Anderson* 7

De G. M. & G. 239, 20 Beav. 98, is in point. There two separate solicitors were retained by the same clients in the same business, and it was held that the presumption of law was that the profits were to be equally divided.

I think, therefore, that judgment should be given decreeing the plaintiff entitled to an equal half interest with the defendant in the "Monitor No. 2," and to an equal share with him in the extension as to which a half interest has been acquired. There will be the usual account of the workings of the mine and division of net proceeds (if any) and, if so desired by either party, a sale of the property. In the meantime there will be a receiver and injunction, if required. The appellant will be entitled to his costs in the Court below, and of the appeal, which will not include the costs of more than one argument.

McCREIGHT, J.: In this case the alleged agreement is found by the learned Trial Judge to be in substance as follows, that the defendant said to the plaintiff "If you will show me where you found the float I will prospect for the ledge and if I find it you will be in on it," and further that some partnership interest was implied, but that the contract was in reality an illusory contract, because judging from the evidence as to the importance of the words used in it, it might be that the plaintiff was "to get a half or three-quarters or one-eighth, or whatever fraction it is." But I think this difficulty must be taken to be entirely obviated by the legal presumption that shares of partners are equal. Of course if witnesses as to fact had satisfactorily proved that the contract *de facto* was for less than a half share, the legal presumption would or might have been rebutted by such evidence, but the learned Trial Judge has found as to the facts in favour of the plaintiff, and I think perusal of the evidence fully warrants him in so doing. The evidence that has induced the learned Judge to decide that the plaintiff has not succeeded in proving his case is that of experts, or merely expert testimony

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called by the defence to show that the agreement could not be interpreted as dealing with any particular share or its amount, and so was illusory; but it could not have been distinctly pointed out to him that the presumption of law was, or in truth the law presumed that it was, a partnership in equal shares in the absence of evidence of fact to displace such presumption, and that the presumption of law remained whatever the opinions of experts might be. In Lindley on Partnership, Ed. of 1891, 348, it is said that "in the event of a dispute between the partners as to the amount of their shares such dispute if it does not turn on the construction of written documents must be decided like any other pure question of fact, and if there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal."

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The first case to which he refers is *Robinson* v. *Anderson* 7 De G. M. & G. p. 239, where two separate solicitors were retained by the same clients in the same business and it was held that the presumption of law was, etc., that the profits were to be equally divided. KNIGHT, BRUCE, L.J., said: "The evidence satisfies us that the result of it cannot be represented more favourable for the defendant than that the statements on one side neutralize those on the other. So putting it, I conceive that the presumption of law remains, which is equality. I believe, indeed, that this was the agreement and that the decision of the Master of the Rolls, with which I entirely agree, is not less according to the truth and honour than it is according to the technical equity of the case." TURNER, L.J., entirely agreed and said, "that in the absence of evidence of an agreement for a different division the presumption is in favour of equality, etc. The burden of shewing an agreement to the contrary is on the defendant." In this case the learned Trial Judge has found that the defendant has not satisfied this burden.

Reference is also made to the case of *Webster* v.

Bray, 7 Hare, p. 159 in which case the V.C. said at page 179 : "The conclusion to which the evidence would probably have led me is that to which I should perhaps have come as a conclusion of law without the evidence, namely, that in the absence of previous arrangement between the parties the remuneration to be paid to either for personal labour, exceeding that contributed by the other, must be left to the honour of the other ; that where that principle was wanting a Court of Justice could not supply it, and that equality in the division of the profits would be the rule. In support of this, some observations may be found in the judgment of LORD ELDON in *Peacock* v. *Peacock*, 16 Vesey 49. But the defendant has pleaded that the agreement does not comply with the Statute of Frauds.

In considering this defence, it seems proper to consider what the position of the plaintiff would have been as a licensee of the Crown authorized by the Lieutenant-Governor to mine for gold on Crown lands, supposing that there had been no legislation as regards his rights and liabilities as a gold miner, would the Statute of Frauds have had any application?—and I think it is easy to shew that it would have had none.

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The well known case and the elaborate judgment in *Wood* v. *Leadbitter*, 13 M.&W. 838, shews he would have a mere revocable license, and that upon revocation he would have had no rights whatever : to use words of the judgment at page 845. "But suppose the case of a parol license to come on my lands and there to make a watercourse to flow on the lands of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable."

This shews that as such licensee he would have had no

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interest in land, and the sections of the Statute of Frauds dealing with such interests would have had no application to him ; and judging from the cases cited in the last edition of Maxwell on Statutes, it would have had none with respect to the Lieutenant-Governor. The defence then of the Statute of Frauds cannot be material.

On turning to the Mineral Act of 1891 we find two sections which if pleaded might have possibly afforded a defence, namely, section 34, which makes an interest in a claim a chattel interest equivalent to a lease for a year, and section 51, which says that " no transfer of any mineral claim or of any interest therein shall be enforceable unless the same shall be in writing signed," etc., etc. But neither these sections nor the Act are pleaded. It may be proper to observe that it is stated in Odger on Pleading at pp. 62 and 63, that " a plaintiff need not shew in his statement of claim that the Statute of Frauds has been complied with. It is for the defendant to plead that it has not, and it will then be for the plaintiff to prove that it has." The defence of the Statute of Frauds seems to be futile, and the Mineral Act of 1891, supposing it to be a defence if pleaded, has not been referred to in the statement of defence, and the case must be determined on the merits which I think are with the plaintiff. It might well be that the Statute of Frauds might be satisfied, not section 51.

Judgment of McCREIGHT, J.

In my remarks on the first point as to the agreement I forgot to say that though the learned Trial Judge says " there must be mutuality " here we have the same kind of mutuality that exists in cases of offers of rewards for the recovery of lost property, etc., where it has never been doubted that there is sufficient mutuality. The Mineral Act was referred to in the particulars of a defence subsequently withdrawn, and not referred to in the amended pleadings where only the Statute of Frauds was alluded to.

Again particulars do not form any part of the pleadings nor can they have the effect of the pleadings nor can they

be looked at with a view to construe the pleadings. On the second argument it was not suggested that the Mineral Act had been pleaded as a defence. I agree substantially in the decree suggested by the learned Chief Justice.

I can't feel quite sure as to the "Hustler Fraction," and if either party wishes, it should be spoken to, I think, on notice being left in the Registry Office to that effect within fourteen days.

DRAKE, J. Concurred.

Appeal allowed.

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Mineral Law—Mineral Act, 1896, Sec. 16 (d)—"Discoverer"—Staking—Bona fide attempt to comply with Act.

As to location, The Mineral Act, 1896, by section 15 provides: "Any free miner desiring to locate a mineral claim shall enter upon the same and locate a plot of ground measuring, when possible, but not exceeding, 1,500 feet in length by 1,500 feet in breadth in as nearly as possible a rectangular form, all angles shall be right angles, except in cases where a boundary line of a previously surveyed claim is adopted as common to both claims, but the lines need not necessarily be meridional."

As to staking, by section 16: "A mineral claim shall be marked by two legal posts, *et cetera*," with provisions as to notices upon and delimitation of the claim by reference thereto. By sub-section (*d*) of section 16, it is provided "that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location and that there has been on his part a *bona fide* attempt to comply with the provisions of the Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity."

Held, 1. That a locator of mineral in place is within the sub-section, though he may not have been the first discoverer.

2. That the *bona fide* attempt to comply with the provisions of the Act does not merely mean an attempt to locate a claim of size and form as provided in section 15, but means an attempt to comply with the formalities provided by section 16 as to staking, and that a locator who had staked his location by four corner posts, without any legal first and second posts, *et cetera*, had not made such an attempt.

Statement.

ACTION by the plaintiff as owner of the "Spero" mineral claim for possession thereof and that the record of a claim by the defendant covering the same ground be declared void and ordered to be cancelled. The defendant counter-claimed, alleging that the "Spero" location and record was illegal and claiming that the record thereof be cancelled.

The action was tried on 13th March and 1st and 2nd April, 1897, before HARRISON, Co. J.

J. P. Walls for the plaintiff.

A. S. Potts (Drake, Jackson & Helmcken) for the defendant.

Cur. adv. vult.

April 15th, 1897.

HARRISON, Co. J.: The plaintiff in this action claims that she duly and lawfully on 23rd February, 1897, located the "Spero" fractional mineral claim, situate on section 49, Metchosin District, and duly recorded the same, and that the defendant illegally located and recorded a mineral claim called the fractional "Last Chance" on the same land and claims possession of the land, and that the defendant's record may be declared void and cancelled.

The defendant counter-claims that he duly and lawfully located the "Last Chance" and that the plaintiff unlawfully entered his claim and illegally located the fractional "Spero" claim and that the plaintiff's record may be declared void and cancelled. Judgment.

The defendant, a free miner, entered on the plaintiff's lands, section 49, Metchosin District. He says he started at the Indian Reserve post; this post, an old survey post, was at the intersection of sections 45, 46, 49 and 50; he tacked on this post a paper on which the words following were written: "Last Chance mineral claim, East corner post, running West 260 feet; Henry Price, Free Miner's License 90805."

West of this post he cut and squared a tree (a legal post), put on it a paper on which the following words were written: "Last Chance mineral claim, North corner post, running 260 feet east; Henry Price, Free Miner's License 90805."

He then went along the shore line and near an old

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mining shaft, which was sunk on a vein and which shaft some men were then bailing out and close to which he found rock in place, he placed a post. On this post he caused to be written the following words: "Last Chance mineral claim, West corner post, running north 175 feet; Henry Price, Free Miner's License 90805."

A mineral claim owned by the defendant and others, called the "Garibaldi," adjoins section 49. This claim the defendant had assisted in locating and marking out. He tacked on the initial post of the Garibaldi claim a paper on which the following words were written: "Last Chance mineral claim, South corner post, running 175 feet West from this; Henry Price, Free Miner's License 90805."

He did not mark any post as an Initial Post or as a Discovery Post, nor did he number any post as a Number 1 or Number 2 post, nor did he mark out any location line.

Judgment.

On 25th January, 1897, he made an affidavit before the Gold Commissioner, in which, among other things, he swears that he had placed a No. 1 and a No. 2 post and a Discovery post of the legal dimensions on the said Last Chance fractional mineral claim. That he had written on No. 1 post the following words: "Henry Price, Free Miner's Certificate No. 90805, Last Chance Post No. 1," and that he had written on No. 2 post the following words: "Henry Price, Free Miner's Certificate No. 90805, Last Chance Post No. 2," and that he had marked the line between No. 1 and 2 posts, as required by section 16 of the Mineral Act, 1896.

On the back of the affidavit is a sketch plan, referred to in the affidavit, shewing the boundaries of the claim marked by posts at each corner, "Post No. 1," "Post No. 2," "Post No. 3," and "Post No. 4."

On 27th January, 1897, a record of the fractional Last Chance mineral claim was issued to him, in which it is stated that "the direction of the location line is East and West; the length of the claim is 260 feet." The defendant,

after getting the record, went on the ground and found a man there named Atkins, who said he was going on working there. He shewed Atkins his record and subsequently went there again with a hammer and drills, but Atkins would not allow him to work there. Atkins had worked at the old shaft, and there was a post with his name on near the shaft, but he did not record a claim there, nor does it appear that he was a free miner.

On 23rd February, 1897, the plaintiff's agent, F. G. Richards, located, and on 24th February, 1897, recorded, on section 49 for the plaintiff the "Fractional Spero Mineral Claim," covering within a minute fraction the Last Chance. No person was then on the Last Chance; no work had been done by the defendant.

No question arises in this case as to there being a vein or lode or rock in place in the ground claimed by these parties.

The plaintiff attacked the defendant's location and record on the grounds of his want of compliance with the Act, both as to locating and recording.

Judgment.

The defendant's counsel admitted that if it were not for sub-section (*d*) of section 16, it would be impossible to give judgment in his client's favour.

As to sub-section (*d*), the plaintiff's counsel contended that that sub-section did not apply to this case, but that it was only intended to benefit "Discoverers," and the Placer Mining Act shews what the meaning of the word "Discovered" is.

That neither the plaintiff nor the defendant were "Discoverers" of the mineral in place, but it had in reality been discovered by Atkins or whoever had sunk the shaft near the spot where the defendant had placed the south corner post before-mentioned, and close to which the plaintiff had placed his discovery post. And as regards both plaintiff and defendant, the Act must be strictly construed.

I do not agree with the construction sought to be placed

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by the plaintiff on sub-section (*d*), and it is not necessary to depart from the Mineral Act and resort to some other statute to ascertain the meaning of the words "actually discovered."

The word "locator," as used in the Act, evidently includes "free miner" and is used with reference to free miners generally.

The Act (*vide* sections 12, 13, 16, 24 and 19,) does not restrict the location of a mineral claim to the first discoverer of rock in place, or to the discoverer of a new mine, but gives any free miner the right not only to locate claims, but also to locate claims abandoned and claims located but not duly recorded. And the locator (free miner) must mark any mineral claim he locates by posts, and section 16 requires him to also place a legal post at the point where he has discovered rock in place, on which shall be written "Discovery Post"; the affidavit he is required to make shews that the word "Discoverer" in that part of the section and the word "Locator" are used synonymously, and the words "Discover" and "Found" are used without any qualification. In other words, every free miner locating any claim is, at the point where he has removed the covering from, or exposed to view, or has met with or fallen in with "rock in place" in any of the different ways in which rock in place may be discovered or found, to place a discovery post, etc. The only qualifying word used in connection with "discovered" in sub-section (*d*) is "actually," *i.e.* in act or in fact, really, in truth, positively.

To support the construction advanced it would be necessary to give the word "discovered" in sub-section (*d*) of section 16 a meaning which would be obviously different to the meaning it has in the earlier part of section 16. Neither the sense of the section nor the sense of the Act requires this to be done.

A number of objections to the validity of the defendant's location and record based on his non-compliance with

matters specified in the preceding sub-sections of section 16 were raised and cases prior to the passing of that sub-section were cited, in which locations of mineral claims were decided to be invalid.

But it is not necessary in this case to decide as to what non-observances of section 16 are material or immaterial, as the question which first presents itself upon the facts as they appear in evidence is, "Does the defendant, having discovered mineral in place, come within the provisions of sub-section (*d*) so as to be entitled to any benefit it may confer?" and I think not. Neither section 16 or any other section of the Act is repealed. Sub-section (*d*) deals with failure to comply with and non-observance of the provisions of section 16, but section 16 still remains part of the Act, and there must, I think, still be a *bona fide* attempt to comply with the provisions of the Act, including section 16.

The Act requires that every mineral claim must have a location line, which must be marked at each extremity by a post, and the location and location line must be defined on the ground in such a way that the initial point and final point and the direction of the location line and the extent of the claim on each side of the line clearly appear, and until the claim is so marked and particulars shewing this has been done are furnished to the recorder, the locator is not entitled to a record.

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Section 16 goes into particulars and states how this intention and general requirement of the Act is to be carried out, but without dwelling on the *minutiæ* of the manner in which section 16 provides it is to be carried out, the provisions as to survey and the other references in that section to the location line and sections 18, 19 and 20 clearly shew that the claim must be located in the way I have stated. And I do not think that sub-section (*d*) in section 16 overrides the Act and allows the locator in locating to disregard not only the details of section 16, but also the requirements of the statute. Here the defendant

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made no attempt to mark out his claim, as required by the Act.

But further, sub-section (*d*) seems to me to only apply to cases of non-observance or non-feasance. Section 16 provides that a claim shall not be recorded unless the application shall be accompanied by an affidavit, and section 19 and 20 also require information, and particulars of what has been done are to be furnished to the recorder.

The defendant did not fail to file an affidavit, but in it he swore that he had complied with the law, and gave particulars which were false.

This was not merely a failure to comply or non-observance, but a misfeasance, and one of the conditions of sub-section (*d*), which he claims as the sole support of his record, is that there should be a *bona fide* attempt to comply with the provisions of the Act, but his record is based, not on a *bona fide* attempt to comply with, but on a violation of the Act, and must fall. The defendant's location and record are declared void and the record is to be cancelled. Nothing has been advanced against the plaintiff's location or record, except the alleged priority of the location and record of the defendant. The counter claim therefore fails. I therefore give judgment for the plaintiff, on her claim, and for her also on the counter claim, with County Court costs on the higher scale.

Judgment.

Judgment for plaintiff.

Noted Land Act 1888 s.c. 26

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Contract—Transfer of pre-emption claim—Land Act, 1888, Sec. 26 —"Transfer."

Defendant having a pre-emption claim to certain land signed an undated deed conveying the same to plaintiff; but it was agreed, in view of section 26 of the Land Act prohibiting the transfer of pre-emption claims, that the deed should remain in escrow until after the issue of the Crown grant, and that the date should then be inserted and delivery made. The transaction was completed accordingly.

Held, per DRAKE, J., at the trial that the word "transfer" in section 26 means the parting with the title, and, as the deed did not operate until after the issue of the Crown grant, it did not constitute a transfer before Crown grant within the meaning of the Act.

Held by the Full Court (affirming Drake, J.) that the parties had avoided doing that which the Act prohibited, and the conveyance was valid and effectual.

ACTION to cancel a deed of conveyance from the plaintiff to the defendant of certain lands, as being a transfer of pre-empted lands before Crown grant contrary to section 26 of the Land Act. Statement.

L. G. McPhillips, Q.C. and *E. A. Magee* for the plaintiff.
E. P. Davis, Q.C. and *A. C. Brydone-Jack* for the defendant.

At the close of the plaintiff's case, counsel for the defendant moved for a non-suit, citing Elphinstone on Deeds, pp. 26, 33, 119, Wharton's Law Lexicon "delivery," *Phillips* v *Edwards*, 33 Beav. 440; *Adsetts* v. *Hives*, *Ibid* 52. Argument.

L. G. McPhillips and *E. A. Magee*, *contra*, cited Stroud's Judicial Dictionary "transfer," *Turner* v. *Curran*, 2 B.C. 51; *Clarke* v. *Scott*, 5 Man.L.R. 281, 284; *Harris* v. *Rankin*, 4 Man.L.R. 115; Stephen's Blackstone, 8th Ed., Vol. II. 103, Elphinstone on Deeds, pp. 120, 122; *Gowans* v. *Barnet*, 12 P.R. 330.

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DRAKE, J.: This action is brought to determine a Crown grant of a tract of land on Thurlow Island.

The plaintiff was a pre-emptor and had a store on the land in question. The defendant proposed a partnership with the plaintiff and on the 26th of May, 1896, a memorandum was drawn up and signed by both parties. By that memorandum the plaintiff agreed to deed a half interest in the pre-emption claim therein described, the defendant to pay $160.00 to the Government for the price of the land and to put in a full line of goods into the store, each to share and share alike in all business and property transactions in Shoal Bay, a formal agreement to be drawn up. On 8th June following a more complete agreement was prepared by Mr. *Brydone-Jack*, as solicitor for both parties, but such agreement contains material variations. The defendant was apparently to have the whole land conveyed to him at some future time, and the land to be sold for joint benefit and the net profits divided on 1st July, 1897, and any land unsold at that date to be divided, together with the profits arising from the business. The defendant was to erect such buildings as he thought necessary for the business.

Judgment of DRAKE, J.

At that time Mr. *Brydone-Jack* pointed out that under the Crown Lands Act it was illegal to convey a pre-emption claim until the Crown grant had been issued and that the best way would be to prepare and execute a deed of conveyance but not to deliver it as a deed until after the Crown grant was issued, and the deed was accordingly signed without a date and Mr. *Brydone-Jack* states he was authorized by the plaintiff to retain the deeds, fill up the date and deliver it after the Crown grant was made. This evidence is confirmed by the defendant and his brother who were both present.

The plaintiff says he does not recollect whether he was told that the date of the deed was left blank because the law would not allow of a transfer of the pre-emption claim. The agreement was altered in pencil after it was executed

by the defendant to meet some objections of the plaintiff, but nothing hinges upon this. The defendant paid the $160.00 in order to obtain a Crown grant and has also expended a considerable sum of money in putting up buildings for the business.

A partnership agreement as to land is quite valid and in no way conflicts with section 26 of the Land Act, C.S.B.C. 1888 Cap. 66. That section says "no transfer of any surveyed or unsurveyed land pre-empted under this Act shall be valid until after a Crown grant of the same shall have been issued" and it is on that the plaintiff relies.

"Transfer," here, in my opinion means the parting with the title. A lease by a pre-emptor would not be void because it would not give to the lessee the rights to claim the Crown grant, yet a lease is a transfer of a limited interest in land. The object of the statute is that the Crown shall not be called upon to decide the rights of parties, therefore they will only issue the grant to the original pre-emptor. Was this deed a transfer? If it was intended a take effect on the day of execution, it undoubtedly was, but the evidence satisfies me that the deed was to be held in escrow until it could have legal effect, and if a condition to be performed by the grantee is necessary to make an escrow there was such a condition, the defendant had to pay $160.00 on the land, which he did, and if a condition was to be performed by the grantee he had to obtain a grant in his name. I think it is clear that at the time the deed was signed, it was mutually agreed that it should remain imperfect until such a time as Mr. *Jack* was in a position to complete it and the date was expressly left blank and he was authorized to fill it in at a subsequent date. In other words, it was to take effect only on the happening of a specified event and that was a complete title in the plaintiff. If the plaintiff never obtained a complete title, the deed would be absolutely inoperative. The agreement, which was signed on the June

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date, clearly indicated that if the defendant did not acquire title, the agreement would be void.

I therefore think the action should be dismissed with costs.

Action dismissed.

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From this judgment the plaintiff appealed, and the appeal was heard on 1st February, 1897, before DAVIE, C.J., MCCREIGHT and MCCOLL, JJ.

L. G. McPhillips, Q.C., for the appellant.
E. P. Davis, Q.C., contra.

Cur. adv vult.

6th May, 1897.

The following judgment was delivered by MCCREIGHT, J., DAVIE, C.J., and MCCOLL, J., concurring.

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MCCREIGHT, J.: I agree with the learned Trial Judge that the action should be dismissed, but I do not assent to all his reasons, at least I had rather rest my decision in some respects upon other grounds.

It seems plain that until the issue of the Crown grant, there was no complete agreement between the parties.

The agreement of 26th May was incomplete owing to the blank in the expression, "to complete the requirements of the store to the value of (———)" and the uncertainty in what immediately precedes and follows. Compare the instances put in section 369 of the 3rd edition of Fry on Specific Performance, p. 168. The provision also as to "the agreement to be drawn between both parties that each share alike," etc., creates a further difficulty. See *Downs* v. *Collins* 6 Hare, 437 and 438, referred to in the same section. Again in section 370 it is said, "contracts are often incomplete from their reserving some matter for

future consideration, etc., etc. A contract to contract is nothing."

The agreement of 8th June was only to operate "in the event of the defendant acquiring title to the land," and as the evidence clearly shews that was to depend upon the issue of Crown grant and the delivery thereafter to the defendant of the escrow, which was to be left in the hands of Mr. *Jack*, the solicitor of both parties, till after the issue of the Crown grant. I do not see that this is illegal, as contended, within *Turner* v. *Curran*, 2 B.C., p. 51, as to which I shall say nothing as it was my own decision. But the deed was given, or at all events delivered, after the period had expired during which a transfer of the land could be considered illegal, that is after the issue of the Crown grant, and even if there had been a binding agreement entered into before the issue, to deliver it after the issue of the Crown grant, it would seem a strong thing to say that the transaction was illegal within section 26 though it is unnecessary to express a decided opinion on this point.

Judgment of McCREIGHT, J.

It was said that it was an evasion of the Act, and Hardcastle on Statutes, edition of 1892 was referred to at page 88, but I think the cases there cited are in favour of the legality of what has been done. In *Yorkshire Ry. Company* v. *Maclure*, 21 Ch. D. 318, referred to in note (*a*) page 88 of that work, LINDLEY, L.J. is reported to have said "there is always an ambiguity about the expression 'evading an Act of Parliament'; in one sense you cannot evade an Act of Parliament, that is to say, the Court is bound to so construe every Act as to take care that that which is really prohibited may be held void. On the other hand you may avoid doing that which is prohibited by the Act and you may do something else equally advantageous to you which is not prohibited by the Act."

Here I think the parties have avoided doing that which was prohibited by the Act, and done something not

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prohibited by the Act, and that the appeal must be dismissed with costs, but without prejudice to any further proceedings which may be taken in due course but which in this case hitherto unfortunately for the plaintiff seem to have been taken too soon.

Appeal dismissed.

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POSTILL v. TRAVES.

Local Judge of Supreme Court—Jurisdiction in action domiciled outside his County Court District.

A County Court Judge sitting as Local Judge of the Supreme Court, has, under the statutes and rules, jurisdiction to make orders in actions in the Supreme Court which are domiciled in a registry outside the territorial limits of his jurisdiction as a County Court Judge.

Statement.

APPEAL from an order of WALKEM, J., dismissing an application by the defendant to set aside an order for judgment made by BOLE, L.J.S.C., sitting at Vancouver, upon the ground that the writ was issued and the action domi-

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NOTE.—By the Supreme Court Amendment Act, 1897, Sec. 17, passed after the decision of this case, it was enacted: "17. Notwithstanding anything contained in the Act passed by the Legislative Assembly of the Province of British Columbia by 54 Vic. Chap. 8, and known as an Act to Amend the Supreme Court Act, and the rules and orders passed thereunder, it shall not be hereafter competent for a County Court Judge to sit as a Local Judge of the Supreme Court of British Columbia, or to exercise the powers of such Judge within any judicial district where a Judge of the Supreme Court resides or usually discharges his duties: Provided, however, that in case of the temporary absence or illness of such Supreme Court Judge, Court motions and Chamber applications may be made to and disposed of by a County Court Judge during such absence only.

ciled at Kamloops, in the Yale district, and that Judge BOLE had no jurisdiction to make any order in a Supreme Court action unless it was domiciled within the territorial limits of the County Court over which he presides.

The appeal was argued before the Full Court, DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on the 8th of February, 1897.

Robert Cassidy for the appeal.
P. Æ. Irving, contra.

Cur. adv. vult.

May 6th, 1897.

MCCREIGHT, J.: If the Acts and Orders-in-Council are considered according to their dates I do not see much difficulty in the question whether His Honour Judge BOLE, whilst sitting in Vancouver, can deal with a Supreme Court action commenced in the Kamloops registry, as a Supreme Court Judge might do.

Stat. B.C., 1891, Cap. 8, says that the County Court Judges shall in all causes and actions in the Supreme Court of British Columbia have, subject to rules of Court, power and authority to do and perform all such acts and transact all such business in respect to matters and causes in and before the Supreme Court of British Columbia as they are by statute or rules of Court in that behalf from time to time empowered to do and perform.

Judgment of MCCREIGHT, J.

The first Order-in-Council, *i.e.* of 4th November, 1891, said "that the Judge of every County Court, in all actions brought in his county, shall be, and hereby is, empowered and required to do all such things, etc., etc., and transact all such business, etc., etc., as by virtue of any statute, etc., are now done, etc., by any Judge of the Supreme Court sitting at Chambers, save and except, etc." The Supreme Court jurisdiction of the County Court Judge was by this Order-

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in-Council limited to actions brought in his County and Chamber applications. But on the 16th of December, 1892, a further Order-in-Council was passed that "Until further order the Local Judge of the Supreme Court of British Columbia for the County Court District of New Westminster shall, within his territorial jurisdiction, in any action, suit, matter, or proceeding in the Supreme Court, have, and be possessed of, the same powers and jurisdiction as are now or can hereafter be exercised by any Judge of the Supreme Court of British Columbia."

The substitution of the words "within his territorial jurisdiction" for those "in all actions brought in his County and by a Supreme Court Judge sitting at Chambers" cannot be mistaken, for it shews that his Supreme Court jurisdiction is no longer limited to actions brought in his county and Chamber applications subject to exceptions, but that Judge BOLE, whilst within his territorial jurisdiction, has the powers and jurisdiction of a Supreme Court Judge.

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If he had been sitting within the County of New Westminster, there could then be no doubt as to his jurisdiction in the matter in question. And I think subsequent legislation leaves no doubt that he has the same jurisdiction in the county of Vancouver as in that of New Westminster. For in the County Courts Amendment Act, 1893, Cap. 10, Sec. 7, it is said that "until a Judge of the County Court of Vancouver is appointed, the Judge of the County Court of New Westminster shall act as and perform the duties of the Judge of the County Court of Vancouver and shall, while so acting, whether sitting in the County Court District of Vancouver, or in the County Court District of New Westminster, have in respect of all actions, suits, matters or proceedings being carried on in the County Court of Vancouver, all the powers and authorities that the Judge of the County Court of Vancouver, if appointed and acting in the said district, would have possessed in

respect of such actions, suits, matters and proceedings," and it is then said that for the purposes of that Act, but no further, the two districts were to be united.

This would have left the jurisdiction of Judge BOLE as a Local Judge of the Supreme Court in the County of Vancouver incomplete in default of further legislation, but the Supreme Court Amendment Act, 1894, Cap. 8, Sec. 2, has cured that defect by enacting that the "territorial limits of the jurisdiction of the Judges of the several County Courts as Local Judges of the Supreme Court of British Columbia shall be co-extensive with any jurisdiction which they may lawfully exercise from time to time as Judges or Acting Judges of any County Court."

Lord MANSFIELD said in *Rex* v. *Loxdale*, 1 Burrows 447: "Where there are different statutes *in pari materia*, though made at different times or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other." See Hardcastle on Stat. Law, page 147.

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The Orders-in-Council having the force of law are, no doubt, to be construed in the same way along with the statutes This will assist in showing the meaning of the words "territorial jurisdiction" and "territorial limits of the jurisdiction," even if the reading of the Acts and orders-in-council in order of date left any doubt on the matter.

I think Judge BOLE, sitting in Vancouver as a Local Judge of the Supreme Court, could exercise jurisdiction in an action domiciled in Yale, as a Supreme Court Judge could have done.

DAVIE, C.J., concurred.

DRAKE, J.: The Legislature, by Stat. B.C., 1891, cap. 8, passed an Enabling Act giving to Judges of the County Court power to act as Judges of the Supreme Court in respect to such matters as they were then, or might by rules of Court be, enabled to perform.

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In November, 1891, a rule of Court was passed giving to the Judge of every County Court in all actions brought in his county power to act in Chambers as a Judge of the Supreme Court, except in certain matters specifically mentioned.

On 16th December, 1892, by order of the Lieutenant-Governor-in-Council, the Local Judge of the Supreme Court for the County Court district of New Westminster was empowered to act as a Judge of the Supreme Court within his territorial jurisdiction.

By Stat. B.C., 1894, Cap. 8, it was enacted that the territorial limits of the jurisdiction of the several County Court Judges as Local Judges of the Supreme Court should be co-extensive with any jurisdiction which they might lawfully exercise from time to time as Judges or Acting Judges of any County Court. This Act gives to the County Court Judge of New Westminster the same jurisdiction in the County Court District of Vancouver as he might exercise in New Westminster district. The question here is whether under this statutory jurisdiction thus conferred, the Local Judge of the Supreme Court, sitting at Vancouver, has the right to adjudicate upon an action brought in the Yale registry, and where all proceedings were instituted.

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If a Supreme Court Judge has that power, then the Local Judge of this district is equally clothed with it. It has been held in this Court that section 27 of Cap. 31, C.S.B.C., 1888, is directory only and that the proceedings in an action instituted in any particular registry must be recorded in that registry, although orders are not necessarily made within the judicial district wherein the registry is situated (*a*). I think that the only mode of taking exception to an order of Mr. BOLE as Local Judge of the Supreme Court is by appealing to the Full Court, and not to a single

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NOTE—(*a*) See *In re Ellard*, 3 B.C. 235.

Judge; in this view Mr. Justice WALKEM was right in refusing to make the order asked for.

I do not think when the time for appealing against an order has gone by, that the fact of taking a step which the parties know must be refused, and such step is taken for the purpose of getting the proceedings before the Full Court, that by this means the order, which the parties have neglected to appeal against, can be considered.

The order of Mr. Justice WALKEM was right; the order of Mr. BOLE was not appealed against, but we were asked to set it aside in a collateral application, which I do not think ought to be done; precedents are easily established and very difficult to control, but under the peculiar circumstances of this case I am inclined to set aside the judgment and let the defendants in to defend. The costs of the proceedings and of the appeal will be the plaintiff's costs in any event.

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Appeal dismissed.

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STUSSI v. BROWN.

Mining Law—Statute of Frauds—Whether Mineral claim an interest in land—Mineral Act, 1891, sections 34-51—Pleading—Admission—Verdict—Estoppel—Partnership.

Per DRAKE, J.: Under section 34 of the Mineral Act, 1891 (*a*), the interest of a free miner in his mineral claim is an interest in land within the Statute of Frauds.

An agreement between the defendant and plaintiff, not stated to be in writing, in regard to the mineral claim in question, being alleged in the statement of claim and admitted in the statement of defence;

Held, That the defence of the Statute of Frauds was waived and the defendant concluded by the admission.

Upon appeal to the Full Court:

Held per MCCREIGHT, J. (Walkem and McColl, JJ., concurring): To maintain the defence of the Statute of Frauds to an agreement for sale or transfer of a mineral claim both that Statute and section 34 of the Mineral Act *supra* must be pleaded.

Quœre: Whether the bar provided by section 51 of the Mineral Act, 1891, that "no transfer of any mineral claim, etc., shall be enforceable unless the same shall be in writing, etc.," is not confined to a plaintiff seeking to enforce the transfer, and inapplicable to a defendant.

Statement.

ACTION for specific performance of an agreement by the defendant to convey to the plaintiff a half interest in a mineral claim. The facts are set out in the judgment of DRAKE, J., at the trial.

NOTE (*a*).—"34. The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest, equivalent to a lease, for one year, and thence from year to year subject to the performance and observance of all the terms and conditions of this Act."

Charles Wilson, Q.C., and *J. H. Senkler* for the plaintiff.
E. P. Davis, Q.C., for the defendant.

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DRAKE, J.: The facts of this case are complicated, and it appears that in July, 1894, the plaintiff and the defendant, Joseph Brown, entered into a partnership, which in the statement of claim was stated to be for the purpose of acquiring, holding, developing and disposing of mineral claims in Trail Creek Mining Division. The plaintiff advanced Brown $40.00 and some provisions in consequence of Brown informing him that he knew of some claims not taken up, and he would locate the claims in their joint interest. Accordingly Brown located and staked out two claims, the "Sunday Sun," and "Pittsburg," and recorded them on the 13th and 16th of August, 1894, in the plaintiff's name, the plaintiff finding the fees therefor. As to these claims there is no dispute except as to a counter claim for damages put in by Brown, on which no evidence was offered.

Judgment of DRAKE, J.

On the 13th of August, 1894, the "St. Louis" was recorded by the defendant Brown in his own name, the plaintiff, as before, paying the recording fee.

The plaintiff claims an undivided half interest in the claim. The first dispute commenced here. Henry Alles claims that he was the discoverer of this claim and had staked it out and was on the ground when Brown arrived, but Alles being uncertain whether his miner's license had been issued, because he had not received any reply to his application for the granting of a license, agreed that Brown should stake the claim in his own name and give him a deed of the undivided half. As a matter of fact a license was in existence at the date of this staking.

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Brown, in his pleading, admits this allegation of Alles, and there is further corroboration in the evidence of Sidney Norman, who gives the result of a conversation between himself and Brown, confirming the statement of Alles.

Brown sold to O'Connell an undivided half of the "St. Louis" claim for $1,200.00 and gave him an option on the other undivided half, which never was exercised. This sale and transfer is not questioned. On the 5th of October, 1895, a bill of sale of one-quarter of the claim was made by Brown to McLeod. On Mr. McLeod taking his claim to be recorded, he then for the first time discovered that J. A. Stussi, the plaintiff, claimed an undivided half interest in the claim.

On the 23rd of October, 1895, the plaintiff commenced an action in the County Court of Kootenay to have it declared that Brown and McLeod were trustees for him of an undivided one-half interest in the "St. Louis" mineral claim. On this action coming on for trial, the judge ordered that the defendant, Mr. Alles, who had also commenced an action against Brown for an undivided one-half interest in the same claim, should be added as a defendant to the plaintiff's action, and his own action struck out, which was accordingly done.

Judgment of DRAKE, J.

Before judgment was given by the County Court judge in the action of *Stussi* v. *Brown*, *et. al.*, namely on 7th March, 1896, an order was made by Mr. Justice WALKEM, prohibiting all further proceedings in the action.

On the 22nd May, 1896, MR. SPINKS, the County Court Judge of Kootenay, delivered a judgment in the action of *Alles* v. *Brown*, in favour of the plaintiff. This was the action which had been struck out of the docket. How a judgment could have been given in an action that was non-existent at the time, and which had never been tried, was explained by the learned judge by stating that when the counsel came before him he had not got his notice or the docket, and he had forgotten the action of Alles was struck

out, and that he had been added as a defendant in the action of *Stussi* v. *Brown*, which had been prohibited.

I therefore hold that this judgment, which is relied on by all the defendants, is void, as it was given without jurisdiction and without trial.

After the writ of prohibition was obtained, this action was commenced, namely, on the 12th of March, 1896. No evidence was adduced shewing that any Crown grant had been issued. The mining records, under the Placer Mining Act, contain all dealings with mining property, but the Act does not make a mere notice of an alleged claim entered in the book, notice to a purchaser. The record books contain copies of all documents connected with mines, but the mere fact of a notice of claim being filed with the Recorder is not more binding on a purchaser for a valuable consideration without actual notice.

Mr. McLeod, in his evidence, denied that he had any notice at all in the claim of Stussi before he obtained his bill of sale from Brown, and there was no evidence to the contrary. I do not, therefore, consider that this notice of claim can in any way prejudice his right to a one-fourth interest, if his right is not displaced by Alles' alleged interest.

Now, with regard to Alles' claim: By his statement of defence he claims he was, and is, a co-owner with Brown of this claim, and entitled to one-half therein.

By section 34 the interest of a free miner in a mineral claim shall be deemed a chattel interest, equivalent to a lease for one year. It is, therefore, an interest in land. Any agreement, therefore, relating to a sale or transfer of such an interest must be in writing. No such document is produced, but the defendant, Brown, in his pleadings, admits an agreement that Alles was to have an undivided one-half interest in this claim. Such an agreement is good between the parties to it, and Alles might enforce it as against Brown on this admission.

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By not having any document in writing to which effect can be given, he cannot give any title to the defendants who purchased from him. Section 51 of the Mineral Act enacts that no transfer of any mineral claim or of any interest therein shall be enforceable unless the same shall be in writing, signed by the transferer and recorded by the Mining Recorder. Neither can he claim a superior right to the plaintiff, as he was not to be a partner of Brown's, but was to have a conveyance of an undivided half, and he is entitled to damages against Brown for breaking that agreement.

Now regarding Stussi's position: It is established by *Forster* v. *Hale*, 3 Ves., 696, and *Dale* v. *Hamilton*, 5 Hare, 369, that an agreement by parole for a partnership in land is good, but it does not follow that a dissolution of such partnership should not be in writing under the Statute, *Gray* v. *Smith*, 43 Ch. D. 212. Admitting there was a partnership between Brown and Stussi in this claim, that partnership was limited to the interest that Brown had, which was one undivided half. The plaintiff can only be entitled to a decree that Brown is a trustee as to the quarter which is all that remains in Brown of the "St. Louis" mineral claim, lot 935, group 1, West Kootenay, because, under the terms of the partnership, as alleged by Stussi, each partner had power to acquire, hold, develop and dispose of mineral claims, and the effect of such a partnership would be to enable either partner to dispose of claims, and they would have to account for the proceeds as part of the partnership assets.

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The order will be that the plaintiff is entitled to an account from Brown of the proceeds of the sale of such portion of the "St. Louis" claim Brown has sold and converted into money and a judgment for one-half of such proceeds when ascertained. Further, that the plaintiff is entitled to a declaration that the remaining quarter in the first claim is partnership property, and I order the same to be sold for

the benefit of the said partnership. The plaintiff is entitled to the costs of action as against Brown.

The action to be dismissed as against F. M. McLeod with costs and as against the other defendants without costs.

Judgment accordingly.

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From this judgment both parties appealed, and the appeal was heard before McCREIGHT, WALKEM and McCOLL, JJ., on the 3rd of March, 1897.

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

E. P. Davis, Q.C., for the defendant.

Cur. adv. vult.

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McCREIGHT, J.: The partnership in July, 1894, between the plaintiff and Brown was for the purpose of acquiring, holding, developing and disposing of claims; the plaintiff supplying the provisions, etc., to the defendant Brown to prospect for and locate such claims. It is not necessary to decide that the "St. Louis" claim fell within the purview of this agreement. Alles in his evidence says he had prospected for and discovered the "St. Louis" claim and had been working on it for a time before he took Brown "up there." Alles' license, it seems, had run out, and the new one, though then on the way, had not then actually reached him, and he was afraid some one would jump the claim. He told Brown of his position and by arrangement staked the claim in his, Brown's, name, the two agreeing that they should hold it in equal shares, Brown to have the claim recorded and pay for the recording of it. The claim was duly located and recorded in Brown's name and they did some work on it. Without expressing a decided opinion as to whether, as between the plaintiff and Brown, it must be

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considered that Brown's half was to be shared with the plaintiff in the partnership, it seems manifest that Alles was entitled as to his one-half, to be placed in as good a position as if no such agreement existed. He says he knew nothing of it, and his evidence seems to be reliable as well as fully corroborated, and to have satisfied the learned Trial Judge. In June, 1895, Brown conveyed to W. L. O'Connell a half interest in the "St. Louis" for the expressed consideration of $1,200.00, and it was duly recorded. It seems to be important to ascertain whether the conveyance of this one-half share in any way affected the rights of Alles to his own half, and I think it can be shewn that it did not. I think Brown might, not illegally, or at all events with an apparent right, *bona fide* entertained, deal not only with the interest owned by himself, but also with that owned, if any, by the plaintiff, his partner; whilst to sell Alles' one-half would be a manifest breach of trust, and, perhaps, punishable under the Code. *Mr. Davis*, I think, fairly contended that the Statement of Claim puts forward a case of a partnership for the purpose of acquiring, etc., and disposing of claims and suggests that Stussi and Brown had each authority to bind the other in the sale of partnership claims. No doubt, it is on the theory of partnership that Stussi brings his action. The evidence from their course of dealing is not conclusive. In the month of June, 1895, Brown sells one-half of the "St. Louis" to O'Connell, the claim being recorded in Brown's name, and he sells the whole of the "Pittsburg" to D. Stussi, the brother of the plaintiff, and gets the conveyance executed by the plaintiff, I gather, because the claim was recorded in his name. But it is important to observe that the jury in *Stussi* v. *Brown*, and others, in November, 1895, find that Alles had one-half interest in the "St. Louis," of this Judge SPINKS is satisfied, and Stussi, though of this Judge SPINKS is doubtful, one-quarter of the "St. Louis," *i.e.* by the verdict in *Stussi* v. *Brown*, *Alles*, and others, in November, 1895, which, of

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course, is material as regards Alles, as shewing that Brown could not have rightfully conveyed to O'Connell, Alles' one-half share, or at all events had not done so in the opinion of the jury, and that Alles' half share was still vested in him. The value of this verdict does not seem to be affected by the prohibition, which only prevented judgment from being entered on the verdict, and the verdict should be conclusive as between *Stussi and Alles* in any action subsequent thereto; see *Outram* v. *Morewood*, 3 East 346 and 2 Smith's L.C. notes to *Duchess of Kingston* case. Whilst Judge SPINKS does not remember what interest the jury in *Stussi* v. *Brown, Alles, et. al.*, found that Stussi had, it is obvious they could not find Stussi had any after finding Alles had a half, as by the conveyance of June, 1895, Brown had already conveyed one-half to O'Connell, which was duly recorded two or three days afterwards. And the Trial Judge finds that this sale and transfer is not questioned. So far it seems (I shall deal with the position of McLeod presently) that O'Connell had one-half interest and Alles the other, and there seems to be abundant authority to shew that a judge should take the same view as the jury did, supposing for the sake of argument their verdict to be now open to question.

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In re Hallett's Estate, 13 Ch.D. 696, it was held by the Court of Appeal, THESIGER, L.J., *dissentiente*, that if a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it up with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money. The late Master of the Rolls says in his judgment at page 727: "Nothing can be better settled, etc., than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and

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in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. The man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale and deny that he acted as agent for the owners, etc." Again, BAGALLAY, L.J., at page 743, says: "I entertain a very decided opinion that in cases like *Pennell* v. *Deffell*, (4 D. M. & G. 372) or in cases such as that which is the subject of the present appeal, full effect should be given to the principle of attributing the honest intention whenever the circumstances of the case admit of such a presumption."

It seems to me that Stussi can have no right to the "St. Louis" or any interest in it, except it may be to the account against Brown for the sale of the half-share to O'Connell and half of the proceeds of such sale, the other half being vested in Alles. Stussi should have seen this when the jury in *Stussi* v. *Brown* found that Alles still owned a half interest in the "St. Louis." Stussi must have known at all events, from the record of June, 1895, of the conveyance to O'Connell. But the learned trial judge seems to have held that the alleged rights of Alles were displaced by sections 34 and 51 of the Mineral Act, 1891, the former section enacting that the interest of a free miner in his claim should be deemed to be a chattel interest equivalent to a lease for a year, etc., etc., and the latter enacting that "no transfer of any mineral claim, or of any interest therein, shall be enforceable unless the same shall be in writing, signed by the transferor, or his agent authorized in writing," etc., etc. If these sections had been relied on by the plaintiff in his reply, a serious question might have arisen, but Order XIX., Rule 15, says that the defendant or plaintiff (as the case may be) must raise by his pleading all matters which shew the action or counter claim not to be maintainable, etc., etc., "and all such grounds of defence or reply, as the case may be, as if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not

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arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts shewing illegality, either by Statute or common law or Statute of Frauds." It seems plain from this rule that the Mining Act of 1891 or the sections 34 and 51, should have been referred to in the plaintiff's reply Further, I do not wish to be understood as holding that, even if the Mining Act had been replied, the defendant Alles could not have insisted that there was no question in this case as to whether his claim was "enforceable" or not, for he was merely a defendant, compare the 4th section of the Statute of Frauds and *Lavery* v. *Turley*, 30 L.J. Ex., pp. 49 and 50, nor as to the effect of the absence in the Act of 1891 of any section corresponding to the 7th or 8th section of the Statute of Frauds.

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It seems to me therefore that there is nothing to prevent Alles insisting on his rights to the one-half of the "St. Louis" as against Stussi. The circumstances that McLeod in October, 1895, purchased one-quarter interest from Brown, the recorded owner, without notice of any right on the part of others is a matter with which Stussi is not concerned. The whole interest being in Alles and O'Connell, Stussi has no ground of complaint but as the purchase by McLeod from Brown has been discussed I may say that I do not see that McLeod's right can be displaced on the grounds suggested by reference to *Hope* v. *Caldwell*, 21 U.C.C.P.; 241 *Robertson* v. *Caldwell*, 31 U.C.Q.B., 402, and *Locking* v. *Halsted*, 16 Ont., 32. He is not seeking to enforce anything as was attempted in those cases for he is simply a defendant as well as Pierce, Norman and McArthur who Mr. *Wilson* says each got a one-eighth from Alles, McLeod being content with the remaining one-eighth, instead of one-quarter, it seems, as there can only be four one-eighths in Alles' one-half.

All this it seems to me is totally immaterial and I give no decided opinion about it. The action is brought by

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Stussi, against Brown, McLeod, Alles, Pierce, Norman and McArthur. As regards Alles and those claiming under him, viz: Pierce, Norman and McArthur, Stussi, must fail; also as against McLeod whether as holding one-quarter through Brown, regardless *pro tanto* of the rights of Alles or by arrangement one-eighth from Alles, along with the three-eighths said to be vested in Pierce, Norman and McArthur. There is no question in this suit as between Brown and McLeod, or as between Alles and McLeod, Pierce, Norman and McArthur. The only question is: Has Stussi any rights?

For these reasons I cannot disagree with so much of the decree of the learned Trial Judge as operates between Stussi and Brown in reference to the "St. Louis" claim, nor with that portion of the decree which directs that as to the defendant McLeod, the action be dismissed with costs to be paid by the plaintiff to the said defendant McLeod. But as to so much of the decree as declares that the defendants Alles, Pierce, Norman and McArthur have no interest in the "St. Louis" claim, I think the same should be reversed and it should be declared that, without prejudice to the rights of said Pierce, Norman and McArthur, Alles is entitled (but also subject to the rights of McLeod) to one-half interest in the said claim and that the action be dismissed as against him and Pierce, Norman and McArthur with their costs to be paid by the plaintiff Stussi. It is, of course, proper that an account should be taken as between the plaintiff and Brown but not an enquiry as to the interest other than that assigned to McLeod outstanding in the defendants or any of them. I think Stussi has no interest in the "St. Louis."

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It is also proper that the counterclaim of Brown against Stussi should be dismissed with costs and that Stussi should have the costs of his action but only as against Brown.

WALKEM and MCCOLL, J.J., concurred.

Judgment accordingly.

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Warranty—Damages—Return of article—Power to order.

In an action (by counter-claim) for damages for breach of warranty of an engine sold and delivered by plaintiffs to defendants, the warranty and its breach were proved at the trial. WALKEM, J., delivered judgment, ordering the engine to be returned to the defendants and assessed the damages to be recovered on that basis.

Upon appeal to the Full Court, *Held*, per MCCREIGHT, J., (Davie. CJ., and McColl, J., concurring,) overruling WALKEM, J., reversing the order for re-delivery of the engine and directing a re-assessment of damages.

A completed sale of chattels cannot be rescinded for breach of warranty and there was no jurisdiction to order re-delivery of the engine.

APPEAL from so much of the judgment of WALKEM, J., at the trial as ordered, that the defendants return to the plaintiff company certain engines purchased by them from the company. The facts fully appear from the judgment. Statement.

The appeal was heard by DAVIE, C.J., MCCREIGHT and DRAKE, JJ.

A. J. McColl, Q.C., for the appeal.

J. A. Russell, contra.

Cur. adv. vult.

May 6th, 1897.

MCCREIGHT, J.: In this case the plaintiffs sued and obtained judgment against the defendants on two promissory notes, amounting to $1,402.06, given for payment for machinery supplied by plaintiffs, there was a counter claim by the defendants for damages for breach of implied warranty as to the machinery, judgment was given for the amount of the notes in the month of February, 1895, but not on the counter claim till the following November, when

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the learned Trial Judge awarded to the defendants on their counter claim $350.00, with costs on the counter claim, but ordered the defendants to return to the plaintiff company the machinery for which the notes sued on were given.

The defendants now appeal, but only from that part of the judgment on the counter claim which orders them to return the machinery to the company.

I gather the defendants received the machinery from the plaintiffs, kept it, and used it for several months in their steamer. It is obvious the property in the machinery had passed to the defendants, who gave notes for it, which have been sued on and paid, and the sole question is whether the order of the Judge, that the defendants do return the machinery, was within his jurisdiction, and I think it was not. If the case had been tried with a jury, they could have given a verdict fixing the damages to be given on the counter claim, in which case the amount of such damages would, of course, have been deducted from the amount recovered on the notes; see S.C. Rule 157. And a Judge trying the case without a jury could do no more in this respect than a jury, that is, ascertain the amount due to the plaintiffs on the notes, fix the amount due on the counter claim as damages for breach of implied warranty, and deduct it from the amount recoverable on the notes. The property, having passed to the defendants, could not now be revested in the plaintiff company without the consent of both plaintiffs and defendants, and the order would be useless for that reason, even suppose there was in other respects jurisdiction to make it, but it is clear there was none. The judgment of a Common Law Court in an action is for debt or damages. If for more, the remedy must be by statute. For instance, by section 79 of the Common Law Procedure Act, 1854, the Judge was enabled to make an order for the specific delivery of chattels in an action for detention, and can still do so under Order XLVIII, Supreme Court Rules 509 and 510; but even this, of course,

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is limited to cases where the jury find the chattel belongs to the plaintiffs. A Court of Equity, of course, did not interfere in an action for damages. The Judicature Acts merely enable the Courts to administer legal and equitable remedies, and neither authorize the order which was made by the learned Trial Judge for the return of the machinery to the plaintiff Company. This part of his order he seems to have considered to be a factor of importance in his judgment. Therefore the question of damages must be reconsidered. Probably the parties can agree as to amount thereof, if not, the question can be mentioned at the next sittings of the Full Court. The appellants will be entitled to the costs of the appeal.

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DAVIE, C.J., concurred.

DRAKE, J.: The plaintiffs recovered judgment on the claim, subject to the judgment on the counter claim. The appeal is only against so much of the order as adjudges that Knight Bros. "do return to the plaintiffs the twin engines in the pleadings mentioned." The judgment awarded Knight Bros. $350.00 damages in respect of these engines on the ground that the engines were defective inasmuch as they could not keep up the steam necessary for efficient working.

The evidence on which the damages were awarded is amply sufficient to justify the judgment of the Trial Judge with regard to the *quantum* of damages. The whole contention is whether he should have made an order for the return of the engines. The engines are of a special construction, called the Cunningham twin engines, were ordered for the purposes of a steamboat, and the object for which they were required was made known to the plaintiffs, and it was alleged that the plaintiffs' agent's remarks on the applicability of these engines for boats induced the order being given. The plaintiffs rely on the case of *Oliphant* v. *Bailey*, 13 L.J.Q.B. 34, in which the defendant ordered a

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two-color printing machine known as Oliphant's patent, and a machine was made which was properly constructed, but which entirely failed to perform the work for which it was bought; it was held that the vendor was entitled to recover the price. The evidence in the present case is very different from that in *Oliphant* v. *Bailey*. Here the plaintiff's agent induced the order by his representations; the order not only included these patent engines, but also a boiler and other machinery. In *Oliphant* v. *Bailey* the defendant was present at an exhibition of the machinery and gave his order from what he saw, and not from the representations made to him by the vendors. The evidence is clear that, owing to some defect either in the engines or boiler, the steam fell down to 85 pounds from 110 pounds, and the boat could not be propelled with that amount of steam, except in still waters. None of the engineers who examined the machinery could account for the waste of steam; different theories appear to have been suggested, but the fact remains that the actual cause remains a mystery. It is not necessary for me to discuss the evidence on this point, but to deal with the grounds of appeal only, because a large portion of this evidence relates to defects which may or may not have been patent on the delivery of the machinery, or they may have arisen afterwards. These defects were not the cause of the waste of steam and were not caused by the defendants in setting up the machinery. The respondents contend that the acceptance of the machinery now estops the appellants from claiming any damages in consequence of the machinery not being competent to do work required of it.

If a person orders a particular article and the article fulfils the order, there is no cause of action if it should turn out that the article thus bought was not fit for some special purpose to which the purchaser applied it. But when the purchaser communicates to the manufacturer the object for which he requires a certain machine, and the

manufacturer supplies such a machine, there is an implied warranty that the machine is reasonably fit for the purpose intended by the buyer.

The fact that the engines are a patent and known under a trade mark has been used as an argument by the plaintiffs to relieve them from liability on the ground that the purchaser knew the class of engine and the purposes for which it was constructed, but the whole tenor of the evidence shews that the inefficiency of the engines to generate and keep steam might have been caused by some defect in the boiler or other machinery supplied by the plaintiffs which no inspection would disclose. Such being the case, and the learned Judge having found that the defendants have sustained damages to the amount of $350.00, I see no reason for disturbing that finding and an order to give effect to it. I think so much of the judgment as directs a return of the engines should be set aside and the appeal allowed with costs.

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Appeal allowed.

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THE NELSON & FORT SHEPPARD RAILWAY COMPANY v. JERRY, *ET AL.*

Mining law—Abandonment of claim—Status of landowner to attack validity of mineral claim—Certificate of improvements whether bar to—"Rock in place"—Bond—Whether pre-requisite to valid claim.

Per DAVIE, C.J.: *Held*, (1) A duly recorded mineral claim may be abandoned before the expiration of the year from the date of its location by absence or other conduct of the holder, evincing an election to surrender it, and, on the facts, that the "Zenith' mineral claim in question was so abandoned.

(2) An exception, expressed in a Crown Grant to the railway company of subsidy lands, of all portions of such lands previously to a certain date, "held as mineral claims," imports only such claims as were then lawfully so held, and that it was open to the Railway Company to question the validity of mineral claims previously located thereon.

(3) In the case of lands occupied for other than mining purposes, the giving by the free miner of a bond, under section 10 of the Mineral Act, as security for any damage which may be caused to such lands by mining operations, is an imperative pre-requisite to his right to enter and locate a mineral claim thereon.

(4) The finding upon the location of mineral bearing "rock in place," with a vein or ledge having defined walls, is essential to the validity of a mineral claim.

(5) A certificate of improvements, under section 46 of the Mineral Act, 1891, is a bar only to adverse claims to the location advanced by other claimants under the Mineral Act, and is not a bar to the rights of claimants of the land as land, to whom the Mineral Act procedure does not apply.

Upon appeal to the Full Court (McCreight, Walkem, Drake and McColl, JJ.):

Held, (1) The title to a duly located and recorded mineral claim is equivalent under section 34 of the Mineral Act, 1891, to a lease for a year, vested in its owner, and the doctrine of implied surrender by conduct does not apply to it; and the only abandonment by which the owner can be concluded is that by notice of abandonment given by him to the Crown, as provided for by section 27 of the Act.

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(2) The exception from the Railway Company's Crown Grant of "lands held as mineral claims" means *de facto* claims, and the word, "lawfully," can not be imported.

(3) A claimant to the land as land has no *status* to question the due performance by the free miner of the conditions required by the Crown as pre-requisite to his right to a valid mineral claim thereon.

(4) The requirement of a bond by section 10 of the Act of 1891 is a directory provision for the protection of the land owner, and is not a pre-requisite to the acquisition by the miner of the mineral rights from the Crown.

(5) The discovery of a mineral vein or lode is not essential to a valid mineral claim; "rock in place" is sufficient.

(6) The words, "rock in place," are satisfied by rock *in situ*, bearing valuable deposits of mineral, although not lying between defined walls, or in a vein or ledge.

(7) A certificate of improvements is, under section 10 of the Mineral Act, 1891, a bar to adverse claimants in any right and on all grounds except fraud.

(8) Holders of mineral claims are not entitled to deal with any portion of the surface, except in accordance with the mining laws, and are not entitled to sell or dispose of the same.

THE action was for a declaration that the plaintiffs were entitled to the exclusive use and possession of certain lands, including portions thereof, occupied by the defendants as a mineral claim.

Statement.

On June 15th, 1892, the "Zenith" mineral claim was located on waste lands of the Crown. On March 23rd, 1893, the Railway Company, pursuant to powers contained in their Land Subsidy Act, 55 Vic., B.C. (1892), Cap. 38, selected a block of Crown lands to be taken by the Company thereunder, within the area of which lands the "Zenith" was situated. The work required to be done on the "Zenith" during the year following its location, under section 24 of the Mineral Act, 1891, was not done, the locators having stopped work and left the claim prior to the date of the selection of the lands by the Railway Company referred to. On December 24th, 1894, the "Paris Belle" mineral claim was located, its area including part of the ground occupied by the "Zenith" location of 1892, as well as other ground.

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On March 8th, 1895, there was issued to the railway company a Crown Grant of the lands selected by them "excepting thereout all lands prior to 23rd March, 1893, held as mineral claims."

The defence maintained that the "Zenith" was a subsisting mineral claim from 15th June, 1892, the date of its location, until the expiration of a year thereafter, and equivalent to an estate for a year in its owners by virtue of sections 24 and 34 *supra*, and that its area was cut out of the landsopen for selection by the railway company, and was with ni the exception from plaintiff's Crown Grant. The defendants also claimed as to the ground covered by the "Paris Belle," that it was properly located as a mineral claim, assuming the lands, as lands, to be the property of the plaintiffs under the Subsidy Act and their Crown Grant.

The plaintiffs replied that, though the locators of the "Zenith" might have had a right to hold that claim till the expiration of a year from its location, that their conduct amounted to an abandonment of such right: and as to the whole of the "Paris Belle" ground, that there was not any "rock in place" found upon it, nor any mineral vein or lode, and that the lands were not therefore subject to location and record, and could not be held as a mineral claim. The plaintiffs further claimed that the absence of a bond of indemnity to them as owners, for damages caused by the location, etc., as provided by section 10 of the Act, invalidated the "Paris Belle."

Statement.

The defendants rejoined that they had obtained a certificate of improvements to the "Paris Belle," and that same operated under section 46 of the Act, as an estoppel and bar to all the objections of the plaintiffs.

One of the allegations in the statement of claim was that "The defendants, or some of them, now claim to be the lawful owner or owners of the said alleged mineral claim, and further claim to be entitled to the surface of all the lands comprised within the limits of the said claim; and

they have caused notices to be posted at various places upon the said lands forbidding the plaintiffs, or any of their agents, or any other person or persons from entering upon or in any way interfering with the surface of the lands comprised within the boundaries of the said claim, and the defendants, or some of them, claim the right to sell and dispose of the surface of the said lands, and to deal with the same generally as if they were the owners thereof in fee simple," which was admitted by the defence, and the question of law raised as to the extent of the defendants' right to the surface as holders of the mineral claim. The ground, in fact, adjoined the town of Rossland and was valuable for townsite purposes.

The action was tried before DAVIE. C.J., January 15th and 16th, 1896.

E. V. Bodwell, for the plaintiffs.

W. J. Taylor, for the defendants.

Cur. adv. vult.

May 30th, 1896.

DAVIE, C.J.: The plaintiff Company, incorporated by special Provincial Act (1891, Cap. 58), to construct, and which has constructed, a railway from a point near the town of Nelson to a point near Fort Sheppard, British Columbia, which work was declared by competent authority to be a railway for the general benefit of Canada, received a grant of public land in aid of its railway, and in this action sues for possession of certain lands comprised within its grant, to which the defendants claim title under locations as mineral claims alleged to have been made on the 15th June, 1892, by E. J. Noel, and on the 3rd January, 1895, by the defendant Jerry, the benefit of both of which locations has passed to the defendants, the "Paris Belle" Mining Company.

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The plaintiff's title proceeded upon 55 Vic. (1892), Cap. 38, which authorized the Government to grant lands

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in the Electoral District of West Kootenay, not exceeding 10,240 acres for each mile of railway constructed, and that upon the fyling and giving by the Company of certain plans and securities, there should be reserved from pre-emption and sale a tract of land on each side of the line of the proposed railway. Accordingly, on the 12th August, 1892, a reservation was made of a tract sixteen miles in width on each side of a line running from the northeast corner of Lot 97, Group 1, to the international boundary line. It is not disputed that the conditions as to plans and security were complied with. The Subsidy Act provided for the selection and projection upon a plan to be fyled by the Company of alternate blocks of an area of sixteen miles, and that as the work of construction proceeded the Government might issue grants of lands within the alternate blocks. On the 23rd March, 1893, the plaintiffs fyled a plan shewing the projection of alternate blocks, among which was exhibited Block 12, containing a tract of land commencing at the boundary line of the Province, and extending northward and including the lands in question in this action.

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The evidence shews that the actual survey on the ground was begun on the 24th September, 1894, and finished on 29th November, 1894, and field notes were deposited in the land department on the 10th January, 1895. In pursuance of such selection, the Crown, on the 8th March, 1895, granted to the Company what is now known and described as Sec. 35, Township 9a, comprising the former Block 12 as defined on the plan fyled on the 23rd March, 1893. Such grant excepts all mineral claims held prior to the said 23rd March, 1893. The Subsidy Act declares that the Company shall be entitled only to unoccupied Crown land, and that to make up for any area within any of the blocks of land to be selected by the Company which shall, before their selection, have been alienated by the Crown or held by pre-emption or lease, or as mineral claims, the Company shall

receive similar areas, of not less than one mile square, in other parts of the district. The question in this action is, whether the defendants have a title paramount to that of the plaintiffs over the lands covered by the alleged mineral locations, or either of them; whether, in fact, the locations are to be deemed excepted from the plaintiffs' grant. The claims were located and recorded, the one as the "Zenith," and the other as the "Paris Belle." The location of the "Zenith," which, according to the evidence, was made on the 15th June, 1892, occupied most of the land which was afterwards staked as the "Paris Belle." The place where the present shaft of the "Paris Belle" is sunk is at the point where Noel did part of his assessment work on the "Zenith." Section 10 of the Mineral Act provides that in the event of a free miner entering upon lands already occupied for other than mining purposes, he shall, previous to entry, give adequate security to the satisfaction of the Gold Commissioner, and after entry shall make compensation for any loss or damage which may be caused by reason of such entry. It is admitted that in this case no security was given, or compensation paid or tendered.

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The plaintiffs contend that at the time of the "Paris Belle" location the land was already occupied by them for other than mining purposes, and was therefore not subject to location as a mineral claim, except under conditions which it was admitted were not complied with; in support of which contention the uncontradicted evidence of Edward J. Roberts proved the situation of the claim in block 12, adjoining the town of Rossland on the north-east; that the Railway Company had upon block 12 a line of road and the station at Wanita; that the road was located in 1892 and was finished in 1893, and that the station of Wanita was built in May or June, 1893. It was burned down or destroyed, and a new station, in the same place, constructed in the fall of 1893, and the Railway Company has occupied the station from the time of its building until

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now, and has operated the railway since it was constructed. The records, both of the "Zenith" and the "Paris Belle," were further impeached, on the ground that no vein or lode of mineral had been discovered, that no mineral in place had been discovered, and that, therefore, the land was incapable of being located as a mineral claim.

To the defendants' contention that the "Zenith" location existed at and prior to the 23rd March, 1893, the plaintiffs replied that the "Zenith" was never properly located, or staked, represented or worked, but was abandoned by Noel in 1892, and had consequently lapsed and become again waste lands of the Crown. Upon the evidence the plea of abandonment by Noel of the "Zenith" seems clearly established. He located the land in partnership with Joseph Villendre, although he recorded in his own name only. He tells us that three or four months after the location he did some work starting a shaft. The work was of about the value of fifty dollars. His partner was supposed to do his share of the assessment work, but did not do so, and consequently he, Noel himself, did no more. Noel says, "I remonstrated with him for not doing his part of the assessment work, and he said he did not think he would do his portion; and when he said he was not going to do his work, I quit. I never did any more assessment work on the 'Zenith.'" There is nothing in the evidence at variance with the testimony of Noel, nor anything to shew that any further work was done upon that location.

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The "Zenith" claim, therefore, having been abandoned, I am of opinion that immediately upon abandonment it reverted to and became the property of the Crown, *Regina* v. *Demers*, 22 S.C.R. 482, and as such came within the plan fyled by the plaintiffs on 23rd March, 1893, as part of block 12, which block was afterwards adopted as a division of the land by the Government and conveyed to the plaintiffs in one lot by one conveyance by the Government.

It is established upon the evidence that before any other

attempt at location of a mineral claim within block 12, the plaintiffs' railway was constructed and the station at Wanita built and rebuilt thereon. The block therefore became lawfully occupied, as to portion of it at least, for other than mining purposes, the evidence shewing that the line was located in 1892 and finished in 1893. The plaintiff Company being then in actual, visible occupation of part of the block was in point of law, and, following well recognized legal authorities, to be deemed in constructive occupation of all of it. In *Davis* v. *C.P.R.*, 12 O.A.R. 724, it was held that "occupied lands" under the Railway Act (Can.) 46 Vic. Cap. 24, denote lands adjoining a railway and actually or constructively occupied up to the line of the railway by reason of actual occupation of some part of the section or lot by the person who owns it, or is entitled to the possession of the whole. In other words, actual occupation of a part is deemed to be actual occupation of the whole. In *Little* v. *Megquier*, 2 Maine, 176, cited with approval in *Harris* v. *Mudie*, 7 O.A.R. at p. 429, the Court remarks: "The deed may not convey the legal estate. Still the possession of a part of the land described in it * * * may be considered as a possession of the whole, and as a disseisin of the true owner, and equivalent to an actual and exclusive possession of the whole tract, unless controlled by other possession." In *Robertson* v. *Daley*, 11 Ont. 352, P., the owner of certain land, in 1811, sold it to D., who went into possession and occupied until 1827 or 1828, when he was turned out by the sheriff under legal proceedings taken by Dufait, who was put in possession and so remained until 1854, when he conveyed to O., through whom the plaintiff claimed. D.'s actual possession had been only of about ten acres. *Held*, that D.'s possession was of the whole land, and that he could not be treated as a squatter, so as to enable him to acquire a title to the ten acres actually occupied. In *Hereron* v. *Christian*, 4 B.C. 246, I upheld the same principle.

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It follows, therefore, that the plaintiffs on and after the construction of their railway and station, lawfully occupied block 12 for other than mining purposes, and, such being the case, a mineral claim could be acquired thereon only under section 10 of the Act, which provides that whilst the miner may enter upon all lands the right whereon to so enter, prospect and mine, shall have been reserved to the Crown and its licensees, (and such right is reserved in respect of the Nelson & Fort Sheppard grant by section 8 of 55 Vic., Cap. 38,) yet in making entry upon lands already lawfully occupied for other than mining purposes, the free miner, previous to entry, shall give adequate security to the satisfaction of the Gold Commissioner for loss or damage, and after entry shall make compensation to the owner or occupant. Compliance with these conditions is, I think, imperative upon the miner seeking to locate a mineral claim upon land occupied for other than mining purposes, as I have held block 12 to have been; and that failure to observe them vitiates the location.

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By section 34 of the Act the interest of a free miner in his claim is to be deemed a chattel interest, equivalent to a lease for a year, and so on, "subject to the performance and observance of all the terms and conditions of this Act." In Maxwell on Statutes, 3rd Ed., p. 521, the distinction is drawn, as demonstrated by numerous authorities, between cases where the prescriptions of an Act affect the performance of a duty and where they relate to a privilege or power: "Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred." I think there can be no question that the rights and privileges conferred upon free miners in this Province come under this head, and that, as remarked in Maxwell, at page 521, "the regulations, forms and conditions prescribed"—for the acquisition of the

miners' rights and privileges—"are imperative in the sense that the non-observance of any of them is fatal." See also *Corporation of Parkdale* v. *West*, 12 App. Cas. 613. In *Belk* v. *Meagher*, 104 U.S. 284, Chief Justice WAITE remarks: "The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant." Upon the ground, therefore, of failure to observe the conditions of section 10, I am of the opinion that the defendants' title fails. I am also of opinion that the plaintiffs' title must prevail, upon the further ground that no vein or lode of mineral had been discovered, and that no mineral in place had been discovered, to justify the location.

The Act defines the word "mine" to mean any land in which any vein or lode or rock in place shall be mined for gold or other mineral, precious or base, except coal, and "mineral" to mean all valuable deposits of gold, silver, etc. "Rock in place" is defined to be all rock in place bearing valuable deposits of gold, cinnabar, lead, copper, iron, or other minerals usually mined, except coal. In other words, "rock in place" is practically synonymous with a "vein" or "lode," and, as stated by the witness Kelly, means, I think, a substance confined between some definite walls or boundaries. Where, then, you have this substance so located, and bearing valuable deposits of gold or mineral, you have "rock in place," or a "vein" or "lode" within the meaning of the Act. It does not, I think, mean mere mineralized rock wherever you may find it, as suggested by some of the witnesses. Mr. Cronan, for instance, says: "I call it mineral in place if it is in rock. If I were to find it in earth or soil where apparently it had been moved, it would not be 'mineral in place.'" He seems to think that wherever you find mineral in the country rock you have "rock in place." I do not think he is right. Taking the statutory definition of a "mine," "mineral," "rock in place," reading them together they are, I think, intended to refer

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to a vein or lode (found in rock) carrying valuable deposits of mineral. The object of this Act was, I think, to give the miner the right to acquire a vein or lode so found, and sufficient adjoining land to work it. If he has discovered no such vein or lode he acquires no right to anything. All the sections of the Act must be read in the light of the interpretation clauses, and, so read, seem to point to the right to locate a vein and use the land for the purpose of mining it, and for no other purpose. Read particularly sections 10, 14, 20, and especially section 26, "No free miner shall be entitled to hold etc., more than one mineral claim on the same vein or lode except by purchase," but may hold by location upon any separate vein or lode. Section 30, "Should any free miner locate, etc., more than one mineral claim on the same vein or lode, all such locations excepting the location and record of his first claim on such vein or lode shall be void." Then section 36 provides that before he can obtain a Crown grant the miner has to shew that he has found a vein or lode within the limits of his claim, all implying the same thing, viz.: that to have a location there must be a vein or lode—or rock in place—and under the Act of 1895, the spirit of the law, conspicuous throughout all the legislation, is further demonstrated by requiring that before the miner can locate at all he must file a declaration shewing his discovery of a vein or lode. In other words, he can have nothing under the Act except a vein or lode and the prescribed area of land to work it.

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The meaning of our Act in this respect seems much the same as the law of the United States. Section 2,320 of the Revised Statutes of the United States enacts: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, etc., may be located," and the definition there of a vein or lode as interpreted by the Courts is the same as I have expressed it here. In *Eureka Mining Co.* v. *Richmond*, 9 Mor. M. C. page 578, argued in the Supreme Court of the United States,

Mr. Justice FIELD, after elaborate argument, and with the advantage of the best of expert and scientific skill, defines the distinguishing characteristics of a vein or lode, as the location of a vein between well defined boundaries, containing a combination of mineral matter which has been thrown up or generally precipitated in solution against the walls of the cavity by the action of water circulating in the original fissure of the earth's surface.

In *Wheeler* v. *Smith*, 32 Pac. Rep. 785, it is laid down: "The mineral land laws of the United States were enacted for the purposes of securing to the miners upon the public lands the title to mineral discovered by them, and a sufficient quantity of the land in which mineral is discovered as will enable them to prosecute the work of development and production successfully. Mines, as known to those laws, embrace nothing but deposits of valuable mineral ores, and do not include mere masses of non-mineralized rock whether rock in place or scattered about through the soil." See also *Consolidated Gold Mining Co.* v. *Champion*, 63 Fed. Rep. 540; *Harrington* v. *Chambers*, 1 Pac. Rep. at p. 375; *Erhardt* v. *Boaro*, 113 U.S. 527. In *Davis* v. *Weibbold*, 139 U.S. 507, it was held that the exemptions of mineral lands from pre-emption and settlement and for public purposes do not exclude all lands in which mineral may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant; and FIELD, J., remarks: "There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral,' etc., is applicable," citing *Alford* v. *Barnum*, 45 Cal. 482; *Merrill* v. *Dixon*, 15 Nev. 401; *Cowell* v. *Lammers*, 10 Saw. 246, 257; *U.S.* v. *Reed*, 12 Saw. 99, 104, and many other cases, shewing that the expression 'mineral lands' means only lands which are

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valuable for mineral purposes, that is, which will pay to work, and not lands in which you may find 'a trace' of mineral (as described by some of the witnesses in this case) and sometimes more, but which do not demonstrate themselves to be worth working." As remarked in *Alford* v. *Barnum*, 10 Mor. M.C. at p. 423: "The mere fact that portions of the land contained particles of gold or veins of gold-bearing quartz rock would not necessarily impress it with the character of mineral bearing land, etc. It must at least be shewn that the land contains metals in quantities sufficient to render it available and valuable for mining purposes."

The authorities above quoted, and many others which could be cited to similar purport, seem precisely to fit the evidence in this case, of which there is but little conflict. Mr. Kelly, one of the plaintiffs' witnesses, tells us that the mineral veins in the vicinity of the "Paris Belle" appear to be divided into a belt; a belt of barren rock, and another belt of veins, that these veins follow a general trend in one direction. For instance, the most valuable mines so far discovered and worked, the "War Eagle," "Josie," "Le Roi" and "Centre Star," appear to have a general direction to a certain point indicated by the "Nickel Plate," where they stop, and to the south of which you find no mineral vein until you get across the country and start on the rise on the other side of the stream, when you again find what appears to be another belt of veins running in the same direction, and having all the characteristics of the belt and veins traced on the other side. Between those two belts we have a large section of diorite or country rock, which is similar in character to the material which forms the walls of the veins where discovered. The country rock carries a certain amount of iron, but not in quantities which would make it valuable for mining purposes, but the particles of iron do not of themselves indicate the proximity of a vein.

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Speaking of the "Paris Belle," with which he is quite familiar, Mr. Kelly says that the rock in that shaft is the same ordinary diorite or country rock which composes this intermediate belt; that in the little seams or counterchecks in the rock, white iron is to be found, and sometimes there may be gold in some of them, but not as indicating a vein but being merely the ordinary mineralization which covers the entire country. To the same effect is the evidence of Mr. Funiell. Mr. Noel originally located the property on the theory that wherever you found a contact between two classes of rock you would find a vein, but finding no vein in this case he abandoned the claim as valueless. The defendants' witness, Mr. Cronan, admits that there is no wall, he says that the rock-bearing mineral of the "Paris Belle" is country rock, but he says also that diorite, or country rock, is the mineralized rock of the "Paris Belle." He says he found mineral in place on the "Paris Belle"; but when asked what is "mineral in place" he defines it merely as "mineral in rock" as distinguished from "mineral in clay" or any other formation. What he means, then, when he tells us that he found "rock in place" in the "Paris Belle" is merely this, that he found rock with mineral or a trace of mineral in it, which nobody doubts that he did, or that, in fact, anyone could find the same thing to a greater or less extent in the country rock. But that is very far from saying that he found "rock in place" according to its accurate definition, which means a vein, something between walls.

Mr. Cronan further tells us that he took samples of this "rock in place" as he calls it—"mineralized rock" as it at most was—and found it to contain all the way "from a trace up to $2.00 a ton in value." No one doubts this; the same might be said of any of the country rock in the vicinity, and in some cases it would not be surprising to find it going as high as $9.50, as another of the witnesses said, or as high as $12.00, which was Mr. Burke's assay. But

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to discover such mineralized rock is very far from saying that you have found a lode or vein; something upon which you could with advantage spend money in development.

Mr. Burke is asked, in reference to the "Paris Belle," Is there a vein on it?—mineral in place?" To which he answers "I think so"; and there his examination-in-chief leaves him. But upon cross-examination he says he found neither foot wall nor hanging wall; he found what he calls a vein, sunk evidently between two walls, but could not find either of the walls, because the vein is larger than the shaft and sunk in the vein. Asked whether by sinking further he thinks a vein between walls could be found, he says: "That I am not prepared to say; that is drawing a conclusion that might be borne out in work and might not"; and he says that he has no means of saying whether the so-called "vein" is valuable or not, not having examined it. Mr. Thompson says this is a prospect, not a mine, and that there are about two thousand prospects located in the district. He does not undertake to say there is a vein, and can say nothing about the appearance of the surface when the location was made; and Mr. Hansy's evidence throws no further light on the case, so far as indicating the discovery of a vein.

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Upon this evidence I can come to but the one conclusion, that there was no discovery of anything beyond the country rock—seamed and mineralized, although that doubtless here and there is—with a trace, to $9.00 or so in various places. All that the defendants have shewn me to have been discovered on the "Paris Belle" is a similar formation to that described and condemned in the following extract from Morrison's Mining Rights, p. 106: "Where the opinions say that it may be rich or poor, they refer to the well known fact that true veins for long distances are often quite barren. But it does not follow that every seam of rock which will assay is necessarily any vein at all; for there do exist seams which carry a little mineral and yet are not veins within the

geological or legal definition. The mineralization in such cases, in some of them at least, is caused by infiltration of ore from a true vein, or deposit along some plane of cleavage, or along the plane between two formations, or through mere mechanical cracks in the rock; and all their mineral is only precipitated or crystalized seepage from the lode or deposit above. Such bastard veins have just enough resemblance to true veins to be used as a pretext of title against neighbouring locations on the legitimate vein. They are generally lacking in walls, continuity, and in the normal uniformity of the true vein, and yet may have slips which are practically indistinguishable from walls, and have some discoloured matter and particles of ore, just enough to be dangerously similar to what is of value, only as it is unlike such things."

But, it has been urged, it is not competent for the plaintiffs in these proceedings to assail the validity of the "Paris Belle" location as a mineral claim because the defendants have secured a certificate of improvements, which of itself affords conclusive proof (1892, Cap. 32, Sec. 13; 1894, Cap. 32, Sec. 5)—of the location of a lode or vein, and in all other respects concludes the title; such certificate, it is argued, was obtained after due advertisement, and the plaintiffs might have fyled an adverse claim against the grant of such certificate if they had desired to contest the defendants' right to receive it; but, not having done so, the matter is now *res judicata*, under 1892, Cap. 32, Sec. 14, which enacts that no adverse claim shall be fyled after a period (which has now expired) and "in default of such fyling, no objection to the issue of a certificate of improvements shall be permitted to be heard in any Court, nor shall the validity of such certificate when issued be impeached on any ground except that of fraud."

This reasoning would be very powerful if the plaintiffs were laying claim to the minerals (if any) to be found in the "Paris Belle" location, but this they are not doing, and cannot do under their subsidy Act. Their ownership of the surface

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is expressly subject to the right of the free miner to acquire claims in accordance with the provisions of the law. The Mineral Act prescribes a procedure to be followed as between rival claimants to mineral ground and the minerals therein, and I take it that as between such parties the procedure adopted by the Act must be rigidly followed, and, in a proper case, is exclusive. But this is not a case of that kind. This is a claim to eject the defendants from the surface, which *prima facie* under the Crown grant belongs to the plaintiffs, and certainly does so unless the defendants can bring themselves within the exception as the owners of a mineral claim held as such prior to the 23rd March, 1893. This, of course, means lawfully held anterior to that date, and then held, not abandoned. There is nothing in the Mineral Act which I can discern dealing with anything else than mineral claims and mineral or mining rights arising under the statutes relating to mining. But here the plaintiffs make no claim to the mineral, as mineral; they are not, so far as appears, free miners themselves; they assert no rights on which a free miner could base a contention. We must look to the scope of the Act and not include within its purview cases which manifestly were not intended to be included by the Legislature. In *Railton* v. *Wood*, 15 App. Cas. 366, Lord FIELD quotes the language of Lord SELBORNE in *Hill* v. *East, &c., Dock Co.*, 22 Ch. D. 23: "On principle it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself and injurious to third parties with whose interests the statute need not, and does not profess to, directly deal." The very summary and unusual provisions of parts of the Mineral Act demonstrate the necessity of confining its operations within its scope. The owner of land knows that his title to the surface, at least, cannot be interfered with except by some person giving him clear and distinct notice of his

adverse title. If he be trespassed upon, he has the period prescribed by the Statute of Limitations applicable to the case to bring his action of trespass. He owns the lands as his own to him and his heirs forever. With the holder of a mineral or mining claim the case is widely different. He holds the land for a special purpose only—that of exercising the statutable privilege of extracting the precious metal. There is nothing, then, unreasonable in the law which confers the privilege, also exacting vigilance as one of the conditions upon which that privilege shall be enjoyed. Hence it imposes the obligation of watching for notices (not to be served personally or in the usual course, but by publication in the Gazette and by posting upon the ground), under which attacks may at any time be made by unheard of parties, and then within thirty days after such notices imposes the further obligation of fyling what are termed adverse claims and the bringing of legal proceedings. As before remarked, these conditions and obligations may be reasonable enough when imposed upon the free miner who holds nothing but a privilege upon the minerals conferred by the Act; but to impose them upon a man who already holds *prima facie* title to the surface of the property, not for mining, but it may be, as in this case it is, for altogether different purposes, appears to me contrary to reason and justice, and not to be implied in the absence of clear and unequivocal statutory declaration. To carry such a contention to its full extent, the owner of an orchard or of ornamental timber lands might be deprived of his property simply because he had failed to watch the Gazette for notices of mining claims, of which he had never so much as thought. We have to avoid placing a construction upon a statute which is repugnant to reason and ordinary justice, and as remarked by Lord COLERIDGE in *Regina* v. *Clarence*, 22 Q.B.D. 65: "In the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or

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those who passed the statute contemplated, and from which one's judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute." See also *Reg.* v. *The Bishop of London*, 23 Q.B.D. 429.

Mr. Taylor has referred me to the case of *Dahl* v. *Raunheim*, 132 U.S. 260, where it was held that when a person applies for a placer patent in the manner prescribed by law, and all the proceedings are had which are required by the statutes of the United States, and no adverse claims are fyled or set up, and it appears that the ground has been surveyed and returned by the Surveyor-General to the local land office as mineral land, the question whether it is placer ground is conclusively established and is not open to litigation by private parties seeking to avoid the proceedings. But there is nothing in that decision in conflict with the reasons which guide me in this. There the defendant laid claim to three acres of a placer location of forty acres made by the plaintiff, the claim to the three acres being founded on the contention that the three acres contained a lode or vein which the defendant claimed as a mineral location. The dispute there was as between miners to the precious metals sought to be extracted from the property. As I have pointed out, the Act was intended to be conclusive of adverse rights of that character, but this is not a case of that kind. To sum up, therefore, I am of opinion:

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1. That the land in dispute was not, prior to 23rd March, 1893, held as a mineral claim.

2. That at the time of the location of the "Paris Belle," on 3rd January, 1895, the land was occupied by the plaintiffs for other than mining purposes, and that therefore the entry and location of the "Paris Belle" was, for want of compliance with the conditions as to security pointed out by section 10 of the Act, illegal and void.

3. That the location was also void, on the ground that "rock in place" had not been discovered.

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4. That the failure of the plaintiffs to fyle an adverse claim does not debar them from impeaching the validity of the defendants' title.

I therefore declare that the location and record of the "Paris Belle" mineral claim by the defendant Jerry was illegal and void, and that neither the defendants nor any of them are entitled to the rights and privileges of lawful holders of a mineral claim upon section 35, township 9, "A." Kootenay District, and that subject to the lawful acquisition in future of claims under section 8 of 55 Vic. Cap. 38, the plaintiffs are, as against the defendants, entitled to the exclusive use and possession of the before-mentioned and described hereditaments. The plaintiffs will have judgment for possession of the said "Paris Belle" location. As the plaintiffs are not shewn to have sustained any, there will be no inquiry as to damages. The plaintiffs will recover their costs of suit, to be taxed in the usual way.

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Judgment accordingly.

From this judgment the defendants brought an appeal to the Full Court, which was argued before McCREIGHT, WALKEM, DRAKE and McCOLL, JJ., on the 5th, 6th, 7th, 8th, 9th, 10th and 11th March, 1897.

W. J. Taylor and *Robert Cassidy* for the appeal: At and prior to the date of the selection by the Railway Company of the lands in question, namely, the 23rd of March, 1893, the "Zenith" was an existing mineral claim, and by section 5 of the Subsidy Act (*a*), 1892, Cap 38, carved out of the block

Argument.

NOTE (*a*).—"5. The company shall only be entitled to unoccupied Crown land, and to make up for any area within any of the blocks of land to be selected by the company which shall before the selection by the company have been alienated by the Crown, or held by pre-emption or lease, or as mineral claims, the company shall be entitled to select similar areas of Crown land in West Kootenay District, to be taken up in blocks of not less than one mile square."

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selected. (See *Demers* v. *The Queen*, 22 S.C.R. 482.) This construction was adopted by the Crown and accepted by the plaintiffs, as appears by the form of their Crown Grant, which is set up by them in the statement of claim, and which conveyed the block to them "excepting thereout all lands held as mineral claims prior to 23rd March, 1893." It is not open to the plaintiffs to maintain the contrary. The conduct of the locators of the "Zenith" in ceasing work upon the claim and leaving the district before the end of the year following the date of location did not operate as an abandonment of the claim from that date. By sections 24 and 34 of the Act of 1891, the right of the recorded locators in the claim was an estate equivalent to a lease for a year, and so from year to year, with a provision by section 24 *supra*, that "during each year or succeeding year such free miner shall do, or cause to be done, work," etc. It is plain that, even between the miner and the Crown, the miner had up to the end of the year within which to satisfy the provision, and that his presence on the claim was unnecessary; and that even if he at any time expressed an intention of doing no further work, he would have a *locus pœnitentiæ* till the end of the year. The doctrine of abandonment by leaving the claim, etc., apart from express enactment, is applicable only to cases in which mineral claims are permitted by the State to be taken and held by possession. Here there is an express statutory holding title. By section 27 of the Act of 1891 the miner is given the option of abandoning his claim by notice to the Recorder. If there was an abandonment of the claim, it would enure only to the Crown as landlord: *Davis* v. *C.P.R.*, 12 O.A.R. 724. The owner of the land has no status to attack the validity of the mineral claim located thereon for non-performance by the miner of any of the statutory prerequisites to his obtaining the mining rights from the Crown. The Legislature did not intend to bring into antagonism settlers claiming under the Land Act or grantees

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from the Crown of lands as lands, and miners claiming mineral rights under the Mineral Acts, or to give either a right of disputing the performance of the pre-requisites to the title of the other, which is a matter entirely for the Crown: *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U.S. 641. 2; *Hastings and Dakota Railway Company* v. *Whitney*, 132 U.S. 357; *Sioux City* v. *Ohio Falls Town Lot and Land Company* v. *Griffey*, 143 U.S. 32.

Supposing that the plaintiffs had a right to intervene and contest the validity either of the "Zenith" or "Paris Belle" claims, they could only do so by adverse claim, as provided by the Mineral Act: *Mont Blanc Mining Company* v. *Debour*, 15 Mor. M.C. 286; *Shafer* v. *Constans*, 1 Mor. M.C. 147; *Hamilton* v. *Southern Nevada Mining Company*, 15 Mor. M. C. 314 at pp. 318, 319, and they are concluded by the certificate of improvements obtained by the defendants by the effect of section 14, Cap. 32, 1892, on all grounds, except fraud, which is not alleged.

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In any case, the provision in section 10 of the Act as to the giving of the security by the locator for damage caused by the entry, is in its nature a directory provision for the benefit of the occupant or owner of the land, attached to the right of the mineral claimant as a burden or obligation, and ought not to be construed as a pre-requisite or as a condition precedent to the validity of the location itself, particularly as it is provided in the section that the locators after such entry shall make full compensation to the "owner for such loss or damage caused by such entry," etc. We suggest also that there was no owner or occupant of the land at the time of the location of the "Paris Belle" in the sense required by the Act, the Crown grant to plaintiffs not being made till 8th March, 1895, and taking effect from its date: *Winona* v. *Barney*, 113, U.S. 618.

The finding of a mineral-bearing vein or lode between defined walls is not an essential to the validity of a mineral claim. The definition of "rock in place" in the Act (1894,

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Cap. 35, Sec. 2) is comprehensive, embracing all classes of rock in which are any of the minerals specified in the Act. The definition should be construed according to the ordinary and general meaning of the language, and not restricted by any technical or scientific meaning which the words may bear: *Gesner* v. *Gas Company*, 2 Nova Scotia, 72; *McShane* v. *Kenkle*, 44 Pac. Rep. 979; *Iron Silver Mining Company* v. *Cheesman, et al*, 116 U.S. 529; *Iron Silver Company* v. *Mike & Starr Company*, 143 U.S. 404 (1891).

L. P. Duff, contra: The discovery of a "vein" or "lode" is necessary to a valid location. "Rock in place" is not to be substituted for "vein" or "lode." The whole tenor of the Mineral Acts shews this: See the Mineral Act, 1891. Sec. 26. "No free miner shall be entitled to hold more than one mineral claim on the same "vein" or "lode." Sec. 30. More than one location on the same "vein" or "lode" shall be void. Sec. 31. The holder of a mineral claim shall have the exclusive right to all "veins" or "lodes," and see the recurrence of this expression in Secs. 31, 32 and 33. Sec. 36 enacts that when a holder of a mineral claim shall have "found a 'vein' or 'lode' within the limits of such claim," he shall be entitled to receive from the Gold Commissioner a certificate of improvements; and see the Placer Mining Act, 1891, Sec. 37: "The holder of a placer claim shall have no right to any 'vein' or 'lode' as defined by the 'Mineral Act, 1891,' etc." By Sec. 10 of the Mineral Act Amendment Act, 1892, Sec. 26 *supra* was amended, "a free miner shall be entitled to locate and record on separate 'veins or lodes,' etc." By the Mineral Act, 1893, Sec. 3: "(15) A mineral claim shall be marked by two legal posts, placed as near as possible on the line of the 'ledge' or 'vein,' etc." See also the forms in Appendices "G" and "H" to Mineral Act, 1891, affidavit of Surveyor: "(7) A 'vein' or 'lode' has been proved to my satisfaction to exist on the claim." Applicant's affidavit: "(3) A

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'vein' or 'lode' has been found." And see the expression "vein" or "lode" as used in section 4 (15) of the Act of 1894, and Sec. 5 of 1895. The term "vein" or "lode" in these sections cannot include "rock in place." For the definition of the term "lode," see FIELD, J., in *Eureka Mining Company* v. *Richmond Mining Company*, 9 Mor. M.C., at page 586: "We are of opinion that the term used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighbouring rock." For the United States Statute, see Morrison's Mining Rights, pp. 385–6, Sec. 2320; "Mining claims upon 'veins' or 'lodes' of quartz or other 'rock in place,' bearing gold, silver, cinnabar, etc., may be located, etc." There were, upon the evidence, no valuable deposits of mineral found to bring it within the term "rock in place" under the Acts and Interpretation Clauses. See the Mineral Act, 1891, Sec. 2: "'Rock in place' shall mean all rock in place bearing valuable deposits of mineral within the meaning of this Act," and see Mineral Act, 1893, Sec. 3, (*c*) p. 129: "No mineral claim shall be recorded without etc. an affidavit etc. that mineral has been found in place." As to mineral in place and what are valuable deposits, see *Wheeler* v. *Smith*, 32 Pac. Rep. 784; *C. W. Mining Company* v. *Champion Mining Company*, 63 Fed. Rep. 540; *Defferback* v. *Hawke*, 115 U. S. 404; *Davis* v. *Weibbold*, 139 U. S. 518, 519, 520 and 521; *Iron Silver Company* v. *Mike & Starr Company*, 143 U.S. 423; *Burke* v. *McDonald*, 33 Pac. Rep. 49. As to defining words, see *Reg.* v. *Justices*, etc., 7 Ad. and El. 491; *Reg.* v. *Pears*, 5 Q.B.D. 389; *Robinson* v. *Local Board*, 8 App. Cas. 401; Maxwell on Statutes, 1896 Ed. 425, 453. As to giving the bond under section 10 of the Act of 1891: The miner has no right of entry independent of the Act, and he must comply with all conditions precedent, of which the giving of a bond is one, "the lands being already occupied (by the Railway Company) for other than mining purposes."

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Section 4 of the Act of 1894 must be read as subject to section 10 of 1891. Entry by the free miner amounts to expropriation, and the Legislature intended security before entry and compensation afterwards. The interest "equivalent to a lease for a year" given to a free miner in his mineral claim by section 34 of the Act of 1894, is by that section "subject to the performance and observance of all the terms and conditions of the Act," of which the giving of security is one. The provision is imperative: *Corporation of Parkdale* v. *West*, 12 A.C. 613. As to abandonment: See *Hardrader* v. *Carroll*, 76 Fed. Rep. 474; *Derry* v. *Ross*, 1 Mor. M.C. 6; *Davis* v. *Butler*. *Ibid.* 7. It is a question of intention: *Belk* v. *Meagher*, 104 U.S. 284, and the locator of the "Zenith" evinced such an intention. The certificate of improvements granted can have no effect on the Railway Company; it was only intended to operate against adverse claimants to the minerals and not against the owner of the land who makes no claim to the mineral. Section 14 of the Act of 1892, as to the operation of the certificate, plainly applies only to contentions between two parties who claim the minerals, and the Railway Company has in this Court an undoubted right now to question its validity. Taking the record and location together, you have an invalid record on the face of it, and it was not intended to except bad locations and invalid records from the Railway Company's grant. As to the surface rights under Mineral Crown Grant, see Mineral Acts 1884, Secs. 77 and 82; 1891, sections 31 and 43; 1892, section 2; 1893, section 23; 1894, section 3; 1895, sections 3 and 6; 1896, section 45.

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W. J. Taylor, in reply.

Cur. adv. vult.

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McCREIGHT, J.: It will be convenient to deal with the

questions relating to that portion of the "Zenith" claim which is common to part of the "Paris Belle" location as different considerations apply to it from those connected with the remainder of the "Paris Belle" location. The "Zenith" was recorded on 17th June, 1892, and thus in ordinary course was a good claim until June, 1893, under section 24 of the Mineral Act, 1891, and under section 34 of the same Act was to "be deemed to be a chattel interest equivalent to a lease for one year and thence," etc.

The learned Chief Justice in his judgment considers that the claim was abandoned in 1892, but section 27 prescribes the proper method of abandonment by giving notice in writing of such intention to abandon to the Mining Recorder, and the adoption of this course seems to be necessary, having regard to the chattel interest equivalent to a lease for a year vested in the miner, any other attempted abandonment might raise the difficulties as to surrender by operation of law, which have caused the Courts a great deal of trouble and are discussed in the notes to *The Duchess of Kingston's case*, 2 Smith's Ldg. Cas. 10th Ed., pp. 813-826. It was not and could not be contended that there was anything in the present case to warrant the application of the doctrine of surrender by operation of law to the "Zenith" claim or any part of it; even supposing there was, the plaintiff Railway Company were not concerned with it as I shall shew presently. I cannot therefore agree that the "Zenith" claim was abandoned or not held as a mineral claim prior to the 23rd of March, 1893. On the contrary I think it was a good claim until June, 1893. The parties could have done the required work on the claim at any time before the 17th of June, 1893.

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If this is so the "Zenith" falls within the exception contained in the schedule to the Crown grant to the Railroad Company dated 8th March, 1895, and which excepts certain lands, and also "all other lands which prior to the 23rd day of March, 1893, were alienated by the Crown, or held

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by pre-emption, uncompleted sale, or lease, or as mineral claims." The learned Chief Justice in dealing with this exception assumes in his judgment that it is restricted to claims lawfully held anterior to that date, but the word "lawfully" is not to be found in the schedule and in my opinion it cannot be read as if that word was inserted, and I think the American cases point this out distinctly, and correctly, if I may say so. In *Newhall* v. *Sangler*, 92 U.S 761, it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of the lands along the route of the road, were not embraced by the grant to the Company. In the judgment at page 765 it is said "the excepting words in the 6th section, etc., etc., clearly denote that lands such as these at the time of their withdrawal were not considered by Congress as in a condition to be acquired by individuals or granted to corporations. This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication." Again, in *Kansas Pacific Ry. Company* v. *Dunmeyer*, 113 U.S. p. 629, under the Acts granting lands to aid in the construction of a line of railway from the Mississippi River to the Pacific Ocean, the claim of a homestead or pre-emption entry, made at any time before the fyling of that map in the G.L. Office, had attached, within the meaning of those statutes, and no land to which such right had attached came within the grant. The subsequent failure of the person making such claim to comply with the Acts of Congress concerning residence, etc., or his actual abandonment of the claim, does not cause it to revert to the Railway Company and become a part of the grant. The claim having attached at the time of fyling

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the definite line of the road it did not pass by the grant, but was by its express terms excluded and the Railway Company had no interest reversionary or otherwise in it. And in the judgment at page 641, "no attempt has ever been made to include lands reserved to the United States, which reservations afterwards ceased to exist, within the grant, though this road," etc. "Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the Government brought them within the grant. Why should a different construction apply to lands to which a homestead or preemption right had attached? Did Congress intend to say that the right of the Company also attaches, and whichever proved to be the better right should obtain the land," etc., etc. "The pre-emptor had similar duties to perform in regard to cultivation, residence," etc." Then follows language which seems to me to be very applicable to the present case: "It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations." I think all this applies to the present case, substituting "mineral claim holders" for "settlers." I observe in the schedule to the Crown grant to the Railway Company, the claims "Le Roi," "Josie," "Centre Star," "Idaho," "War Eagle" and "Virginia" are also included in the exception, and for the reasons stated in the above judgment I do not believe there could possibly be any right on the part of the Railway Company to question their titles, and it seems plain that all claims held before the 23rd March 1893, would in no case revert to the Railway Company, but if at all, only to the Crown in right of the Province. In

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short the exceptions in the schedule as regards the Railway Company are absolute: *Newhall* v. *Sanger*, 92 U.S. 761, to which I have already referred, is discussed in the foregoing judgment, at page 642.

The above case of *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U.S. p. 629, was relied upon by the respondents successfully in *The Queen* v. *Demers*, 22 S.C.R., at p. 486, where it was held that certain land was exempt from the statutory conveyance to the Dominion Government, and that upon a preemption right granted to one D. being abandoned or cancelled, the land became the property of the Crown in right of the Province and not in right of the Dominion.

If these views are correct it is unnecessary to discuss the alleged right of the Railway Company to any part of what was the "Zenith" claims. The only parties interested appear to be the Crown in right of the Province and the defendants. And the remainder of what is now the "Paris Belle" claim is the only subject for further consideration.

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As to this, Mr. *Duff*, for the Railway Company says that the Chief Justice held the "Paris Belle" location bad as there was no mineral in place to justify location, and that a "vein" or "lode" must be discovered in order to justify the location of the "Paris Belle" in December, 1894. Whether a "vein" or "lode" must be discovered in order to justify location must depend upon the words of the Mineral Act of 1891 and its amendments, especially the Amending Act of 1894, bearing in mind the rule that "where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there be some strong and obvious reason to the contrary": Hardcastle on Statutes 98. Now the interpretation clause in the Mineral Act Amendment Act 1894, (and the same provision is to be found in the Mineral Act of 1891), says as to "vein" or "lode" that whenever "either of these terms is used in this Act, 'rock in place' shall be deemed

to be included." When then it is argued that a "vein" or "lode" must be discovered, the argument is really met and satisfied by ascertaining whether "rock in place" has been discovered. If "rock in place" has been discovered, that is enough for due location, and the definition of "rock in place" in the Act of 1894 is that it "shall mean all rock in place bearing valuable deposits of mineral within the meaning of this Act." The question then is not simply whether the "Paris Belle" locators discovered a "vein" or "lode," but whether "rock in place" was discovered containing any of the many minerals (some perhaps not even minerals *e. g.* iodine) referred to in the interpretation clause to the Act of 1894. The Legislature, as might be expected, among the many amendments to the Act of 1891, passed I believe every year, has made what Lord CAIRNS once called in *Hill* v. *Crook*, 42 L.J. Ch. 716, a dictionary to shew its meaning of words used in connection with the important subject of location and record, and of such amendments those in the Amendment Acts of 1893 and 1894 seem to give great assistance. In those Acts, at pages 128 and 155 respectively, we find the words "(15) A mineral claim shall be marked by two legal posts placed as near as possible on the line of the ledge or vein, &c. &c. &c." The words "ledge" or "vein" in the disjunctive in both Acts, shew that the Legislature did not consider "vein" to be necessary though it might be sufficient for location, and was careful to say so. Again on the same pages respectively, we find the following: "The locator shall also place a legal post at the point where he has discovered 'rock in place,' on which shall be written 'Discovery Post.'" This, taken in connection with the diagrams or "examples of various modes of laying out claims," shews that the discovery of "rock in place" is sufficient. Such "rock in place," according to the Interpretation Clause, bearing "valuable deposits of mineral within the meaning of this Act" (of 1894). See Imperial Dictionary and Century Dictionary

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as to " rock " and "place." The word "valuable," I believe, means little more than " capable of being valued," at least in its primary signification, and certainly is not the same as " costly." However, fortunately, the Acts of 1893 and 1894 have not left this point in doubt, for at pages 129 and 156 respectively (Sec. c) we find the following provision: " No mineral claim shall be recorded without the application being accompanied by an affidavit or solemn declaration made by the applicant, or some person on his behalf cognizant of the facts, that mineral has been found in place on the claim proposed to be recorded." The applicant then, in order to have his claim recorded, need not swear as to the value of the mineral found in place, but merely that he has found it. The language of the Mineral Acts seems to be plain as to what is necessary to a good location and record, and as to the meaning of " rock in place," but notwithstanding, at the trial, witnesses, (miners) were called by the plaintiffs, unchallenged, as I gather, by the defendants, (who in truth seem to have adopted a similar course), for the purpose of shewing that " rock in place " according to the understanding I presume among miners, means a "vein," something between two walls. And this, notwithstanding that the Act of 1894 says it shall mean all rock in place bearing valuable deposits of mineral within the meaning of this Act, of course, as previously defined in the Interpretation Clause. It was admitted that the rock in the "Paris Belle" location contained some iron, and mineral in place was found on the surrounding surface, but there was no true fissure or vein, or at least none was found.

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The learned Chief Justice, as the result of hearing the witnesses and argument on the cases in the Courts of the United States of America, to which I shall refer presently, came to the conclusion that " rock in place " is practically synonymous with "vein" or " lode," and means "a substance defined between some definite walls or boundaries." " Where then you have this substance so located," he says,

"and bearing valuable deposits of gold or mineral, you have rock in place, or a vein or lode within the meaning of the Act." But his attention could not have been called to the fact that the true question is, what do the mining Acts require, according to their legal construction, for a good location, and that they are perfectly silent as to a substance defined between some definite walls or boundaries. Again, that according to those Acts, "rock in place" is by no means synonymous with "vein" or "lode" that, whilst by the Interpretation Clause, both in the Acts of 1891 and 1894, "vein" or "lode" shall be deemed to include "rock in place," the converse by no means holds good, and that "veins," "lodes," or "rock in place" are spoken of in the disjunctive in the forms of Crown grants in the Acts of 1891 and 1894 and, *passim*, that in the application for record an affidavit that "mineral has been found in place," is sufficient by the Acts of 1893 and 1894. No doubt for the purpose of obtaining a certificate of improvements it seems necessary for the applicant to swear that he has found a "vein" or "lode," but then "vein" or "lode" includes "rock in place." See Mineral Acts 1891 and 1894, and see Form "H" of Act of 1893, Cap. 29. In short, as I read the Acts, it is not intended to subject the miner to the necessity of finding a "substance between defined walls" before location and record, bearing in mind that often a large expenditure is necessary in order to find walls, and the vein between the walls, and often without success even as to the walls.

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The first case referred to in the Courts of the United States of America was *Eureka Mining Company* v. *Richmond Company*, at p. 585 of 9 Mor. M.C., as to the definition of "lode," which I may observe is not defined in our Act except as including "rock in place." It is said by the Court: "The miners, to use the language of an eminent writer, made the definition first. As used by miners before being defined by any authority, the term 'lode' simply meant that formation by which the miner could be led or

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guided. It is an alteration of the verb 'lead,' and whatever the miner could follow expecting to find ore was his 'lode.' Some formation within which he could find ore, and out of which he could not expect to find ore, was his 'lode.'" The term lode star, guiding star or North star, he adds, is of the same origin, etc., etc. The Court goes on to say at page 586: "It is difficult to give any definition of the term (lode), as understood and used in the Acts of Congress, which will not be subject to criticism," etc. Then the Court proceeds to say: "We are of opinion therefore that the term (lode) as used in the Acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighbouring rock." The question then in that case was the meaning of the term "lode" in certain Acts of Congress passed in 1866 and 1872, and considering also that that expression "lode" does not appear in any of the sections of our Acts dealing with the location or record, which are confined to the use of the words "ledge" or "vein," "rock in place," and "mineral in place," I confess I fail to see that the definition is useful to us, or its applicability to the mining laws of this Province; least of all that it should be invoked so as to displace what appears to me to be the plain meaning of our laws on the subject of location and record. The next case referred to was *Wheeler* v. *Smith*, 32 Pac. Rep. 784, etc. The marginal note is "that land containing a deposit of limestone entirely devoid of ore, cannot be located as a mining claim, etc., etc., since the mineral land laws of the United States were enacted for the purpose of securing to the miners, etc. the title to minerals," etc. But it is not even suggested here that the "Paris Belle" is entirely devoid of ore, but only that a vein, something between the walls, was not found. The nature of the adjacent country should also be regarded. A miner might expect to find ore readily in the neighbourhood of Rossland and other places in Kootenay, when he could not reasonably look for it at say the delta of

a river. The next case referred to was *Consolidated W. G. Mining Company* v. *Champion Mining Company*, 63 Fed. Reports, at p. 540. The marginal note is: "To constitute a vein it is not necessary that there be a clean fissure filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form and be well defined, with hanging and foot walls." I have only to make a similar observation to what I made on the *Eureka Mining Company* v. *Richmond*, 9 Mor. M.C. as to the word "lode." "Vein" does not appear in our sections dealing with location and record, except at page 155 of the Acts of 1894 where it is referred to in the alternative along with "ledge," and therefore in no way essential to location or record. *McShane* v. *Kenkle*, 44 Pac. Rep. 979-982 was referred to as illustrating the meaning of section 2320 of Revised Statutes of United States, and I do not think it assists in interpreting the B.C. Acts. As far as it does so it is in favour of the locators. *Defferback* v. *Hawke*, 115 U.S. 392, was also referred to. The Court in giving judgment in that case say at page 400, that the principal question presented by the pleadings for their consideration is whether "upon the public domain title to mineral land can be acquired under the laws of Congress relating to town sites." The passage to which we were referred at page 404 of the report, no doubt does relate to "valuable mineral deposits," but I find no definition of what are "valuable deposits of mineral" so as to assist in explaining in our Act of 1894 what is "rock in place."

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We were also referred to *Davis' Administrator* v. *Weibbold*, 139 U.S. at pp. 518–519, and to page 521, where reference is made to the judgment in the *United States* v. *Reed*, 12 Sawyer 99, 104, and quoting part of it as follows: "Judge DEADY, etc., etc., said: The nature and extent of the deposit of precious metals which will make a tract of land 'mineral' or constitute a 'mine' thereon within the meaning of the Statute, has not been judicially determined. Attention is called to the question in *McLauglin* v. *United States*, 107

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U.S. 526, but no opinion is expressed. The Land Department appears to have adopted a rule that if the land is worth more for agriculture than mining it is not mineral land, although it may contain some measure of gold or silver, etc., etc. In my judgment this is the only practicable rule of decision that can be applied to the subject." It is not shewn in this case that the adjacent lands and the "Paris Belle" location are of value for agriculture rather than mineral lands. Indeed I do not know that the decision assists us, for the case made by the plaintiffs is that there was no vein between defined walls, and it is not denied that mineral was found in the "Paris Belle." The present question is whether the defendants found "rock in place" within the meaning of the B.C. Mineral Acts 1891 and Amending Acts. *The Iron Silver Company* v. *Mike & Starr Company*, 143 U.S., at pp. 423–424, was also referred to, and the passage: "As stated above there can be no location of a lode or vein until the discovery of precious metals in it has been had," etc. The remainder of the passage seems to refer to "known" veins or lodes, and the inapplicability of the case, owing to the very different laws of the United States of America, is obvious on perusal even of the marginal notes; I have already shewn that by our laws the miner in order to locate should find "rock in place," not a "vein" or "lode" necessarily. *Burke* v. *McDonald*, 33 Pac. Rep. pp. 49-50, was referred to by counsel. The marginal note is: "Though to constitute a 'vein' it is not required that well defined walls be developed or paying ore found within them; there must be rock, clay or earth so coloured or decomposed by the mineral element as to mark and distinguish it from the enclosing country." This case by no means assists the contention of the plaintiffs. The question is simply as to the meaning of our mining laws, and foreign statutes and decisions on them can hardly give us much assistance, for there appears to me to be another ground upon which the rights of the locators of the

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"Paris Belle" cannot now be questioned on the suggestion of bad location and record. They obtained a certificate of improvements on the 8th of November, 1895. The plaintiff Company issued their writ previously on the 2nd of July of the same year, and although by the Mineral Act of 1891, Sec. 37, a certificate of improvements was not to be granted when the title was in litigation, that section was repealed by the Mineral Act Amendment Act 1892, (Cap. 32) Sec. 14, which further provided that the validity of such certificate when issued should not be impeached on any ground except that of fraud. It was contended for the Railroad Company that this provision could not have been intended to apply except as between persons interested in claims, and that here the Railway Company were not even laying claim to the minerals, but it seems to me that the Railway Company and the defendants having been in litigation in this action from the 2nd of July 1895, with reference to this very claim, (located, it should be remembered, in December, 1894), the plaintiffs were bound to notice and oppose if they thought it of importance, any step taken by the defendant Company for the purpose of obtaining a certificate under the Acts, and are not entitled to ignore it now, when they might at any time after the issue of the writ have applied for an injunction to prevent the defendants from obtaining such certificate, in which case the matter might have been at once decided and great expense avoided. Considering that the plaintiffs and defendants were at arms length, at all events from the 2nd of July 1895, the date of the issue of the writ, they, the plaintiffs must have noticed the advertisements of the defendants for "at least sixty days" prior to the application for the certificate. See Mineral Act 1891, section 36 (*e*). Indeed I observe that though the defendants by their rejoinder allege that they have such certificate, the plaintiffs even now by their pleadings, make no application to set aside such certificate, or raise objections to its validity. The defendants in their rejoinder alleging that they have a

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certificate of improvements to the "Paris Belle" Mineral Claim, the plaintiffs might have surrejoined and under Order XXV, raised by their pleadings (stating the facts which they considered necessary) the point of law as to the validity of the certificate under the circumstances. This has not been done, and the certificate is not challenged in the pleadings. I am disposed to think that this operates as an estoppel upon the plaintiffs so that the certificate cannot now be challenged, upon principles laid down in *Staffordshire Banking Company* v. *Emmott*, L.R. 2 Ex. at pp. 220–221, and in *Rossi* v. *Bayley*, L.R. 3 Q.B. 628, approving of the judgment of Baron CHANNELL in the former case. I also refer to the judgment of Lord BRAMWELL in the same case of *Staffordshire Banking Company* v. *Emmott*, at p. 217, where he seems to apply the doctrine of estoppel on account of expense incurred by one of the litigant parties. At least $500.00 worth of work must have been done by the defendants with a view to getting their certificate of improvements, probably with full knowledge on the part of the plaintiffs who now seek to ignore it. We must also bear in mind the words in the Subsidy Act of 1892, Cap. 38, Sec. 8, which says: "Nothing in this Act and no grant to be made thereunder, shall be construed to interfere with free miners entering upon and searching for precious metals and acquiring claims in accordance with the mining laws of this Province." Also the words in the Crown grant of March the 8th, 1895, to the Railway Company: "Provided also that it shall at all times be lawful for Us, etc., etc., or for any person or persons acting under our authority, etc., to enter into and upon any part of the said lands, and to raise and to get thereout any minerals, precious or base, other than coal, which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land, and of the easements and privileges thereto belonging, for the purposes of such raising and getting and every other purpose connected therewith, paying in respect of such

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raising and getting and use, reasonable compensation." We must also bear in mind section 3 of the Mineral Act Amendment Act 1894, and section 44, (page 152) relating to "Crown grants of mineral claims located on lawfully occupied lands." This seems to presuppose the validity and conclusiveness of the certificate of improvements without which the Crown grant could not be obtained, and the former should be promptly and before issue challenged, if at all. Both the Railway Company and the licensees of the Crown have rights under the Act and Crown grant. The free miner can enter, locate, record, and in due course obtain a certificate of improvements, etc., and the Railway Company must have a right to see these privileges are not abused by the miner to their detriment. And I take it both are bound in that behalf by the mining laws of the Province.

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I may observe that the Mineral Act of 1896, (see section 167) does not affect litigation pending at the time of the passage of that Act. Therefore I cannot say that the certificate of improvements is now void as against the plaintiffs. I think the *lis pendens* in this case has practically no operation so as to affect the defendants. Jerry conveyed the five-eighths to Glass in April, 1895, and so before the issue of the writ. The effect of a *lis pendens* is discussed in the notes to *Le Neve* v. *Le Neve*, 2 W. & T. Ldg. Cas. 6th Ed. pp. 75–76, and it only affects conveyances made after its registration on the issue of the writ, and in the way mentioned in the notes to *Le Neve* v. *Le Neve*.

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The only remaining question to be disposed of seems to be under section 10 of the Mineral Act 1891, or rather the proviso therein mentioned, which reads as follows: "Provided that in the event of such entry being made upon lands already lawfully occupied for other than mining purposes, such free miner, previously to such *entry*, shall give adequate security, to the satisfaction of the Gold Commissioner, for any loss or damage which may be caused by such *entry*, and provided that after such entry he shall

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make full compensation to the occupant or owner of such lands for any loss or damages which may be caused by reason of such entry; such compensation in case of dispute to be determined by the Court having jurisdiction in mining disputes, with or without a jury." It is admitted that in this case, and I understand that such is the general if not universal practice, no security was given to the Gold Commissioner for any loss or damage which might be caused by the entry of the defendants; but it is contended that the giving of such adequate security is a condition precedent to the validity of any location or record made under section 10 of the Act of 1891, so much so that in default the location and record become actually void, just as if never made. I do not think this contention is satisfactory. The Gold Commissioner, on application by the intending locator, would have to estimate the damage to be caused "by such entry," and he could not well estimate that the mere entry would occasion more than nominal damages. The compensation to be made after such entry for any loss or damages "which may be caused by reason of such entry," is an entirely separate matter, and for the purpose of the present question is not to be considered. That the omission to give security to the Gold Commissioner in a nominal or at least a small amount, should have a fatal effect on the title to the claim, no matter how valuable, seems to me a startling doctrine, and opposed to many provisions and to the policy of the Mining Acts. It will be observed that location and record are not more burdensome to the miner than the interests of the mining community and security of titles require, but the giving of the suggested security to the Gold Commissioner, who might be at a distance and might wish to make inquiries, would cause serious difficulty, and delay the location and record, and often cause the loss of the claim. Moreover, if this is the meaning of section 10, it seems to be a snare to the miner, for the remainder of the Acts point to location and record

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as sufficient, and are silent as to the suggested security. But a still more serious objection appears when we consider the important subject of the transfer of claims. The Mineral Act 1891, Sub-secs. 50, 51 and 52, and Sub-sections 9 and 17 of Mineral Act Amendment Act 1892, shew the anxiety of the Legislature to have such transfers made safe to a purchaser who purchases by the record. If the record discloses a good title, an honest purchaser can buy with safety, but according to the argument the security to be given to the Gold Commissioner under section 10 of the Act of 1891, as to which the party searching the record will have no notice, (there being no record of it) is a serious source of hidden danger, and is contrary to the policy which has long characterized legislation, both as to real estate throughout the Province and claims in the mineral districts. The danger which would ensue from the construction contended for is greater than any affecting the transfer of property, even in countries where they have no land registry laws. There a purchaser by calling for the deeds shewing a chain of title, and ascertaining that possession has been held under such deeds, is generally safe, but here we have a danger which cannot be guarded against. Moreover, in the Crown grant to the Railway Company, the proviso which I have already quoted as to paying reasonable compensation, and the silence as to any security to the satisfaction of the Gold Commissioner, shews that neither the Crown nor the Railway Company contemplated that such security should be given. I cannot therefore agree with the judgment of the learned Chief Justice, for I think the " Zenith " claim was a good location prior to the 23rd of March, 1893. And that as to the location on the 24th December 1894, and record of January 1895, of the " Paris Belle," it was not void as against the plaintiffs for a supposed want of compliance with section 10 of the Act of 1891. This is as regards the remainder of the claim, with which alone the plaintiffs are concerned. I cannot

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agree that the location was void on the alleged ground that "rock in place" had not been discovered. I think the plaintiffs are now debarred from impeaching the validity of the certificate of improvements obtained by the defendants. I agree with the declaration that the location and record of the "Paris Belle" Mineral Claim by the defendant Jerry, was illegal and void. But I think the plaintiffs, having regard to paragraph 23 of the Statement of Claim, admitted by the defendants, are entitled to an injunction to restrain the defendants from claiming a right to sell, etc., the surface, etc., and to deal with the same as if owners in fee, etc. Appellants partly succeed and partly fail, and their conduct in setting up a wrongful claim, etc., disentitles them to costs. The defendants appeal against the whole decree of the Chief Justice, including the injunction which the plaintiffs were obliged to apply for, and which properly limited to intended sales etc. of land should be continued. We all agree that an inquiry should be made as to what compensation the plaintiffs are entitled to receive in respect of their surface rights.

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WALKEM, J., concurred.

DRAKE, J.: This appeal is against a judgment of the Chief Justice, declaring that the plaintiffs, the Railway Company, as against the defendants, are entitled to the exclusive use and possession of the lands in the pleadings mentioned, and further declaring that the location and record of the "Paris Belle" Company was illegal and void, and granting an injunction. The plaintiffs, a Railway Company, obtained from the Provincial Legislature a land subsidy for the construction of a railway, and this subsidy is contained in an Act, Stat. B.C. 1892, Cap. 38. Section 5 compensates the Company for any lands which were taken up either under the land or mineral laws of the Province, in the blocks which were to belong to the Railway. The Crown expressly reserved to free miners the right of

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searching for and acquiring claims on any part of these lands in accordance with the mining laws of the Province. Subsequently the Crown, by deed, granted to the Railway Company on the 8th day of March, 1895, certain of the subsidy lands in which the defendants claim the "Paris Belle" was located. That grant excepted all lands held by preemption, incomplete sale or lease or as mineral claims, prior to the 23rd of March, 1893, and contains this provision: "That it shall be lawful for any person acting under our authority to enter the said lands and raise and get thereout any minerals (other than coal) and to use and enjoy any part of the said land and of the easements thereto belonging, for that purpose, paying in respect of such raising and getting and use, reasonable compensation."

On the 15th of June, 1892, the "Zenith" claim was located by Noel, and a certain amount of exploration work was done, to the value of $50.00. The locator stated in evidence that he would not do any further work as his partner did not do his share. Under section 24 a locator has twelve months after record to do work to the value of $100.00 on the claim, for which he can obtain a certificate from the Mining Recorder, and he may abandon his claim at any time upon giving notice in writing to the Recorder under section 27. No notice was given and as far as the Crown is concerned the "Zenith" claim was on 23rd March, 1893, a recorded claim and is covered by the exception in the grant, and did not pass to the plaintiffs, and after the expiration of twelve months from the date of record this land was open to location under section 10 of the Mineral Act, 1891. The case of *Reg.* v. *Demers*, 22 S.C.R. 482 is cited as an authority. I think the land covered by the "Zenith" claim is entirely within that authority and never passed to the plaintiffs. The plaintiffs are not prejudiced as they may be entitled to call upon the Provincial Government to make up to them out of other lands so much land as was held by others on the 23rd day of March, 1893,

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under the exception in the grant. The plaintiffs, however, say that the location of the "Zenith" claim was improperly done because an extra stake with a notice on it was left on the ground. The plaintiffs' grant excepts recorded claims, and this being a recorded claim of the 23rd of March, 1893, I fail to see what right the Company have now to question the location on which the record is based. The Crown could do so and so could any free miner during the twelve months the record lasted. Of this "Zenith" claim, a portion is alleged to be covered by the "Paris Belle" location as appears by the maps filed as exhibits. On the 24th of December, 1894, the "Paris Belle" was located; on the 3rd of January, 1895, recorded. This the defendants claim they have a right to do, both under the Plaintiffs' Act, Cap. 38 of 1892, Sec. 8, and under the grant which contains the provisions before mentioned. The Mineral Act, 1894, under which the defendants located and recorded this claim, defines a mine as meaning any land in which any vein or lode or rock in place shall be mined for gold or other minerals, precious or base, except coal, and minerals include valuable deposits of various ores, and also of other substances which are not found in ores, such as aluminium, phosphorus, iodine, sodium, and also mineral pigments which can be extracted from various earths. Rock in place is defined as rock in place bearing valuable deposits of mineral within the meaning of the Act. Vein or lode includes rock in place. The Act is silent as to the discovery of minerals which are found in earths alone, or how it is to be posted as there can be no rock in place bearing deposits of this class of minerals. The meaning of rock in place appears to be all rock which has not been broken or moved from the main body. How valuable its deposits or minerals may be, may not be discovered until expensive work has been done. A vein or lode is not under this Act necessary to be discovered to enable a miner to locate ground if there are mineral deposits of sufficient value to induce the miner

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to expend capital and labour in their development. A great deal of evidence at the trial was directed to the question whether or not there was any valuable deposit of mineral discovered, and the evidence was confined to ores. A man need not specify what mineral he is searching for, and the question whether he has found valuable deposits of ore does not arise, but in the present case there are some deposits of ore which may be indications of larger deposits. I see nothing in the Act to prevent any one taking up ground for the purpose of working any of the class of minerals mentioned in the Act, provided he discovers sufficient minerals to justify the expenditure of time and labour on them. The American authorities cited are decisions on Acts very much more restricted than our Mineral Act, and will hardly assist the determination of questions arising here.

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A miner cannot take up a claim on occupied ground without paying compensation, and that is considered by the statute a sufficient protection. If it is not the Legislature can amend the Act. The plaintiffs contend that the "Paris Belle" Company were bound to tender security to the Gold Commissioner before they made entry on the plaintiffs' lands, and not having done so their location and record are valueless. Section 10 is unhappily worded, the proviso is that "in the event of an entry being made," this presupposes an actual entry on the land for the purpose of location and record, and yet the section proceeds to say that previous to such entry he shall give security. The intention of the Act I think was that after entry for location and record purposes the locator could not mine and prospect for minerals without giving security, and the first part of section 10 gives sanction to this view, for it authorizes a free miner to enter, locate, prospect and mine; four different and distinct operations, entry for the purpose of viewing, locate for the purpose of staking and recording, prospecting implies examination by pick and shovel, and

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mining, digging and destroying the surface. As the minerals are not the property of the land owner, it would be only right that the surface should not be destroyed except on security being given, and this construction will also protect the miner who may have a valuable surface discovery from the liability of losing his find, as he can record and protect his rights before he further proceeds to give security or pay compensation. His right is to deal with the Crown minerals. This is independent of his right to deal with the surface owner. If the condition of giving security is to be treated as a condition precedent to recording, non-compliance with which renders the record void, the result will be that a record for which a certificate of improvements has been issued is no evidence of title. Section 14 of the Mineral Act Amendment Act, 1892, after providing for fyling adverse claims, says: "Nor shall the validity of such certificate of improvements when issued be impeached on any ground except that of fraud." This portion of the section is general and applies to all cases. To treat it as only applicable to contests between claimants to mines, would be to render a certificate of improvements useless. The certificate of improvements in this case was granted 8th November, 1895, and recorded 18th November. The plaintiffs commenced their action before the certificate of improvements was issued. They could have obtained an injunction after having got their grant, but they stood by from December 24th, 1894, until this action was commenced in October, 1895, and allowed the defendants to do work which is estimated at $500.00. But the grant under which the plaintiffs hold has waived the necessity of giving security before entry, and only requires compensation. In my opinion, as I have already stated, the plaintiffs have no claim to the lands covered by the record of the "Zenith." All that they are entitled to claim is compensation for surface rights over such portion of the "Paris Belle" as lies outside the "Zenith" claim which may be necessary for the due and proper working of the claim. The question

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of what constitutes a vein or lode was very fully argued, but it really has but little to do with the case. Mr. McConnell, the Dominion geologist, points out in his report, page 25, dealing with the Rossland District, that the ores of the massive eruptive rocks consist principally of sulphides of various metals. Of these pyrrhotite is the most abundant. It constitutes the common Rossland ore. It is found as a rule in the massive condition, ranging in texture from a fine to a medium grain, but it is also disseminated through the country rock, and at page 27 he continues: "The blunt irregular outlines of some of the ore and the fissure like regularity in others, the presence in most cases of a single wall, which is often meaningless as a confining line, and the occasional lack of any wall, the gradual blending of the ore with the country rock and the presence of the latter as the principal gangue, are all characters consistent with the deposition of the ore from ascending waters which have eaten away portions of the country rock along lines of fracturing, and replaced it by minerals held in solution, while the fissure veins are seldom observable." This opinion of the characteristics of this district renders a greater part of the argument addressed to us (that the absence of wall and veins on the "Paris Belle" claim was cogent evidence of this not being a mineral deposit at all) of little effect, and the further indications given by the Mineral Act itself, that it was not intended to apply to ores only, but to all minerals whatever discovered under the surface.

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The order that we think should have been made in this case is that as regards the "Zenith" claim the defendants are entitled to treat the land covered by that claim as waste lands of the Crown, in so far as they can be ascertained from the record, and as to the other portion of the claim, the plaintiffs are entitled to compensation for surface damages (if any) to be ascertained in the mode pointed out by the Mineral Act. The appeal should be allowed, with costs.

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McCOLL, J.: I have had the advantage of reading the opinion of Mr. Justice McCREIGHT, with whom I concur, in the judgment proposed by him. I do not think it necessary to say anything more than to make some observations upon one of the questions raised by the pleadings and argued at great length upon the appeal, as I have apparently taken a somewhat different view of this question. The plaintiffs were met by the defendants at the threshold of this controversy with sub-section (1) of section 14, Cap. 32, 55 Vic., which provides: "(1) No adverse claim shall be filed by the Mining Recorder after the expiration of the period of publication in the next preceding section mentioned; and in default of such filing no objection to the issue of a certificate of improvements shall be permitted to be heard in any Court, nor shall the validity of such certificate, when issued, be impeached on any ground except that of fraud." It is admitted that the defendant Company obtained such a certificate of improvements as is here provided for, and the plaintiffs have not attempted to impeach it. What then is its effect between the parties? For the plaintiffs it was strenuously contended as regards this question that the "Mineral Act, 1891" and Amending Acts, (which for convenience I shall refer to as the Acts) only contemplate possible disputes between two or more adverse claimants to a mineral claim; that it could never have been the intention of the Legislature to make the title to land depend upon compliance with the provisions of Acts passed solely for the purpose of providing for the acquisition of mineral claims, and that it is impossible to conceive that the Legislature meant to place upon a land owner the intolerable burthen of constant watchfulness lest he be deprived of some portion of his property. It was also urged that the adverse proceedings provided for by the Acts are inapplicable to a land owner, and that therefore his rights cannot be dependent upon his taking such proceedings; nor can a certificate of improvements be binding upon him.

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I agree that the proceedings referred to are required only of a claimant to a mineral claim claiming adversely, but I do not accede to the proposition that therefore, notwithstanding the issue of the certificate of improvements, the question between the parties is to be determined as if no such certificate had been granted. There can be no pretense that the position of the plaintiff Company is, in the circumstances of this case, better than that of a grantee of lands from the Crown, whose grant in the ordinary form excepts the precious metals.

A sufficient reason why the adverse proceedings required by the Acts do not apply to such a grantee is, that he does not need their protection against persons claiming to be entitled to enter and remain upon his land without having complied with such of their requirements as concern himself. They are trespassers, and can be dealt with as such. It is necessary to bear in mind that the rights conferred by the Acts as regards lands lawfully occupied for other than mining purposes, are not in the first instance dependent even upon the existence of mineral upon the land. I do not think it would be useful, even were it possible, to lay down any general rules by which to determine what defaults will leave such persons in the position of trespassers. The rights of the parties in each instance must naturally depend largely upon the precise circumstances in which they may be found when a dispute arises.

Judgment of McColl, J.

It seems to me difficult to allow to the grantee a status to question the title of any claimant to a mineral claim, who in good faith may be claiming under his record, but it is sufficient for the purpose of this appeal to say that, whatever may be the position of the grantee at any time antecedent to the issue of the certificate, I do not doubt that he will never find it possible to successfully attack the title to a mineral claim in respect to which a certificate has been granted, unless he is able to prove such facts as would amount to fraud. If the grantee may bring an action

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attacking the title to a mineral claim, notwithstanding the existence of a certificate of improvements, without impeaching its validity, when does the title to the claim become unimpeachable by him? And if he, in his quality of land owner, is to have the right to bring such an action at such a time, what is there to prevent him, if successful, taking advantage of such right for the purpose of himself acquiring the claim? Such a grantee is not concerned with the right of property in the precious metals which may be found upon his land. He can acquire them only in the way open to all persons equally under the Acts. His title to his land does not depend upon the Acts, nor can he be deprived of his title to it or any part of it by any proceedings under them. His liability is to have his land entered upon and occupied for mining purposes, and the rights given him are that he is carefully guarded in respect of such liability by the exemption and security against loss provided for.

Judgment of McCOLL, J.

I am of opinion that the policy and provisions of the Acts are alike opposed to the construction contended for on behalf of the plaintiff Company; that the certificate of improvements is in effect conclusive, as well against the plaintiff Company as against any adverse claimants (if such there were) to the "Paris Belle" mineral claim; and that the present rights of the plaintiff Company are those, and only those, conferred by the Acts. The plaintiff Company is entitled to security, and to an injunction in the meantime. The appeal should be allowed; neither party should have the costs of the appeal.

Appeal allowed.

Noted Mineral Act 1896 s 37

IN RE "GOLDEN BUTTERFLY FRACTION" AND "COUNTESS" MINERAL CLAIMS.

WALKEM, J.

[In Chambers.]

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Dec. 23.

IN RE GOLDEN BUTTERFLY FRACTION MINERAL CLAIM

Mineral Law—Practice—Mineral Act, 1896, Sec. 37—Time—Extending after lapse.

The boundaries of the "Countess" and "Golden Butterfly" mineral claims overlapped. The "Countess" having applied for a certificate of improvements was adversed on the ground of defective location by the "Golden Butterfly," with a view to secure the ground common to the two claims. The Secretary of the "Golden Butterfly" had relocated the remainder of the "Countess" ground in his own name as a fraction. He, upon the assumption that, if the adverse of the "Golden Butterfly" was sustained, the whole of the "Countess" location would be invalidated, did not bring an action attacking it on his own behalf until after the expiration of the statutory sixty days from the publication of the notice of application for the certificate of improvements to the "Countess." He then applied to the Court for leave to bring an action.

Held, per WALKEM, J.: That the circumstances were sufficient ground for an order extending the time.

MOTION by Thomas Gilmour, locator of the "Golden Butterfly Fraction" mineral claim, for leave to commence an action to establish an adverse claim notwithstanding the lapse of time. The facts fully appear from the headnote. Statement.

Archer Martin, for the application cited *Re Good Friday*, 4 B.C. 496.

G. H. Barnard, contra: The applicant made a mistake as to the law in thinking that the action already instituted would be sufficient. As Secretary of the Company owning the "Golden Butterfly," he had notice of all the facts. The time should not be extended, especially after its lapse: *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368. Argument.

WALKEM, J.: I will give leave to commence action, costs of the application to be paid forthwith. Judgment.

Order made.

Noted 6. C. Dec. 52

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1897.

Jan. 2.

RE BOSSI

IN RE BOSSI.

Will—Bequest to certain persons or their issue "share and share alike" —Per stirpes or per capita—Codicil—Substituted Legacy.

Under a bequest in favour of certain persons, if living at testator's death, and the issue of such of them as should be then dead "to be equally divided between them, share and share alike," such issue take per capita and not per stirpes.

The will bequeathed $1,000.00 to each of the executors "for the trouble they will have in carrying out the trusts of this my will." By a codicil, reciting that the original executors had died, new executors were appointed and a provision made authorizing the executors for the time being to retain, as remuneration for their services, a commission of five per cent. on all monies collected under the will. The codicil further provided that the will should be construed as if the names of the new executors were inserted throughout in place of the names of the original executors.

Held, That the existing executors were entitled only to the commission mentioned in the codicil.

Statement.

PETITION by the trustees of the will, with a codicil thereto, of Carlo Bossi, deceased, to have the following questions determined:—

(1) What respective shares did the nephews and nieces and issue of deceased nephews and nieces take?

(2) To what remuneration were the trustees and executors entitled?

Argument.

F. B. Gregory for the trustees.

L. P. Duff for the children of Luigi and Julia Bossi.

S. Perry Mills for the remaining *cestuis que trustent* contended that the bequest constituted an original gift as well to the children as to the issue of the deceased children of the testator's brothers and sisters, whereby all took an equal interest, as tenants in common, in the trust fund; in other words, they took *per capita*. In the alternative he submitted that though otherwise the nephews and nieces

and the other issue of a deceased nephew or niece would take as tenants in common, yet there being only one set of words of severance, these words might apply to the nephews and nieces only and not to the issue, and that the issue then took *inter se* as joint tenants: *In re Yates, Bostock* v. *D'Eyncourt* (1891), 3 Ch. 53; but as to construction and interpretation of deeds see *Seale-Hayne* v. *Jodrell*, (1891) A.C. 304.

McColl, J.: By order, dated 3rd August, 1896, argument was directed to be heard upon the questions (1) of the right of the children of Julia Bossi to claim an interest in the estate of Carlo Bossi, deceased, as issue of Angelica Signorelli through their mother, Julia Bossi, and also a further interest as children of Luigi Bossi; and (2) of the amount of remuneration to which the trustees and executors are entitled.

Judgment.

By the testator's will, dated the 26th May, 1877, he appointed his brother Giacomo and one Grancino executors, and bequeathed to them all his personal property upon trust to convert the same into money "and to stand possessed thereof upon trust for the children of my brothers, Giacomo Bossi, Luigi Bossi, and of my late sister, Angelica Signorelli, who shall be living at the time of my decease, and the issue of such of them as shall be then dead, to be equally divided between them, share and share alike." There is also the bequest to each of the executors of the sum of $1,000.00 "for the trouble they will have in carrying out the trusts of this my will." By another instrument, expressed to be made as a codicil to this will, and dated 15th November, 1894, it was recited that the said persons so appointed executors had since died, and Americo and Andrea Bossi were appointed executors and trustees of the will. There is also this provision: "And I authorize my trustees or trustee for the time being to deduct and retain, as remuneration for their services, a commission of five per

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cent. on all monies which shall be collected by them under my said will, such commission, if more than one trustee shall act in the execution of the trusts of my said will to be equally divided between them unless they shall otherwise determine; and I declare that my said will shall be construed and take effect as if the names of the said Americo Vincenzo Bossi and Andrea Calvino Bossi were inserted in my said will throughout, instead of the names of the said Ermengildo Grancini and Giacomo Bossi. And in all other respects I confirm my said will."

Counsel were, by the order mentioned, assigned to argue the questions on behalf of the various persons interested and did so very fully.

As regards the first question, it is obvious that if all the beneficiaries take *per capita* no such possible right as is suggested can exist, and, after very careful consideration, and after referring to the numerous authorities cited, as well as to others, I am unable to see any reason to doubt that the beneficiaries do so take.

Judgment.

The argument against this view was based upon the supposed hardship of a construction of the will which would permit each of the issue of a deceased nephew or niece to share equally with their uncle or aunt, and the presumption that such could not have been the testator's intention.

This argument is disposed of in the cases to which I shall refer. I will merely say that to conjecture—if conjectures were permissible—that the testator's intention must have been that children should be limited to their parents' share seems to me to be certainly not more reasonable than to suppose that by declaring in the will the shares which he intended the beneficiaries to take, instead of leaving them to take by intestacy, or as upon intestacy, he designed a different method of distribution.

The question is, whether the issue of any of the named beneficiaries so dying take directly or by way of substitution for their parents.

The words used in their ordinary sense plainly mean that the equal division directed, which is, of course, of the whole property to be divided, is to be made among all the beneficiaries. To read the word "them" where last used as referring solely to the "issue" would be to give such issue the whole of the property. Then is there any rule or authority requiring me to construe the words in any different sense? Of the numerous authorities cited to me, only one, *Congreve* v. *Palmer*, 16 Beav. 435, seems to have any direct bearing upon the point. There the division was directed to be made among the testatrix's sisters, "or their children living at her disease," and the Master of the Rolls held that, because of the use of the word "or," the children took by way of substitution, and, therefore, that those entitled took *per stirpes*, declining to read "or" as meaning "and" in which case it seems to have been conceded that the decision would have been the other way.

Judgment.

In the case of *Houghton* v. *Bell*, 23 S.C.R. 498, the will directed certain property to be divided upon the death of the testator's wife equally among "those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto," and it was held that all the beneficiaries took *per capita*. These two cases seem to me to be authorities for the conclusion to which I have come. But, having regard to the remarks of the Lord Justices in *Re Stone, Baker* v. *Stone*, 12 R. 415, upon the danger of construing one will by the language of another, I have arrived at that conclusion because the language used appears to me free from ambiguity, and to clearly direct that the division is to be made between all the beneficiaries equally, share and share alike, and I have not been referred to any authority, and I know of none, for declining to give effect to that language. As regards the second question, the same motive is expressed for both the bequest of the $1,000.00 by the will and of the commission by the codicil

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and I do not doubt that the testator did not intend to give both, and that the codicil should not be construed to have such effect.

It was contended that the present executors having been also appointed trustees—which the former were not in terms—indicated an intention on the part of the testator that both bequests should stand, but this circumstance is deprived of any possible weight which might otherwise have attached to it by the recital in the latter document that the executors appointed by the will had also been appointed trustees.

Judgment.

If the parties represented before me have not been already determined to be those entitled, there must, I suppose, be a reference upon that point.

Order accordingly.

Noted C.S.B.C. 1888 cap. 87 s. 2

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PARIS v. BISHOP OF NEW WESTMINSTER.

Corporation Sole—Covenant for self and heirs—Whether successors bound by mortgage—C.S.B.C. 1888, Cap. 87.

A covenant by a corporation sole, described in his corporate capacity, expressed to be on behalf of himself, his heirs, executors and administrators, will not bind his successors in office.

ACTION against the Bishop of New Westminster on a covenant in a mortgage deed made by his predecessor in office to secure a sum of money borrowed by him for the purpose of building a rectory on the land mortgaged. The facts more fully appear from the judgment.

Statement.

R. L. Reid, for the plaintiff.

W. Myers Gray, for the defendant.

Judgment.

McCREIGHT, J.: In this case the plaintiff sues the present

Bishop of New Westminster on a covenant in a mortgage deed made by the late Bishop to the plaintiff for the sum of $350.00 which was borrowed from him for the purpose of building a rectory on the land so mortgaged; at least I gather this was the object from the argument addressed to me.

The mortgage was drawn in pursuance of the Act Respecting Short Forms of Mortgages, C.S.B.C. 1888, Cap. 87, "between Acton Windeyer Sillitoe, The Lord Bishop of New Westminster, a corporation sole, hereinafter called the mortgagor of the first part," and the plaintiff of the second part. After describing the parcels of land the mortgage deed applies form number one of column one in the second schedule to the Act, using the following language:

"Provided, this mortgage to be void on payment of $350 of lawful money of Canada, with interest at ten per cent. per annum, as follows: 'That is to say, at the expiration of five years from the date of these presents, together with interest at the rate aforesaid from the date hereof, payable half yearly, on the 23rd days of May and November in each and every year during the said term, and until said principal sum shall have been fully paid, whether the same shall or shall not be paid at the time herein limited for the payment thereof.'"

Then giving the mortgagor the right to pay earlier, etc. The deed proceeds as follows: Judgment.

"The said mortgagor covenants with the said mortgagee that the said mortgagor will pay the mortgage money and interest, and observe the above proviso."

These forms number two and three in the column one represent the mortgagor, and see second column, as covenanting "for himself, his heirs, executors and administrators, etc., shall and will well and truly pay or cause to be paid unto the said mortgagee, etc." I may here observe that the expression "Acton Windeyer Sillitoe, the Lord Bishop of New Westminster, a corporation sole," etc., by no means implies that he contracts as a corporation sole, but merely gives a *descriptio personae*, and this is important. See *Parker* v. *Winlo*, 27 L.J.Q.B. 49, 51 and 53. The remainder of the mortgage deed makes no allusion whatever to the

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"successors," and as a matter of intention to be collected from the words, it seems as if the only intention was to bind the heirs, executors, etc. of the Bishop. But independently of this conclusion the question arises whether the successors can be bound without being expressly named, and the authorities shew that in the case of a corporation sole they can not.

The words successors in such case is not included in the mere description of "corporation sole," so much so that a conveyance in fee to such a corporation is futile without the word successors, and would only convey a life estate. This appears from 1 Co. Lit. 94b, Sec. 133, where it is said: "But if lands be given to a bishop, parson, or any other sole corporation who after their deceases have a succession, there without this word successors nothing passeth unto them but for life."

Judgment.

It is plain therefore that the present Bishop is not bound by the covenant sued on, and the action against him on such covenant must be dismissed with costs. There may possibly be equities independently of the covenant, but on this record and the case and argument I cannot deal with them. Neither have I considered the question, but I may refer to *Blackburn Bldg. Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. at p. 71, and *Portsea Island Bldg. Society* v. *Barclay*, (1895), 2 Ch. at pp. 304–305, which may or may not apply.

Action dismissed.

BEAVEN v. FELL *ET AL.*

WALKEM, J.

[In Chambers].

1897.

May 13.

BEAVEN v. FELL

Practice—Examination for discovery of guardian ad litem, at same time party defendant—Whether examinable.

A party defendant is not absolved from examination for discovery by reason of being also guardian *ad litem* of infant defendants.

SUMMONS by the plaintiff for the examination of Theophila Turner Green, a party defendant who had, at the application of the plaintiffs, been appointed guardian of infant co-defendants *ad litem*.

P. Æ. Irving for the application,

Gordon Hunter, contra: We submit that an order should not be made for the examination of a guardian *ad litem*: *Ingram* v. *Little*, 11 Q.B.D. 251, MANISTY, J., at p. 254. The fact that Mrs. Green is also a party defendant is no ground for making the order as we cannot divide the examination, and she would necessarily be subject to questions affecting the interests of the infant defendants. Argument.

WALKEM, J.: Mrs. Green, being a party defendant, is liable to examination. It might as well be contended that as she is a guardian *ad litem* she is not personally responsible in the action, notwithstanding her being a defendant herself. Judgment.

Order made.

Noted Maclaren Bills & Notes p. 114 & 120.

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1897.

May 26.

BURTON v. GOFFIN

BURTON v. GOFFIN, *ET AL.*

Bill of exchange—Blank spaces on bill—Alteration after endorsement—Estoppel — Material alteration — Waiver of demand — Bills of Exchange Act, 1890, Sec. 20.

A promissory note, containing blank spaces for the names of the payee and the rate of interest, was endorsed for the accommodation of the maker and handed to him in that condition. The maker inserted the name of the payee and 12 per cent. as the rate of interest.

(1) *Held*, that the endorsers were estopped from denying that they had given the maker authority to fill in the blanks and that the insertions by the maker were not alterations avoiding the note.

(2) The object of presentment being to demand payment, waiver of demand is also waiver of presentment.

ACTION by the holder of a bill of exchange against the maker and endorsers thereof. The facts sufficiently appear from the judgment.

Statement.

Robert Cassidy for the plaintiff.

L. P. Duff for the defendants.

Cur. adv. vult.

May 26th, 1897.

DAVIE, C.J.: The defendant Goffin made a promissory note for $1,500.00, payable at six months to the order of..... .....carrying interest, until paid, at the rate of...per cent. per annum, and in this incomplete state the note was endorsed, first, by the defendant Williams, and then by Munsie, who likewise, underneath their endorsement signed the following memorandum "For value received we hereby waive protest, demand and notice of non-payment." In this condition the endorsers delivered the note to Goffin, who filled in (as Williams and Munsie inform us, without their knowledge,) the name of "Williams" as the payee and "twelve" as the yearly rate of interest, and then discounted

Judgment.

the note with the plaintiff, who swears that he had no knowledge or suspicion that the note was not in the precise form as that in which it left the endorser's hands.

It is contended by the endorsers that the filling in of these blanks was a material alteration, vitiating the note, but I find myself entirely unable to assent to this view. As far as the filling-in of Williams' name is concerned, the point was surrendered upon the argument, and wisely so, I think, for Williams' endorsement would have been meaningless and useless, except upon the supposition that his or some other endorser's name was to be filled in as payee. Then, as to the rate of interest, if it was uncertain at what rate the note would be discounted, most likely the rate would be left blank. The endorsers had sufficient confidence in the maker to intrust him with their endorsement for $1,500.00, and it would be unreasonable to suppose that they would not trust him also to get the money as cheaply as possible.

Judgment.

It is settled law that endorsers, permitting a note to remain in the hands of the maker in a blank state, constitute him their agent to fill in the blanks. BOWEN, L.J., in *Garrard* v. *Lewis*, 10 Q.B.D. 30, at p. 35, remarks: "I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp." It was argued by Mr. *Duff* that *Garrard* v. *Lewis* was overruled by the more recent case of *Scholfield* v. *Lord Londesborough*, 65 L.J.Q.B. 593.

I have carefully read the report of that case, both in the Court of Appeal and the House of Lords, and must say that I perceive no conflict with *Garrard* v. *Lewis*. In the latter case Lord Londesborough had accepted a bill of exchange for £500, which had been drawn with artistic cunning so as to be easily raised to £3,500, which was afterwards fraudulently done by the drawer. It was held

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that the plaintiff could not recover more than £500 because there was no duty incumbent upon the acceptor of a bill of exchange towards the public, or subsequent holders of the bill, to see that the bill is in such form as to prevent the possibility of fraudulent alteration after it has left his hands.

In the Court of Appeal the wide distinction is pointed out between the case of a bill containing blanks, which are afterwards filled up without reference to the acceptor, and the case where the bill has been tampered with so as to be changed from its original tenor: In the one case, the acceptor is bound; in the other, he is unaffected by the alteration. So far from dissenting from the passage in BOWEN, L.J.'s judgment, which I have quoted from *Garrard* v. *Lewis*, Lord ESHER, in the Court of Appeal, 64 L.J.Q.B. 293, says the same thing, although in other words: "The signing of a blank cheque is, according to the law merchant, an authority to any person into whose hands the cheque may come, to fill it up as the agent of the drawer, who cannot say that that person has acted contrary to his instructions," and he cites approvingly the language of BLACKBURN, J., in *Swan* v. *The North British Australasian Company*, 2 H. & C. 175: "It is sufficient to point out that a party signing in blank a cheque or bill or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment of *Freeman* v. *Cooke*, 2 Ex. 654, he means the holder to be induced to take the instrument as if it had been filled up from the first, and," adds Lord ESHER (64 L.J.Q B. 299), "those remarks apply to a blank cheque, but not to a cheque which is not in blank, but which has been tampered with after it has been signed." It has also been objected in this case that the note was not presented at the Bank of Montreal, where payable, and that the waiver of demand does not waive

Judgment.

presentment. This contention, I think, is unsound. The only object of presentment is to demand payment, and if the demand be waived, the presentment becomes unnecessary. In my opinion, therefore, there is no defence to this action, and the plaintiff is entitled to judgment for principal and interest according to the exigency of the note, with costs.

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Order made.

RITHET, *ET AL.* (TRUSTEES OF HENRY SAUNDERS) v. BEAVEN, *ET AL.*, (TRUSTEES OF GREEN, WORLOCK & Co.)

DRAKE, J.
1897.
May 29.
RITHET v. BEAVEN

Bill of Sale—Recital—Estoppel—Covenant.

A bill of sale contained a recital that a certain sum was due from the mortgagor to the mortgagee, and a covenant by the mortgagor to pay that sum and also any other sum which on taking an account might appear to be due thereon.

Held, That the mortgagor was not estopped by the recital from claiming that the debt due at the date of the bill of sale was larger than the sum therein named.

An express covenant overrides and excludes an implied covenant.

APPLICATION by originating summons to determine the extent of the applicants' liability to the respondents under certain instruments. The facts are sufficiently set forth in the judgment. Statement.

L. P. Duff, for the application.

J. S. Yates, contra.

DRAKE, J.: This is an originating summons taken out by the plaintiffs for the purpose of ascertaining what rate of interest the plaintiffs can be called upon to pay in respect of the debt due by Henry Saunders to the defendants. Judgment.

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Henry Saunders was a customer of the Bank of Green, Worlock & Co., and had a heavy overdraft. The bank charged him interest on this overdraft at 12 per cent. per annum without any objection on his part. On the failure of the bank in March, 1894, the overdraft principal and interest was $66,742.32. On 1st March, 1894, Saunders gave a bill of sale to Worlock virtually on behalf of the bank, and that bill of sale contains a recital that the balance due by Saunders to the bank was $49,384.00 and it was recited that further advances might be made to the mortgagor. The mortgagor had agreed to secure $49,384.83 and any and all further advances in manner thereinafter appearing. In the mortgage is contained a covenant by the mortgagor to pay on demand all sums of money as shall be due to the mortgagee on account current or on any account whatsoever with interest at 12 per cent. per annum to be computed from the respective times of the mortgagor being according to the usual custom of banks charged with or debited money in account current.

Judgment.

The deed then provided for service of notice of demand and assigned certain chattels subject to redemption and contains the following covenant: "And the said mortgagor, his heirs, executors, etc., covenants with the said mortgagee, his executors, etc., that if the moneys so owing as aforesaid shall not be paid on demand, he the aforesaid mortgagor shall and will so long as the same or any part shall remain unpaid—pay to the said mortgagee, his executors, administrators and assigns, interest for the same or for so much thereof as for the time being shall remain unpaid at the rate of 12 per cent. per annum by equal monthly payments." On 3rd March, 1894, the banking firm stopped payment and assigned to trustees for the benefit of creditors, of whom the defendants are now the representatives.

On 5th March, 1894, H. Saunders assigned to plaintiffs for the benefit of creditors. The defendants put their mortgage into force and realized $17,554.66.

The question which is submitted to the Court is : Are the trustees of Green, Worlock & Co. entitled to rank on the estate of H. Saunders in respect of their claim for interest and at what rate? It is contended that the recital of the amount of the debt operates as an estoppel against the mortgagees and that they cannot now say that at the date of the deed there was any large sum due. If a recital in fact contains a covenant it operates as an estoppel but not when there is an express covenant to be found in the witnessing part. There is nothing in this recital that can operate as a covenant, it does not state that on a balance of account being struck $49,384.00 was due or that it was admitted by the bank that no more was due. It is an assertion by the mortgagor that he owes that amount at all events. It does not control the subsequent covenant that the assignor will on demand pay all such moneys as shall be due on account current or on any account whatsoever with 12 per cent. interest. Looking at the whole tenor of the deed in my opinion it is a deed to secure whatsoever balance might be found due to the bank. The admission of a debt by an instrument under seal would amount to a covenant to pay it. See *Jackson* v. *N.E. Ry.* 7 Ch. D. 583. I am therefore of opinion that the defendants are entitled to claim interest on the unpaid balance at the rate of 12 per cent. after deducting the amount at which they value the securities retained by them.

Judgment.

Order accordingly.

Noted Rule 84.

DAVIE, C.J.

[In Chambers].

1897.

June 2.

BARKER v. LAWRENCE

BARKER & COMPANY v. LAWRENCE.

Practice—Summons under Order XIV.—Service of exhibit to affidavit —Rule 84.

Supreme Court Rule 84, providing that the summons for leave to enter final judgment order XIV. R. 1, must be accompanied by a copy of the affidavit and exhibits referred to therein, is imperative. Adjournment to enable the plaintiff to furnish a copy of exhibit, refused.

SUMMONS by the plaintiffs for leave to enter final judgment.

Statement.

A. S. Potts, (Drake, Jackson & Helmcken) took the preliminary objection that the exhibit to the affidavit was not served with the summons, as provided by Rule 84. *Hughes* v. *Hume*, *ante* p. 278.

A. P. Luxton, for the plaintiffs: The only exhibit is the writ of summons which has already been served. The summons should be adjourned so that the exhibit may be served.

Argument.

DAVIE, C.J.: The rule is imperative. Order XIV. takes away the right of defendant to have the action tried. The service of the affidavit and exhibit is a condition precedent to the jurisdiction of the Judge to hear the application. I can only dismiss the summons.

Judgment.

Summons dismissed.

Noted Rule 703.

HOBBS v. E. & N. RAILWAY COMPANY.

DRAKE, J.

[In Chambers]

1897.

June 4.

HOBBS v. E. & N. RY. COMPANY

Practice—Officer of Corporation—Examination for discovery—Service.

A Summons, under Rule 703, for the examination for discovery of past and present officers of a body corporate, must be served personally on all past officers. Order made as to present officers, and application adjourned to enable the past officers to be served.

APPLICATION by the plaintiff under Rule 703, for the examination of certain past and present officers of the defendant Company.

A. C. Anderson (McPhillips, Wooton & Barnard), for the application.

A. P. Luxton, contra, objected that the summons had not been served on the past officers of the defendant Company. Argument.

DRAKE, J.: As to present officers of the defendant Company, service on the Company is sufficient, but persons not now in the employ of the Company must be served personally. An order cannot be made against a person who has not been served. The application as to the officers now in the employ of the Company is granted. So much of the summons as applies to the past officers, is adjourned for service on them. Judgment.

Order accordingly.

Noted 6. J. B. C. 1888 cap 82. S. 126

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GRAY v. MCCALLUM

GRAY *ET AL* v. McCALLUM *ET AL.*

Mineral Act, C.S.B.C. 1888, Cap. 82, Secs. 114, 126—Foreman—Estoppel —Partnership.

M was a member of and held a controlling interest in a mining partnership. He was not formally appointed foreman, but appeared to have been permitted to manage its affairs in the matters in question, and appointed one G superintendent, who ordered certain goods from M for the partnership. He also supplied other goods to the partnership, accounts for which were passed at a meeting of the partnership.

Held, per DRAKE, J., affirming the Registrar's certificate made upon taking the accounts under the decree allowing the items to M, that section 126 of the Act (*a*) does not preclude a mining partnership from contracting liabilities otherwise than upon the order of a duly appointed foreman.

That as to the items passed at meetings of the partnership, it was estopped from disputing its liability.

Upon appeal to the Full Court, MCCREIGHT, J. (Walkem and McColl, J.J. concurring), affirmed DRAKE, J.

APPEAL from a judgment of DRAKE, J., upon the hearing for further consideration and motion by Johnson, a defendant by counter-claim, for directions and to vary the Registrar's certificate granted in favour of McCallum, the plaintiff by counter-claim. The action was originally commenced by John Gray, James Gray and Samuel Gray against McCallum to have certain assignments from them to him of certain shares in a mining partnership known as the "Ophir Bed Rock Flume Company," and certain goods at the Company's mine owned by James Gray, appearing on their face to be absolute, declared to be mortgages. McCallum counter-claimed against the Grays that the assignments were absolute

Statement.

NOTE—(*a*) "126. No such Company shall be liable for any other indebtedness than that contracted by their foreman, or by their agent duly authorized in writing."

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against the Company for moneys paid for stores, etc., on account of and for the benefit of the mine, and against the Grays and E. M. Johnson, who had been secretary of and was a shareholder in the partnership, for damages for conspiracy. On the 17th of April, 1889, McCallum became the owner of a majority of shares in the partnership, and on the same day appointed James Gray superintendent and director of works, to serve and work for the partnership for the season of 1889, and Gray was notified by Mr. Johnson as secretary of the Company. Some of the payments for stores, etc., were passed and accepted at a meeting of the partnership, and assessments levied therefor. At the trial of the action on the 18th of December, 1891, the issue as to the assignments was found in favour of McCallum, and that as to conspiracy in favour of the Grays and E. M. Johnson, and by the order made at the trial it was ordered that an account should be taken between McCallum and the "Ophir Bed Rock Flume Company," of the advances and payments made by McCallum on behalf of the Company for working the mine (without disturbing any settled accounts) and that McCallum have judgment against the Company for the amount found to be due, less any amount that might be due from him as a member of the Company. Further consideration and costs were reserved. On the 26th of July, 1893, DRAKE, J., on motion to him, declared that the stores were purchased for the partnership, and directed the Registrar in taking the accounts to allow the payments accordingly, and the order was confirmed on appeal by the Divisional Court on the 27th of January, 1894, and by the Full Court on the 10th of May, 1895. The grounds of these appeals were, *inter alia*, that McCallum was not authorized to purchase the stores and that he was not foreman of the Company nor the agent thereof, duly authorized in writing. The accounts were taken before the Registrar, and on the 24th of July, 1895, he found that there was due to McCallum the sum of $6,350.66. The partnership was not represented on the

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taking of accounts, but E. M. Johnson as a shareholder of the partnership attended and opposed the allowance of the accounts. A summons was taken out by Johnson to vary the Registrar's certificate by disallowing the amount certified to be due to McCallum, and that such consequential directions might be given and corrections and alterations made in the certificate as might be necessary, and this summons was adjourned to come on at the same time as the hearing for further consideration. Both parties set the action down for hearing on further consideration, and it came on, together with the summons to vary the Registrar's certificate, before DRAKE, J., on the 15th and 16th of November, 1895.

L. P. Duff, for A. E. McCallum, plaintiff by counter-claim.

A. P. Luxton, for E. M. Johnson, one of the defendants by counter-claim, submitted that all items allowed by the Registrar's certificate should be disallowed on the ground that McCallum was not the foreman or agent of the Company duly authorized in writing, referring to sections 114 and 126 of the Mineral Act, C.S.B.C. 1888, Cap. 82, and in any event as not being properly vouched, no receipts being produced other than cheques endorsed by the payees thereof.

Argument.

L. P. Duff, contra: Whether or not McCallum was as a matter of fact the foreman properly authorized, the Company has approved the accounts and is estopped. It is clear, however, from the whole proceedings, that McCallum was to all intents and purposes holding the controlling interest in the mine. As between Johnson and Mr. McCallum, Johnson is estopped by his actions and representations from disputing the allowance to McCallum.

Cur. adv. vult.

February 12, 1896.

Judgment of DRAKE, J.

DRAKE, J. (after stating the facts).: As to the objection

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that cheques, endorsed by the payees and supported by the oath of the drawer as to payment are not sufficient vouchers of payment, I overrule it at once. The Registrar considered the evidence in support of the payments and was satisfied, and I shall not interfere with his findings on this account. (The learned Judge after discussing the evidence, proceeded):

The Mineral Act, C.S.B.C. 1888, Cap. 82, Sec. 114, says a majority of the co-partners may decide the manner of working the claim, and may choose a foreman or local manager, and a majority, by section 115, is to be ascertained by the number of full interests voted upon and not by the number of partners. The effect of these two sections is to give a control to any single person who holds a majority of full interests. This majority was held by McCallum, and he exercised this control when he appointed Gray as superintendent, confirmed by the secretary of the Company, but Mr. *Luxton* contends that unless there is a foreman *eo nomine* appointed no liability can attach to the other members of the Company under section 126.

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I do not think there is any substantial ground for this contention. For the liabilities incurred in the year 1889, the Company are liable under Gray's appointment and also by acceptance of the accounts. The other indebtedness was incurred by Mr. McCallum, acting as secretary and controlling owner, and section 126 has reference to liabilities contracted by some person who had no authority to act for the Company. It does not preclude the Company from contracting liabilities as a company. If, for instance, the Company required a pump, and gave an order for one through its secretary, they cannot repudiate liability because the order was not given by the foreman. The object of the Act is to enable a person at the mine to engage labour and purchase supplies, and to protect persons with whom such contracts are made, and also to protect the Company against unauthorized persons pledging their credit. If the contention of Mr. *Luxton* could be sustained in the broad way he stated

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it, no company could carry on business, as no liability could be incurred or payments made except by the foreman, which I am clear is not the intention or the object of the clauses referred to. I therefore find that there is due from the Company to McCallum, $6,469.89. I further find that McCallum is entitled, as against Johnson, to his costs subsequent to the decree, to be taxed, except the costs of preparing and filing the account and affidavit in support, which are to be paid by the Company, and to judgment against the Company for $6,469.89, with interest at six per cent. on the sum of $5,322.52 from 23rd July, 1890, and interest on $1,147.37, the remainder of the sum, from December, 1891. I fix these dates in order to avoid further reference, which would involve a heavy expense, judging from past proceedings.

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Order accordingly.

Statement.

From this judgment the defendant Johnson appealed to the Full Court, and the appeal was argued before MCCREIGHT, WALKEM and MCCOLL, JJ., on the 11th of May, 1897.

A. P. Luxton, for the appeal.

L. P. Duff, contra.

Cur. adv. vult.

June 12, 1897.

Judgment of MCCREIGHT, J.

MCCREIGHT, J. (after stating the facts): It is unfortunate that the note of what took place in the Divisional Court on the 27th of January, 1894, was not found until the conclusion of the argument in the Full Court. The fact that the order of Mr. Justice DRAKE was affirmed by the Divisional Court appears in the appeal book, but it does not appear that it was affirmed by four Judges, and the question was argued before us as if the interlocutory order was not binding on the Full Court.

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My note as to the decision of the Court is: "Mr. *Luxton* argued, as I understood him, that the majority could not bind the minority at a meeting of the shareholders as regards these stores valued at $2,500.00, although such majority twice ratified the transaction, once at a meeting held on the 21st June, 1890, and again on the 23rd July, 1890, where the item of $2,500.00 was included in an account which amounted to $6,180.87, and which was ratified by directing an assessment for payment for the same. It may be proper to add that the distinct power of the majority to bind the minority, given by the Mineral Act of 1884, Sec. 114, p. 695 of C.S.B.C. 1888, is emphasized by section 115, which says that: "The result of the votes given shall be determined by the number of the full interests voted upon and not by the number of co-partners voting at such meeting," etc. Mr. McCallum at this time held at least sixteen of the thirty interests in the partnership, and so had a controlling interest. But I think Mr. *Luxton* cannot fairly be considered as arguing against what seems to me to be the very plain language and meaning of section 114, as well as of partnership law, but only to have meant that the purchase of this supply of stores for the partnership was illegal, and so much so that it could not be ratified as if foreign to the objects of the partnership; but it was admitted that the stores were all mining stores, and nothing else."

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It may be that if McCallum had started a line of stage coaches, or done some other imprudent act of that nature, Johnson would have been justified in urging the rights of the dissenting minority, and vigorously contesting the acts of McCallum. Even that would involve questions rather of joint stock company than of partnership law, and section 114 contemplates a partnership rather than a joint stock company, framed, as I will suppose, under the Joint Stock Companies' Act of 1862. See *Ashbury Railway Company* v. *Riche*, L.R. 7 H.L. 653, where it was held that the objects of the Company as stated in the memorandum of association

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must not be departed from. I think for every reason we are bound by what the Divisional Court has done, and that the decision of DRAKE, J., as to the item of $2,500.00 must be affirmed. However, another point was argued and much insisted upon, namely: that under section 126 of the same Act, McCallum was debarred from enforcing this claim. That section reads as follows: (Quoting). There seem to be many answers to this contention. In his evidence McCallum says: "I consider that on the 17th day of April, 1889, I was the foreman of the Ophir Gold Mining Company, Limited, by the surrender of James Gray's foremanship, by the acquiescence of the shareholders, and by the secretary of the Company informing me that I represented the Company, and could levy assessments for all necessary expenditures. Also, that James Gray having surrendered his foremanship . . . I remember Mr. Johnson saying to me 'you are now the Company, you have nothing to do but run the mine, and to levy your assessments on us for the necessary expenditures, just as the Grays did before.'" And as to this statement it was said during the argument that there was no cross-examination on it. But there seems to be a direct answer on a broader ground, and it may be well to mention it. In section 126 and the other sections of Part VII., the term "Company" is used indiscriminately with that of "partnership," or as having the same meaning. The only exception is section 130, which refers to duly incorporated companies. The Ophir Company is only registered under section 121. Now only a stranger could bring an action against a partnership, that is, claim "indebtedness" against it, and that before the Judicature Act only in a Court of law. A partner as McCallum was, could, on a dissolution after the debts of the concern were paid, obtain an account and reimbursement for his advances, and contribution and repayment to the extent that his advances had exceeded those of the other partners, but it is evident that in doing so he would avail

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himself of section 114, or rather the general law of partnership, and certainly not invoke section 126, which was inserted, as the learned trial Judge says, to protect the Company against unauthorized persons pledging their credit. It had nothing to do with the internal management. It is indeed a startling contention that a member of a mining partnership, holding as in this case a controlling interest in the mine, cannot make advances prudently, even with the full consent of the majority, unless the foreman or agent duly authorized in writing, first sanctions the proceeding, and that without such antecedent sanction no ratification can be of any use; a doctrine which is regardless of the maxim *omnis ratihabitio retro-trahitur et mandato priori æquiparatur*. We were not told what was to be done where there was no foreman or agent duly authorized in writing. In truth McCallum was really foreman, for Gray was to serve him in such capacity as McCallum "should by himself or his agents direct." Further I may add that there seems to be a clear case of estoppel as against E. M. Johnson, the only person really contesting the case, for the Ophir Bed Rock Flume Company did not attend or oppose the accounts.

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The next point argued by Mr. *Luxton* was as to the sum of $1,188.00, "James Gray's wages, due by Company for 1889." This charge of McCallum was ratified by the Company in recognizing the account amounting to $6,180.87. McCallum's account of this is plain. He says the sum of $1,188.00 was not actually paid, but that sum represents the amount of James Gray's wages for the year 1889, which were hypothecated to him, McCallum, by Gray, under indenture of 17th April, 1889. This instrument might have been more simply drawn as an assignment of Gray's future wages to McCallum in trust really for his benefit. See *Brice* v. *Bannister*, 3 Q.B.D. 569; *Buck* v. *Robson*, *Ibid.* at p. 691. The important thing is that it, or the issue of which it consists, were ratified by the Company after audit. Indeed it was stated during argument that the amount was not

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objected to, but that a separate action should have been brought for it instead of including it in the accounts, but the answer to that is that if the action could have been maintained for it, that shews it was correctly included in the account, there being no doubt as to its relevancy.

The next point is as to interest, as found by the learned trial Judge, and I think McCallum is entitled to such interest, subject as to the sum of $813.00, balance of the sum of $1,188.00, after deducting $375.00 as previously mentioned, and which I shall deal with presently. Now, in Lindley on Partnership, p. 391, 6th Ed., it is said that: "Subject to any agreement between the partners interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he has agreed to subscribe," and the author refers to what is said by KNIGHT-BRUCE, and TURNER, L.JJ., in *Ex parte Chippendale*, 4 DeG. M. and G. 36, which binds us as the Judicial Committee points out in *Trimble* v. *Hill*, 5 App. Cas. 345. No doubt the author refers to *Stevens* v. *Cook*, 5 Jur. N.S. 1415, as an authority to the contrary, but perusal of that case, with all respect, seems to shew the party claiming interest was bound by his contract of partnership to make the advances, and so was not entitled to charge interest as if he had made advances independently of any antecedent contract. Here McCallum paid money from time to time for the benefit of the partnership, beyond the amount of capital which he had agreed to subscribe, or rather he agreed simply to buy shares, pay for them and no more, as I understand the case. If I am mistaken on this point the matter had better be spoken to on settling the minutes, as I think will have to be done in dealing with the subject of interest on the sum of $813.00, which, together with the sum of $375.00, makes up the before mentioned sum of $1,188.00. I confess I do not see how McCallum can charge interest on this sum of $813.00 in the character of advances made by him to the Company, within the rule

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laid down by Lindley. No doubt the whole $1,188.00 was his by assignment from James Gray, and as such recognized by the Company, but I do not see that he advanced more of this for or to the Company than the sum of $375.00, which he paid by different sums to James Gray. The whole sum of $1,188.00 the wages of James Gray for the year 1889, was assigned to McCallum "to be devoted as far as can be to defraying any assessment calls and expense of the said Arthur E. McCallum in respect of any interest he may now or hereafter hold in the said Company during the season of 1889." I should gather from this provision, coupled with what McCallum says, that he did not advance to the Company or on their behalf, (for of course it is unimportant what he advanced on his own individual account) more than the sum of $375.00 out of this $1,188.00, and if so he should not charge interest on the balance of $813.00 as advanced to or for the Company. This question may be spoken to on settling the minutes.

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With respect to the costs as awarded by the learned trial Judge by the decree of the 12th February, 1896, I think he is right in directing that E. M. Johnson should pay the costs of McCallum, subsequent to the decree of 18th December, 1891, except the costs of preparing and filing the accounts of McCallum. The learned Judge says that the Ophir Bed Rock Flume Company did not attend or oppose the accounts, and Mr. E. M. Johnson, a shareholder in the said mine, did, and he, Mr. Johnson, moved that the Registrar's certificate as to the accounts referred to him by the Court be disallowed. He seems to have been the cause of all the costs subsequent to the decree of December, 1891, and as Sir GEORGE JESSEL has said that one principle upon which costs are given is that he who causes expense should pay it, I do not see that the learned Judge could make a more correct order as to costs than what he has done.

It is much to be regretted that this litigation has been protracted for many years, as there was no point of difficulty

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to warrant the repeated appeals, and after having spent much time on the case, I cannot say I have observed any difficult point of law in it. The costs of the appeal must of course follow the event.

WALKEM and MCCOLL, JJ., concurred.

Appeal dismissed.

Noted R. C. V. 90 cap. 12

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Interpretation of deeds—Voluntary conveyance—Trust deed for benefit of creditors—Fradulent preference—Setting aside deeds.

Under a trust deed assigning the assets of a partnership business upon trust to sell the same and divided the proceeds "into and among all the creditors of the parties of the first part" (viz., the assignors) without any words of distribution, such as "or either of them" being added.

Held, on appeal to the Full Court, by DAVIE, C.J., and MCCREIGHT, J., MCCOLL, J., not dissenting, overruling DRAKE, J., that the deed provided only for the payment of the joint creditors, and not the separate creditors of the partners, and, in the absence of any satisfactory arrangement being agreed upon, the deed must be set aside on the ground that it constituted a preference.

When a voluntary conveyance has the effect of defeating creditors it will be set aside, and it is not necessary to adduce evidence of fraud; the burden lies on the person executing the deed to shew cause why it should not be set aside.

APPEAL by the defendants from a judgment of DRAKE, J., at the trial. The facts of the case appear sufficiently from the judgment of DRAKE, J.

Statement.

H. F. Clinton, for the plaintiffs, cited *Mills* v. *Kerr*, 7 O.A.R. 769.

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R. W. Harris, for the defendants, cited : *Re Johnson*, 20 Ch. D. 389 ; *Copis* v. *Middleton*, 2 Madd. 410 ; *Davis* v. *Wickson*, 1 Ont. 369–374; *Cascaden* v. *McIntosh*, 2 B.C. 268, Partnership Act, 1894, Sec. 23, Sub-Sec. 1.

DRAKE, J : Edward A. Curtis and James A. Newsom carried on business as Curtis & Newsom and became indebted to the plaintiffs in a considerable sum of money. On 20th August, 1894, Edward A. Curtis, on the ground of ill health, transferred his share in the business to his wife, Annie A. Curtis, and the business was continued under the old name of Curtis & Newsom. No notice of any change in the firm was communicated to the plaintiffs or advertised, but under the Partnership Act the change was registered in the County Court. On the 27th of February, 1895, the firm assigned for the benefit of creditors, having apparently been in insolvent circumstances for a considerable period, in fact it is doubtful if it was solvent when E. A. Curtis went out.

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The assignment was made to W. L. Newsom, and some meetings of creditors were held at which James A. Cunningham, the liquidator of the plaintiff Company, was present. He there represented the plaintiffs in respect of a debt of $20.00 due by the new firm to the plaintiffs, but the creditors refused to recognize the plaintiffs' claim for the larger sum due by the old firm. The result was that an action was brought, and on the 15th January, 1896, judgment was recovered for $3,947.07 against J. A. Newsom and Curtis & Newsom ; Curtis was out of the jurisdiction and was not served.

From the evidence of the assignee it is clear that the change in the firm of Curtis & Newsom was more nominal than real, for no change was made in the books or in the accounts, and old accounts were paid out of the business and new debts incurred, and the whole business went on without the general body of creditors knowing of the change.

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The deed of 20th August, 1894, is made between E. A. Curtis and A. A. Curtis, his wife, and recites that E. A. Curtis is desirous of retiring from the firm of Curtis & Newsom and has arranged with J. A. Newsom to transfer his interest in the business to A. A. Curtis, and that she should become a partner upon the same terms and conditions as theretofore existed between E. A. Curtis and J. A. Newsom, and in consideration of natural love and affection and $1.00, E. A. Curtis assigned his interest in the said business and book debts to Annie A. Curtis, who thereby covenanted to indemnify the said E. A. Curtis from and against all debts and liabilities of the said firm. The deed of 27th February, 1895, is made between A. A. Curtis, wife of E. A. Curtis, and Adam Newsom, carrying on business under the style or firm of Curtis & Newsom, of the first part, William L. Newsom, trustee, of the second part, and the several persons, firms and corporations who are the creditors of the parties of the first part, reciting that "the parties of the first part are indebted to the parties of the third part, and are desirous of having their estate equitably divided and distributed among their creditors." It witnesses that the parties of the first part did thereby grant and assign all their and each of their personal estate credits and effects unto the said trustee upon trust, after providing for the payment of the costs which might be incurred in or about the execution of the trusts therein contained, to pay and divide a clear residue of the said monies into and among all the creditors of the said parties of the first part, rateably and proportionately, and without preference or priority, according to the amounts of their respective claims.

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Mrs. Curtis never accepted the liability of this debt, although apparently other debts were paid out of the earnings of the new firm. The plaintiffs contend that the assignment by Curtis to his wife of his interest in the partnership is void under the Statute of Elizabeth. The

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chief question which has to be considered in all cases of this nature is the *bona fides* of the transaction. I see nothing in the evidence to impeach the deed on this head. Mr. Curtis was ordered abroad for his health, and, instead of continuing the business in his own name, he retired in favour of his wife, and there is no evidence to shew that the firm was insolvent at this time. Mr. Newsom, the assignee, thinks that they could not pay $1.00 for $1.00, but he says he could not say without knowing what stock was on hand, and *Ex parte Mayou*, 4 DeG. J. & S., 664, which was relied on in support of the contention of the plaintiffs, was decided on the ground of the insolvency of the firm at the date of the retirement of one partner.

This deed, therefore, being valid, what is the plaintiffs' position? They are relegated from a claim against the firm assets to that of creditors of the individual members of the late firm. On this point is the deed of assignment such a deed as is contemplated by the Stat. B.C. 1894, Cap. 9, Sec. 1. By that section every deed, whereby any property shall be expressed to be conveyed or assigned to a trustee for the purpose of satisfying, rateably and without preference or priority, all the creditors of such person, their just debts shall be deemed a good deed.

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Does the language of this deed cover the separate creditors of the assigning parties? The words used are to divide the residue "into and among all the creditors of the parties of the first part." The parties of the first part are Annie Amelia Curtis and James Adam Newsom, carrying on business under the style and firm of Curtis & Newsom.

In the case of *Mills* v. *Kerr*, 7 O.A.R. 769, a somewhat similar deed was held void as having a trust for the joint creditors only. The deed in *Mills* v. *Kerr* was made between Goold & Wilson, of the first part, not as here, between the individual partners carrying on a partnership business. It purported to assign the partnership assets only. Here it appears to me that in the true construction of the deed

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the joint as well as the separate creditors are entitled to participate in the realized assets.

The defendants, by their amended claim, now admit that the deed does provide for the separate creditors, yet the action was brought because they refused to recognize any such claim. There will be judgment for the plaintiffs with costs; the plaintiffs will have to pay the costs of the issue as to the invalidity of the deed of August, 1894, such costs to be set off against the costs of the cause.

From this judgment the defendants appealed, and the appeal was heard before DAVIE, C.J., MCCREIGHT and MCCOLL, JJ., on the 2nd of February, 1897.

R. W. Harris for the defendants, appellants, cited *Robertson* v. *Holland*, 16 Ont. 532.

H. F. Clinton for the plaintiffs, respondents, contended that the parties had no property outside of the partnership business; and on the question whether a conveyance to the wife for natural love and affection came within the Statute 13 Eliz., Cap. 5, where the action was defended by the assignees, cited *Freeman* v. *Pope*, L.R. 5 Ch. 539.

Argument.

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MCCREIGHT, J.: In this case I cannot agree with the view taken by the learned trial Judge, that the deed of assignment of February 27th, 1895, between A. A. Curtis, wife of E. A. Curtis, and James A. Newsom, carrying on business under the style or firm of Curtis & Newsom, of the first part; and W. Lavens Newsom as trustee, of the second part; and the creditors of the said A. A. Curtis and J. A. Newsom, of the third part, can be supported on the ground that,

according to its true construction, the separate as well as the joint creditors are entitled to participate in the assets realized by W. Lavens Newsom under the above deed.

If such was the true construction, the liquidator, James Cunningham, could prove under the deed against J. A. Newsom as a separate debtor by judgment against him, though the debt was originally joint, and would receive payment rateably or proportionately without preference, and along with all the other creditors in respect of the judgment of the hardware company, at least it would appear to be so at first sight, but there would be difficulty even then in upholding the deed, as I shall shew presently.

It is true that the deed purports to assign "all their and each of their personal estates, credits and effects which may be seized and sold under execution, and all their real estate," and that the trustees "are to pay and divide the residue, after making necessary deductions, among all the creditors of the said parties of the first part rateably and proportionately and without preference or priority, according to the amounts of their respective claims," but I do not think the instrument extends to separate creditors. There is throughout an absence of the necessary distributive words. For instance, the words: "The several persons, firms and corporations, who are creditors of the said parties of the first part, of the third part," do not contain the words "or either of them," or words having the same effect. Perusal of the deed shews that in several instances we also find the omission of the same or similar words; for instance, we have the words, "among all the creditors of the said parties of the first part," with an omission of the words, "or either of." Again, after the words, "debt or claim of any of the creditors of the said parties of the first part," there is the same omission of the words, "or of either of them," and further on we find the words, the trustees, etc., "may appear and defend for the said parties of the first part," omitting the words, "or either of them."

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Lastly, the parties of the first part covenant with the trustee and use no distributive word in binding themselves—the covenant is only joint. But little importance attaches to the assignment by A. A. Curtis and J. A. Newsom of their separate estate as W. L. Newsom swears they had no separate estate; even if otherwise, the defect would not be remedied.

Leake on Contracts, 3rd Ed., 1892, at p. 378, discussing the subject of the construction of contracts as to joint and several liabilities, and the cases there cited, seem to be to the above effect. But besides the above reason against admitting Cunningham as liquidator, and a separate creditor accordingly of J. A. Newsom, to prove under the deed of February, 1895, another serious objection arises from the rule that a separate creditor cannot be admitted to prove against partnership assets until the joint creditors are paid in full, and the fund in court is only $900.00, and more than $1,500.00 is due to the credit of the new firm alone: *Lodge* v. *Prichard*, 1 DeG. J. & S., at p. 615, per TURNER, L.J., *Ex parte Elton*, 3 Ves. Jr. 239, 240.

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In *Badenach* v. *Slater*, 8 O.A.R. 402, at p. 408, the law is discussed as to the framing of deeds under the Ontario Act, where partners make a deed of composition as to joint and separate creditors, and it is shewn that the only legal way of framing the deed is by adopting the rule as it is in bankruptcy, and likewise adopted in Courts of Equity in administering estates, that while the joint creditors are deprived of recourse against the separate estate of either partner until the separate creditors of that partner shall have been paid in full, the separate creditors must be confined to the separate estates respectively, unless the joint estate is more than enough to pay the joint debts. See also what is said in *Ewart* v. *Stuart*, 12 O.A.R. 99, at the beginning of page 106. The substance of the passage is that the creditors of the separate debtor can have no greater right against the partnership assets than the debtor has, and, as he

cannot touch such assets until the partnership debts are paid, neither can his separate creditors. In other words, if the deed means that the separate creditors can rank against the joint estate, it would be held bad as against the joint creditors, where as here, that fund is insufficient to pay the joint creditors, and the position of the Hardware Company as separate creditors of J. A. Newsom would not really be improved.

Accordingly the Hardware Company, as separate credi. tors, would have no recourse against the $900.00 in Court, and recourse against E. A. Curtis and J. A. Newsom is, of course, of no account whilst the deeds of August 20, 1894, and 27th February, 1895, stand in the way, and the question whether they are to be set aside must be considered. Now, in *Freeman* v. *Pope*, L.R. 5 Ch. App., see pp. 540 and 544, Lord HATHERLEY and Lord Justice GIFFARD evidently consider that, in order to set aside a deed such as that of the 20th of August, 1894, proof is not required of an actual and express intent to defeat creditors. In the later case of *Ex parte Mercer*, 17 Q.B.D., pp. 298, 300, 301, the Lord Justices appear disposed not to put quite so strict a construction on the Statute of Elizabeth as was applied in *Freeman* v. *Pope* but even there at page 298 Lord ESHER says : " No doubt in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done ; I do not use the words 'necessary result' metaphysically, but in their ordinary business sense, and, of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts ; but if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue

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in fact." There the Court of Appeal was satisfied from the evidence given by the defendant that he had no fraudulent intention whatever.

Here James A. Newsom is not called as a witness, nor was his evidence taken by commission. The deed of August, 1894, says that "the said E. A. Curtis, etc., has arranged with the said A. A. Curtis and the said James A. Newsom that the said E. A. Curtis shall transfer his interest in the said business and in the said assets, etc., to the said A. A. Curtis, etc." Therefore J. A. Newsom knew all the circumstances connected with that deed, and in fact it was arranged with him and of course he must have been, and was, the important mover in the making of the deed of 27th February, 1895, which could have had no effect but for the deed of August, 1894, and necessarily presupposes its validity. The two deeds, although executed at an interval of some months, cannot be separated when we come to look at the whole transaction, which, briefly stated, amounts to this, that the creditors of E. A. Curtis and J. A. Newsom are forced out, and the subsequent creditors of A. A. Curtis and J. A. Newsom occupy the place of those which have been so forced out as regards the distribution of partnership assets.

Mrs. A. A. Curtis in all probability did not understand the transaction in that light, or perhaps at all, but neither she nor J. A. Newsom were examined at the trial, and as a burden was cast upon them, and *Freeman* v. *Pope* seems to go even further, they should have been examined to satisfy that burden, and, if possible, prove circumstances such as were held in *Ex parte Mercer* to rebut the inference that the deed, or, in this instance, rather the two deeds, fell within the purview of the Statute of Elizabeth.

The learned trial Judge says in his judgment that he sees nothing in the evidence to impeach the *bona fides* of the deed of August, 1894, but the law, in the cases to which I have referred, shews that the burden of proof is cast not

upon those who seek to impeach it, but on the parties who seek to maintain it. It was made without any valuable consideration, and a power of attorney could have answered all its legitimate objects. Again, the learned judge says: "There is no evidence to shew that the firm was insolvent"; but W. L. Newsom's evidence was read, and he says: "I do not think that, allowing the Cunningham claim, the firm of Curtis & Newsom could have paid dollar for dollar," and he adds, "that is still my opinion." I have no difficulty in saying a firm is insolvent which can only meet claims amounting to $5,000.00 or $6,000.00 with assets amounting to $900.00. It appears there was no stock list, and I think that does not improve matters. A mercantile man, as J. Adams Newsom was, must be assumed to have known that the deed of August, 1894, placed the creditors at that date in serious jeopardy, which was completed by his execution of the deed of February, 1895.

Judgment of McCREIGHT, J.

I think both deeds must be set aside, and must add that if allowed to stand a practice might be introduced highly prejudicial to the character for fair dealing of the mercantile community. I felt more difficulty in setting aside the deeds owing to the delay between the execution of the deed of February, 1895, and the present time, but fortunately the learned Chief Justice has called my attention to a provision in the Stat. B.C 1890, Cap. 12, Sec. 5, which reads as follows: "And also with the consent of a majority in number, representing three-fourths in value of the creditors of the debtor, expunge from any such deed any condition or stipulation therein contained, or with the like consent, alter or vary any trust in or by the deed declared or created."

Now, if such majority of the creditors will consent that the creditors anterior to August, 1894, may come in *pari passu* with those who can claim under the deed of February, 1895 (that is, of course, joint creditors in both cases), the creditors will be placed in the same position as if the deeds

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of August, 1894, and the other deed had not been executed, and a just distribution will be made of the assets irrespectively of whether claims originated before or after August, 1894. The judgment of PATTERSON, J.A., in *Badenach* v. *Slater*, 8 O.A.R. pp. 405, 408 and 409, and *Ewart* v. *Stuart*, 12 O.A.R., at p. 106, before referred to, will render it easy to frame a provision to the above effect, varying any trust in the deed of February, 1895, which does not place all the joint creditors on an equal footing, and expunging from such deed any provisions which might be unjust in the same point of view. If, unfortunately, the required majority of creditors will not consent, I see no course but to set aside both deeds, and the law must take its course by execution, as if no such deeds had been executed. I think a period of two months should be allowed for the creditors of A. A. Curtis and J. A. Newsom to give such consent. A point seems to have been made of estoppel through the Hardware Company taking such trifling benefit under the deed of February, 1895, but this should have been pleaded in the action of *Cunningham, Liquidator* v. *Curtis & Newsom*. See *Rossi* v. *Bayley*, L.R. 3 Q.B. 621. Again Jas. Cunningham dissented from the deed being carried out. I may add that the learned Trial Judge seems to have misdirected himself in applying the Stat. of Eliz., and the rule as to reluctance to the Court of Appeal to set aside a finding of fact of the judge of first instance does not apply. I think the plaintiffs are entitled to their costs, both of appeal and in the Court below. I do not understand the defendants to admit that the deed of February, 1895, provides for separate creditors; even if it did, an admission of what seems to be bad law would be of no importance. Mr. Justice MCCOLL is not satisfied with this judgment, but does not dissent from it.

Judgment of McCREIGHT, J.

DAVIE, C.J.:—I concur.

MCCOLL, J.:—*Non dissentiente.*

Judgment accordingly.

RICHARDS v. B.C. GOLDFIELDS (FOREIGN.)

DAVIE, C.J.

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RICHARDS v. B.C. GOLDFIELDS CO

Practice—Evidence—Discovery—Company—Estoppel.

The registered agent in B.C. of the defendant foreign Corporation, advertised his clerk B., and B. also advertised himself, as local manager of the Company. The plaintiff made an application for an affidavit of documents by B., which the Company resisted upon the grounds that it had never authorized B. to act as its local manager, and that in fact his duties were merely those of clerk to the local manager.

Held, by DAVIE, C.J., granting the order, that for the purposes of the application B. must be treated as local manager of the Company.

SUMMONS by the plaintiff for an affidavit of documents by G. E. G. Brown, the Local Manager of the defendant Company. The Company's registered agent in British Columbia, who had also been their Western manager there, inserted an advertisement in a newspaper published at Victoria, mentioning Mr. Brown, who was his clerk, as the Local Manager of the Company, and Mr. Brown afterwards published advertisements purporting to act as "Local Manager." The Company opposed the application and filed an affidavit by Mr. Brown, stating that he had not at any time received any authority from the Company or their Western manager to act as Local Manager, and that he did not at any time act in any other capacity than that of a clerk in the office of the Western manager. Statement.

J. P. Walls, for the application.

A. L. Belyea, contra.

DAVIE, C.J.: The Company by their registered agent have held out Mr. Brown as their Local Manager. The order should go for an affidavit of documents which are or have been in his possession as representing the Company. Judgment.

Order made.

Noted v. 74.

DRAKE, J.

[In Chambers].

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June 19.

ZWEIG v. MORRISSEY, *ET AL.*

Practice—Rule 74—Taking Final Judgment against one partner—Afterwards proceeding against others.

A plaintiff, who has obtained final judgment against one of two defendants sued upon a joint liability, may afterwards, under Rule 74, proceed to judgment against the other defendants.

ZWEIG v. MORRISSEY

SUMMONS by the defendant to set aside the judgment signed against him on the ground set out in the judgment.

Statement. The application was argued before DRAKE, J.

A. S. Potts, (Drake, Jackson & Helmcken) for the application.

Geo. Jay Jr., contra.

DRAKE, J.: In this case the plaintiff sues the two defendants by specially endorsed writ, for $205.62 for goods sold and delivered. Judgment was entered against John Leahy, on 9th June, and against Michael Morrissey on the following day. Morrissey now applies to set aside the judgment on several grounds: (1) That the statement of claim discloses no cause of action against him. (2) That judgment having been signed against John Leahy, the cause of action against Morrissey is extinguished. (3) That Morrissey has

Judgment. a good defence to the action on the merits. (4) That the judgment is irregular because of a variance between the parties named in the writ and statement of claim.

These defendants are, in the statement of claim, alleged to be partners. It is contended that *Kendall* v. *Hamilton*, 4 App. Cas. 504, governs this case. In that case judgment was recovered in an action against two partners, and afterwards the plaintiff, by a second action, tried to obtain judgment against a third person whom he had subsequently discovered was a partner with the others. This was denied him on the

ground that the simple contract debt had been merged into a specialty. Here the defendants are sued for a liquidated demand, and the case appears to me to fall within Rule 74, which authorizes a plaintiff to enter final judgment against a defendant who has not appeared without prejudice to his right to proceed against the defendant who has appeared. Neither of the defendants appeared, but the plaintiff entered up separate judgments as speedily as the rules allowed. I see no reason to doubt that such judgments are legal, and that *Kendall* v. *Hamilton* does not apply. In *Weall* v. *James et al.* 68 L.T. 515, 5 R. 157, the plaintiff recovered a judgment against one joint debtor, and the other obtained leave to defend, and on the trial the plaintiff succeeded and had judgment entered for him. The defendant appealed, but it was held that such a judgement was valid and the plaintiff was entitled to recover the unpaid balance of the debt from the defendant. The plaintiff cannot recover from these defendants more than is actually due.

Judgment.

The defendant further asks for leave to defend on the ground of a mistake in not entering appearance in time. In order to set aside a valid judgment, there ought to be some merits shewn. Morrissey shews none. He admits he was carrying on business with Leahy, and does not deny either the delivery of the goods or the value, he says that they were delivered to the firm, of which he is a member. If the firm as a firm do not pay their liabilities, the members of the firm must. The summons will be dismissed, with costs to be plaintiff's costs in cause.

Application dismissed.

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Criminal Law—Statute creating offence—Exemption from—Proviso or Exception—Negativing—Game Protection Act, 1895—Operation as to imported skins.

The existence of an exception nominated in the description of an offence created by statute, must be negatived in order to maintain the charge, but if a statute creates an offence in general with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso:

The generality of the prohibition contained in the Statute (Sec. 7) against purchasers having in possession with intent to export, causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province.

Statement. CASE stated, the subject fully appearing from the judgment.

G. E. Powell, for the Crown.

F. B. Gregory, for the accused.

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WALKEM, J.: This is an appeal, brought in the form of a case stated at the instance of the prosecutor, from a dismissal by the police magistrate of Victoria, of a charge laid against the accused for having 777 deer skins in his possession for export purposes, contrary to Sec. 7 of the "Game Protection Act, 1895," as amended by Sec. 3 of the Game Protection Amendment Act, 1896. The section reads as follows: "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 the limits of this Province, any, or any portions, of the animals or birds mentioned in this Act," (deer are so mentioned) "in their raw state: Provided that it shall be lawful for any person having a license under section 20 of this Act to export, or cause to be exported or

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carried out of the Province, the heads, horns and skins of such animals mentioned in section 21 of this Act, as shall have been legally killed by such license-holder: Provided that the provisions of this section shall not apply to bear or beaver, marten or land otter."

The license mentioned in section 20 is a license to the holder, during the shooting season for which it is issued, to kill a limited number of deer and other animals that are specified in Sec. 21. By Sec. 16, the Act is not to be "construed as prohibiting any resident farmer from killing, at any time, deer that he finds depasturing within his cultivated fields"; and by Sec. 17 its provisions are not to apply to Indians of this Province, or to settlers in the Province, with regard to any game killed for their own immediate use for food only, and for the reasonable necessities of the person killing the same, and his family, and not for the purpose of sale or traffic, or to free miners actually engaged in mining or prospecting, who may kill game for food, provided they are not mining at a camp where boarding houses are maintained; or to the Curator of the Provincial Museum, or his assistants, while collecting specimens for the Museum. At the close of the case for the prosecution, the charge against the accused was dismissed in view of the observations made by the learned Chief Justice in *Reg.* v. *Boscowitz*, 4 B.C. 132, to the effect that it was the duty of the prosecution in such cases to severally negative the exemptions contained in the proviso of Sec. 7, and in Secs. 16 and 17, and also the fact that the hides were those of animals killed beyond the boundaries of the Province, and, therefore, beyond the reach of the Act. The only question referred to the learned Chief Justice in that case was the constitutionality of the Act, hence the observations referred to were merely *obiter dicta*; but as the learned Magistrate based his judgment upon them, I must deal with them.

Judgment.

In *Simpson* v. *Ready*, 12 M. and W., at page 740, Baron

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Alderson observes: There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the Statute, the exception must be negatived. But if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances. For instance, if in the present case Sec. 7 had read thus: "No person, not being an Indian, farmer, settler, free miner, or holder of a license under section 20 hereof, shall at any time purchase or have in his possession with intent to export the same, the whole, or any portion, of any animals or birds mentioned in this Act, in their raw state," the prosecution would have been obliged to negative the exception, or in other words prove that the accused was neither a farmer, Indian, settler, free miner, or license-holder, as the exception would obviously in such a case be part of the description of the offence; but as the exceptions in the Act as it stands, are by way of proviso as in Sec. 7, and as distinct enactment as in Sec. 17, the defence should have pleaded, and proved, that the accused came within one or other of them, if such was the fact. In *Charter* v. *Greame*, 13 Q.B. 227, Lord Denman observed: "The distinction may be between an exception and a proviso; the distance between the enacting part cannot be very important." In *Reg.* v. *Bryan*, 2 Str. 1101, a conviction under Sec. 1 of 9 Geo. II. Cap. 23, for selling liquor without a license, was held to be good without an averment that it was not to be used medically, as that exception was in a separate section by way of proviso, e.g.: "Provided always that this Act shall not extend to physicians, etc." I have taken this reference from *Reg.* v. *Nunn*, 10 P.R. at p. 397.

Judgment.

The language of Sec. 7 is quite clear. Mere possession of deer skins in their raw state with intent to export them, subject to the qualifications mentioned in the Act, constitutes

an offence. Possession, in the present case, for export purposes, having been admitted, it only remained for the prosecution to satisfy the Magistrate that the skins were in their raw state, but although the prosecution gave evidence to that effect, evidence to the contrary which was preferred by the defence was not heard, as the Magistrate considered that, in view of the *dicta* in *Reg.* v. *Boscowitz*, which I have mentioned, no offence had been proved. What is meant by the skin in its "raw" state is a matter to be determined by the Magistrate, for I intend to remit this case to him for a re-hearing. The word "raw" would seem to be used in contradistinction to tanned or dressed.

Again, the learned Chief Justice's opinion to the effect that such skins if obtained from places beyond the Province would not be within the Act, is contrary to the decision of the Court in *Price* v. *Bradley*, 16 Q.B.D. 148. That case was one upon the 11th section of the "Freshwater Fisheries Act, 1878," which in general terms prohibits the sale or exposure of fresh-water fish during the close season. The Act only applies to England, but it was nevertheless held to apply to fish offered for sale in Birmingham, although they had been caught in Ireland. The language of MATTHEW, J., who delivered the judgment, is as follows: "The question is whether this provision is to be construed as applicable only to fish caught in that portion of the United Kingdom to which the Act applies, (namely England). I think not. The words of the section do not of themselves import any such restriction of its applicability, and I can conceive of excellent reasons why it should not be so restricted. A difficult and troublesome inquiry might often be necessary to ascertain whether the fish were caught in England or imported from elsewhere, and this might tend to defeat the object with which the enactment was made. For these reasons I think the conviction must be affirmed."

Judgment.

It seems to have escaped the attention of all parties, both in the Magistrate's Court and in this Court, that the Dominion

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"Customs Tariff Act, 1894," which I have examined, prohibits the export of deer or deer skins, for Sec. 16 says: "The export of deer, wild turkeys, quail, partridge, prairie fowl and woodcock, in the carcase or parts thereof, is hereby declared unlawful and prohibited; and any person exporting or attempting to export any such article shall for each such offence incur a penalty of one hundred dollars, and the article so attempted to be exported shall be forfeited, and may on reasonable cause of suspicion of intention to export, be seized by any officer of the Customs, and, if such intention is proved, shall be dealt with as for breach of the Customs laws; Provided, that this section shall not apply to the export, under such regulations as are made by the Governor in Council, of any carcase or part thereof of any deer raised or bred by any person, company or association of persons upon his or their own lands." Again, by section 43 of Stat. Can. 51 Vic., Cap. 14 (another of the Customs Acts) the onus of proof is shifted, and the accused required to prove his innocence in such a case as the present. What the effect of these sections is upon the provisions of the Game Protection Act which I have been considering, it is not for me to decide, as the question of the constitutionality of the latter Act forms no part of the case stated. I mention the sections as they refer to the alleged offence, and cannot therefore be disregarded, and especially so as it may be held that they override our own legislation in respect to exportation. The case requires to be reheard, and for that purpose is remitted, together with this opinion upon it, to the Police Magistrate. See Criminal Code, Sec. 900. I make no order as to costs.

Case remitted to Magistrate.

SMITH *ET UXOR* v. CITY OF VANCOUVER.

DAVIE, C.J.

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SMITH *v.* CITY OF VANCOUVER

Municipal Corporation—Negligent construction of sidewalk—Misfeasance.

The defendant Corporation constructed a sidewalk and street crossing in such a manner that the defendant, walking upon the sidewalk at night, with reasonable care, failed to step on to the crossing, which was of less width than the sidewalk, but stepped over its outer edge on to the ground, which at that point was at a considerably lower level, thereby sustaining injury.

Held, that the method of construction constituted a misfeasance by the Corporation, and that it was liable in an action for damages.

ACTION to recover damages for an injury sustained through the faulty construction of a road-crossing. The facts sufficiently appear from the head-note and judgment. Statement.

W. J. Bowser and *J. J. Godfrey*, for the plaintiffs.

A. St. G. Hammersley, for the defendant Corporation.

DAVIE, C.J.: The plaintiff, Mary Anne Smith, sustained injuries by stepping from the sidewalk on Westminster Avenue, to the ground below.

The Corporation, in 1891, constructed a sidewalk eight feet wide along Westminster Avenue, as far as its intersection with Tenth Avenue, from which point they constructed a crossing only four feet wide. The crossing was not laid from the centre of the sidewalk, but had a space of two and one-half feet on the side nearest the road, and one and one-half feet on the inside. The two and one-half feet space sloped towards the road, and instead of being filled up an abrupt drop was left of (as the jury find) from twelve to fourteen inches from the end of the sidewalk to the sloping ground. The female plaintiff coming along here at night-time, when, as shewn by the evidence, the electric light was out, stepped off and seriously injured Judgment.

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herself. The jury find that the distance from the sidewalk to the ground was about the same when constructed as at the time of the accident; in other words that the sidewalk was originally constructed with the abrupt termination off which the plaintiff fell; that pedestrians using ordinary precautions might step off at night and be injured, although with the same care in daylight, the place would not be dangerous. In answer to the question whether the sidewalk and crossing were originally constructed in a reasonably safe and proper manner, and with due regard to the safety of travellers, the jury say that they were reasonably safe, but that the approaches should be filled level with the sidewalk. The jury acquit Mrs. Smith of any want of ordinary care, and under the circumstances award her $500.00 damages.

Judgment.

There is here, therefore, no question of failure to repair, but only as to the manner of construction, and the jury having found that the construction was reasonably safe and proper Mr. *Hammersley* argues that the city is entitled to a verdict, as the additional expression of opinion that the approaches should have been filled level with the sidewalk is a mere conclusion of law, and moreover an erroneous one, as *Goldsmith* v. *The City of London*, 16 S.C.R. 231, decides that a municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk. But assuming *Goldsmith* v. *London* to be an authority for this proposition, it hardly fits this case. The Corporation are not blamed here for not having made the sidewalk and the crossing of the same level; on the contrary, as a fact—if I may speak of my own observation at the view—they are of the same level, but what is complained of here is the drop from the sidewalk, not on to the crossing, but on to the ground below. *Goldsmith* v. *London* was the case of a depression of not more than four inches from the sidewalk to the crossing, and the plaintiff in walking from the crossing to the sidewalk, had, as Chief Justice WILSON expresses it,

"stubbed her toe" in stepping from the crossing to the sidewalk, which caused her to fall and injure herself.

A majority of the Queen's Bench Division in Ontario held the Corporation liable, even in that case, and afterwards the Court of Appeal was equally divided on the subject, but the Supreme Court of Canada finally held that a Municipal Corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that the fact of a sidewalk being at an elevation of four inches above the level of the crossing, is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger, sustained by striking her foot against the curbing while attempting to cross the street. Whilst deciding that there was no obligation to construct at the same level, and that an elevation of four inches was not sufficient evidence of negligence, that by no means says that an elevation of twelve to fourteen inches would be permissible, or might not be evidence of very culpable negligence. All the Court decide in that case is that the height of four inches was not sufficient evidence of negligence to leave the case to the jury, and they agree with the minority judgment of WILSON, C.J., in the Court below. As remarked by him, "It becomes a question of degree," and he also says, "I do not say the Corporation should have the sidewalk two or three feet higher on the perpendicular than the crossing, and perhaps an abrupt rise of one foot from the crossing to the sidewalk might be too great for ordinary convenience and safety." On the whole, I think *Goldsmith* v. *London* is rather an authority for the plaintiff, but I do not rely upon it, as the case proceeds upon mere non-feasance which clearly, according to the law of British Columbia, gives no right of action, but the authority when examined is clearly not one for the defendants. *Mr. Hammersley* has further argued in support of his contention, that so much of the answer as alludes to the filling up of the slope should be disregarded; that the

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statement is a mere expression of opinion, at variance with their finding that the sidewalk was constructed in a reasonably safe way. I do not view it in that light. We must read the answers as a whole, and in the light of the evidence viewed in this way, their finding means that the leaving a drop of twelve or fourteen inches, as in this case, was not a reasonable and safe way of leaving the sidewalk. This is the conclusion also which I have arrived at upon the evidence, and this constitutes a direct case of misfeasance against the Council, for which they are liable. If they had not undertaken to construct a sidewalk at all, they would not have been liable for their failure, however much inconvenience the public might have been put to, but having undertaken to build one, they were bound to do it without negligence.

Judgment. I think judgment must be entered in favour of the plaintiffs for the amount of the verdict. I allow two counsel.

Judgment for plaintiffs.

Noted v. 235

COWAN v. MACAULAY.

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Practice—Frivolous action—Dismissing—Pleading—Rule 235—Lis pendens—Action for maliciously fyling and maintaining—Appeal—Setting down—Time—Rule 678—Supreme Court Amendment Act, 1897, Sec. 7, Sub-Sec. 5, Sec. 12, Sub-Sec. 1.

The statement of claim disclosed that the defendant had brought an action to set aside a conveyance to the plaintiff, a married woman, from her husband, of certain lands, as being made for the purpose of defeating a judgment of the defendant against him. That the defendant had issued a certificate of *lis pendens* in that action and registered it against the lands in question, whereby the plaintiff was prevented from making an advantageous sale thereof. That "the defendant, although he was made aware of the circumstances surrounding the transaction in question, and of the loss of profit which he would thereby entail upon the plaintiff, wrongfully and maliciously refused to remove the said *lis pendens*," and that the defendant afterwards discontinued his action.

Upon application by defendant to dismiss the present action as frivolous and vexatious, and an abuse of the process of the Court, and, under Rule 235, as disclosing no reasonable cause of action.

Held, By WALKEM, J., and affirmed by the Full Court (Davie, C.J., McCreight, and Drake, JJ.) that the statement of claim disclosed no reasonable cause of action, and, upon all the facts (which appeared by affidavits fyled for the purpose of defendant's contention that the action was an abuse of the process of the Court) that no truthful amendment could be made to the statement of claim which would disclose a good cause of action.

Held (by the Full Court): That the omission to set down the appea two days before the day for hearing, as prescribed by S.C. Rule 678, is an irregularity only, and should be relieved against under section 12, subsec. 1, and Sec. 7, subsec. 5 of the Supreme Court Amendment Act, 1897 (*a*) *Reg.* v. *Aldous*, 5 B.C. 220, *Tollemache* v. *Hobson*, *ibid*, 223, and *Kinney* v. *Harris*, *ibid*, 229, discussed.

Statement.

APPLICATION by the defendant by summons, under Rule 235 to "dismiss the action with costs upon the ground that

See Note (*a*) next page.

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there is no reasonable cause of action disclosed by the statement of claim, and that the said action is frivolous and vexatious, and an abuse of the process of the Court." The latter branch of the application was directed to the inherent jurisdiction of the Court, and the defendant in support fyled affidavits, and the plaintiff fyled affidavits in answer thereto.

The material allegations in the statement of claim were: "10. The defendant herein recovered a judgment against the said M.H.C. (the plaintiff's husband) for the sum of $1,016.02. 11. The said judgment having remained unpaid the defendant herein commenced an action against the said M.H.C. and this plaintiff, in which the defendant herein claimed that the transfer of the lands, etc., to the plaintiff, was made by the said M.H.C. in fraud of his creditors. 12. Shortly after the commencement of the said action the defendant herein registered a *lis pendens* against the said property." The claim then charged that the defendant herein had delayed proceeding with the action though pressed to do so, and that the plaintiff had obtained an offer for the lands, but that the sale had been prevented by the *lis pendens*. "17. Thereupon the plaintiff applied to the defendant, and informed him of the groundless nature of the action which he had commenced against her, and requested him to allow her to complete the said sale by the removal of the said *lis pendens*, as otherwise she would not be able to make a title to the said lands. 18. The defendant,

Statement.

NOTE (*a*.) "12 subsec. (1) No appeal shall be defeated by reason of the existence of any irregularity or the taking of any preliminary objection relating to a matter of procedure, but in directing the appeal to be heard, notwithstanding the existence of such irregularity or objection, the Court may impose such terms as to adjournment, payment of costs and otherwise, as to the Court may seem just. Provided that nothing in this section contained shall be deemed to extend the several times hereinbefore appointed for the bringing of appeals hereunder." "7. (5) The giving of notice of appeal shall be deemed to be the bringing of the appeal within the meaning of this act."

although he was thus made aware of the facts and circumstances surrounding the transaction in question, and of the loss of the profit which he would thereby entail upon the plaintiff, wrongfully and maliciously refused to remove the said *lis pendens*." That the plaintiff was unable to furnish security to the defendant, so as to cancel the registration of the *lis pendens* under the Land Registry Amendment Act, 1890, (*a*), and that the defendant's action in which the *lis pendens* was issued, was afterwards discontinued by him. The application was argued before Mr. Justice WALKEM, on the 10th April, when he delivered a verbal judgment dismissing the action. From this judgment the plaintiff brought an appeal to the Full Court, which was argued before DAVIE, C.J., MCCOLL, and DRAKE, JJ., on the 7th of July, 1897.

Statement.

The notice of appeal had been given within the time prescribed by the Supreme Court Amendment Act, 1896, Sec. 16, for the last day for hearing under that section, but the appellant did not enter the appeal two days before the day named in the notice of appeal for the hearing, setting it down on that day. The respondents gave notice of motion to strike out the appeal, but before the motion was heard the Supreme Court Amendment Act, 1897, was passed.

Robert Cassidy, for the respondents on the motion to strike out the appeal: The appeal has never been set down in compliance with Rule 678, two days before the day of

Argument.

(*a*.) "(1.) Any person against whose real estate a *lis pendens* has been registered under the provisions of the 'Land Registry Act,' may apply to a Judge of the Supreme Court, on an affidavit setting forth the registering of the same, and that hardship and inconvenience is experienced, or is likely to be experienced thereby, with the reasons for such statement, for a summons calling on the opposite party to shew cause why the same should not be cancelled upon sufficient security being given."

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hearing; the setting down of the appeal on the last day for hearing on that day, was irregular. In order to take advantage of the Supreme Court Amendment Act, 1897, extending the time for appeal, the appellants should have set down the appeal again, so as to comply with Rule 678, which must be read with the statute: *Reg.* v. *Aldous*, 5 B.C. 220; *Tollemache* v. *Hobson*, *Ibid.* 223; *Reinhard* v. *McClusky*, *Ibid.* 226; *Harris* v. *Kinney*, *Ibid.* 229. Preliminaries relating to appeals are not mere questions of procedure, nor is an appeal a vested right, but a privilege dependent on the performance of certain prerequisites, the non-observance of any of which will prevent the appellant from proceeding with the appeal.

Argument.

L. P. Duff, contra: The setting down of the appeal after the time limited, is a mere irregularity, which should be relieved against under the Supreme Court Amendment Act, 1897, Sec. 12, Sub-Sec. 1, the appeal having been brought (see S.C. Amendment Act, 1897, Sec. 7, Sub-Sec. 5) within the prescribed time.

Judgment of DAVIE, C.J.

DAVIE, C.J.: The cases cited have, I think, in view of section 12, no application to anything but the giving of the notice of appeal. Sub-section 1 says that no appeal shall be defeated by reason of the existence of any irregularity, or the taking of any preliminary objection, relating to a matter of procedure, but in directing the appeal to be heard, notwithstanding the existence of such irregularity or objection, the Court may impose terms, etc. This is clearly a preliminary objection relating to a matter of procedure, and the appeal must be heard unless the case comes within the proviso "that nothing in this section shall be deemed to extend the times hereinbefore appointed for the bringing of appeals hereunder." "Bringing an appeal" is confined by section 7, sub-section 5, to the giving of the notice of appeal. Therefore, as this is not an objection relative to the time for giving notice of appeal, the proviso does not apply. The

appeal will be heard. Question of imposing terms reserved until after argument on appeal.

Motion to strike out appeal refused.

L. P. Duff, for the appeal: An action will lie for maliciously using the process of the Court where it causes damage either to person or property of the plaintiff: *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674, (presenting petition to wind up Company), BRETT, M. R., at p. 682, BOWEN, L.J., at 688; *Re Walter D. Wallet*, (1893) P.D. 202, at 205 (malicious arrest of ship), Sir FRANCIS H. JEUNE, P., at p. 205: "No precedent, as far as I know, can be found in the books of an action at law for the malicious arrest of a ship by means of admiralty process. But it appears to me that the *onus* lies on those who dispute the right to bring such an action, to produce authority against it. As Lord CAMPBELL said in *Churchill* v. *Siggers*, 3 E. & B. 929, at p. 937, 'to put into force the process of law maliciously, and without any reasonable or probable cause, is wrongful, and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case.'" *Wren* v. *Weild*, L.R. 4 Q.B. 730, at p. 735 (Slander of Title); *Savile* v. *Roberts*, 1 Ld. Raymond, 379. It is no answer to the action that the plaintiff might have got rid of the *lis pendens* by making an application under the Land Registry Amendment Act, 1890: *Gilding* v. *Eyre*, 10 C.B.N.S. 592. In *Churchill* v. *Siggers*, which was an action for maliciously arresting defendant for more than he owed, Lord CAMPBELL delivering the judgment of the Court says, at page 938: "The Court or a Judge, to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the

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debtor may have suffered long imprisonment, and have been utterly ruined." See, also, *Wentworth* v. *Bullen*, 9 B. & C. 848; *A.G. of Lancaster* v. *L. & N.W. Ry. Co.* (1892) 3 Ch. 276; *Montreal Street Ry. Co.* v. *Ritchie*, 16 S.C.R. 622.

Robert Cassidy, contra: There are two grounds upon which the action should be dismissed, first, under B.C. Rule 235, as being shewn on the face of the statement of claim to be frivolous and vexatious, Annual Practice, 1897, pp. 206 and 563; and, second, under the inherent jurisdiction of the Court, as being an abuse of its process; Judicature Act, 1873, Sec. 24, Sub-Sec. 5. The respondent had, under C.S.B.C. 1888, Cap. 67, Sec. 29 (*a*) a legal right to file the *lis pendens* as claiming a charge and equitable execution, the action being brought "in respect of the real estate." The

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assertion of a legal right, even if such assertion be malicious, is not actionable: Addison on Torts, Ed. 1893, pp. 29–30; *Lord Beauchamp* v. *Croft*, 3 Dyer's Reports, 285*a*. "No punishment was ever appointed for a suit in law, however it be false and in vexation": *Savile* v. *Roberts*, 1 Ld. Raymond 374; see also *Roret* v. *Lewis*, 5 D. & L. 371. Instituting legal process, if regular, does not constitute a right of action: Broom's Legal Maxims, 121; *Montreal Street Railway* v. *Ritchie*, 16 S.C.R., STRONG, J., at p. 629; *Yearsley* v. *Heane*, 14 M. & W. 322, POLLOCK, C.B., at p. 332; see also *Phillips* v. *Naylor*, 3 H. & N. 14; *Davis* v. *Jenkins*, 11 M. & W. 745; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210. There being a procedure provided by statute for removing the *lis pendens*, of which the appellant should have availed herself, no action lies; see WILDE, C.J., in *De Medina* v. *Grove*, 10 Q.B. 172, at p. 177. The right to dismiss under Rule 235 is entirely distinct from that

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NOTE (*a*.) "29. Any person who shall have commenced an action in respect of any real estate, may register a *lis pendens* against the same by means of a charge."

under the inherent jurisdiction of the Court: *Blair* v. *Cordner*, 36 W.R. 64. Upon application to the inherent jurisdiction, evidence is admissible to shew the nature of the action, etc.: *Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489. CHITTY, J., at p. 498. An action similar to this has already been dismissed; see *Montgomery* v. *Russell*, 11 T.L. R. 112. The appellant could not by any truthful amendment make a good statement of claim.

L. P. Duff, in reply, cited *Steeds* v. *Steeds*, 22 Q.B.D. 542, as to amendment.

Cur. adv. vult.

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DAVIE, C.J., delivered the judgment of the Court.

We are not prepared to say that the learned Judge whose decision is appealed from, exercised a wrong discretion in dismissing this action as being frivolous and vexatious. As remarked by A.L. SMITH, L.J., in *A.G. of Lancaster* v. *L. & N. W. Railway*, 2 R. 87, an application under the rule has to be decided on the face of the pleadings, without the necessity for going into extrinsic evidence. Here the statement of claim is clearly demurrable, and it is difficult to see how it could be amended consistently with the facts before us, so as to disclose a good cause of action. The plaintiff is a married woman, against whose husband the defendant has an unsatisfied judgment of $1,000.00. Shortly before the defendant's judgment, the plaintiff's husband, who the statement of claim alleged was at that time perfectly solvent, made her a gift (*bona fide* as she asserts) of a town lot which was already subject to a mortgage for $10,000.00. The defendant, upon recovering judgment, attacked this transaction, by suit, under the Statute of 13 Eliz., to set aside the settlement as fraudulent, and contemporaneously with commencing his action, the plaintiff registered a *lis pendens* against the property. The plaintiff's action now is not for

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maliciously commencing that action, or registering the *lis pendens*, but, because the defendant after, as alleged, receiving information purporting to shew the settlement to have been valid, and that the plaintiff had the chance of selling the property at a profit, "wrongfully and maliciously refused to remove the *lis pendens*;" a statement of action better fitted to the provisions of Rule 235 than this would be difficult to conceive. In *A.G. of Lancaster* v. *L. & N. W. Railway Company*, LINDLEY, L.J., remarks: "The order says 'The Court or a Judge may order,' and so on. It appears to me that the object of the rule is to stop cases which ought not to be launched; cases which are obviously frivolous or vexatious, or obviously unsustainable."

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The defendant's action to vacate the settlement (which he afterwards discontinued, as we are informed, because the mortgagee had sold the property for less than the mortgage) indicates the effort of a creditor to recover his money, which is inconsistent with any reasonable suggestion of malice.

The appeal must be dismissed. We will hear the question whether a married woman can be ordered to pay costs on an appeal brought by her: See *Hood Bars* v. *Herriot* (1897) A.C. 177.

Appeal dismissed.

NOTE: The form of order as to costs of the appeal was settled as follows, following *Scott* v. *Morley*, 20 Q.B.D. 120: "And this Court doth further order and adjudge that the defendant do recover his costs of the said appeal (to be taxed) against the plaintiff, such costs to be paid out of her separate property as hereinafter mentioned. And it is ordered that execution hereon be limited to the separate property of the plaintiff, not subject to any restriction against anticipation unless by reason of section 16 of "The Married Women's Property Act," the property shall be liable to execution notwithstanding such restriction."

BOWNESS v. THE CITY OF VICTORIA AND THE CONSOLIDATED RAILWAY COMPANY.

GORDON v. THE CITY OF VICTORIA AND THE CONSOLIDATED RAILWAY COMPANY.

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BOWNESS v. VICTORIA

Practice—Parties—Rule 94.

The statements of claim were so drawn as to charge the two different defendants with separate acts of negligence, causing damage to the plaintiff. It appeared, however, from the facts alleged, that, if the actions lay at all, the two defendants each contributed to the injury in such manner as to make them joint *tort feasors*.

Held, by the Full Court, that the plaintiffs were entitled so to join the defendants: *Sadler* v. *G. W. R. Co.* (1895) 2 Q.B. 688 (1896), A.C. 450, distinguished.

APPEAL by the Consolidated Railway Company from a judgment of McCOLL, J., reported *ante*, page 185, refusing an application by the defendant Company in *Bowness* v. *Victoria, et al.*, to stay all proceedings in the action unless the other defendant was struck out, and from the judgment of BOLE, L.J.S.C., dismissing a similar application in *Gordon* v. *Victoria, et al.*: The actions were under Lord Campbell's Act, by Eliza Bowness, for the death of her child, and by Mina Elizabeth Gordon for the death of her husband, who were passengers on the defendants' tramway, by the collapse of the Point Ellice bridge over which the tramway line ran, and which was situated within the limits of the City of Victoria. The statements of claim charged both the defendants with negligence in regard to the condition of the bridge, and also charged that the Railway Company had contracted safely, etc., to carry the deceased persons as passengers, etc.

Statement.

The judgment of BOLE, L.J.S.C., was as follows:

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BOLE, L.J.S.C.: This summons is brought to stay proceedings unless the Tramway Company, the other defendant, is struck out. Mr. *L. G. McPhillips, Q.C.*, relied strongly on *Sadler* v. *G.W.R. Co.* (1896), A.C. 450, 453 in support of his contention; also on the facts that the joinder of the two defendants was calculated to embarrass and prejudice the defence. The action is brought to recover $20,000.00 damages for the death of Mr. Gordon, the plaintiff's husband, on the 24th May, 1896, at Point Ellice Bridge, Victoria, and the plaintiff claims against the Corporation of Victoria and the Tramway Company, on one of the cars of which the deceased was travelling when he lost his life, by the collapse of the bridge. In *Sadler* v. *G.W.R. Co.*, it was clear there existed two separate causes of action, and that decision merely affirmed the rule that claims for damages against two or more defendants in respect of their several liability for separate *torts*, cannot be combined in one action. Now the defendants have not shewn that such is the case in the present instance; indeed, it appears to me the question as to which of the defendants is liable, is a matter still involved in much uncertainty; there is merely one *tort;* the whole difficulty is this, who is responsible therefor? In *Massey* v. *Heynes*, 21 Q.B.D. 330, at p. 334, WILLS, J., remarks: "Before that provision (Order 16) was made, great injustice often arose because a plaintiff did not know, and could not find out, amongst the several persons involved in a transaction, who was really liable, when certainly some one of them was so, and the persons themselves knew where the truth lay, yet it was their interest to conceal it. Often a plaintiff could not get redress from the real defendants until the plaintiff had gone through the troublesome and expensive process of suing them separately, and failing against one or more of them. Order XVI. was meant to get rid of that state of things." This judgment is referred to by KAY, L. J., in *Indigo Company* v. *Ogilvy*, (1891) 2 Ch. 31, at p. 44, as a very careful and well considered

judgment; *vide* also *Noyes* v. *Young*, 16 P.R. 254, and the judgment in *Bowness* v. *Victoria, et al.*, by Mr. Justice McColl, ante p. 185. Moreover, I feel hesitation in differing from the judgment of another, save for the gravest and most overwhelming reasons—but would rather, in the absence of such reasons, leave the parties to their appeal. I therefore dismiss the application with costs—costs to be costs in the cause.

Application dismissed.

Statement.

It was agreed that the judgment on appeal in *Bowness* v. *Victoria*, should govern the appeal in *Gordon* v. *Victoria*. The appeal was argued before Davie, C.J., McCreight and Walkem, JJ., on the 3rd of May, 1897.

Argument.

A. E. McPhillips, for the appeal: The defendants are wrongly joined; two distinct causes of action are shewn by the pleadings; one defendant being a private Company and the other a Municipal Corporation, the ground of liability is different. As regards the City, it will be necessary to shew a statutory obligation. *Sadler* v. *G. W. Ry. Co.* 14 R. 774, discussed by Sir F. Pollock in the Law Quarterly Review for January, is in point.

W. J. Taylor, for the City of Victoria.

C. Wilson, Q.C., and *D. G. Macdonell*, for the respondents, were not called on.

Judgment of DAVIE, C.J.

Davie, C.J.: It is unnecessary to hear the other side. The distinction between *Sadler* v. *G. W. Ry. Co.* cited, and this case, is so apparent that there is no possibility of mistake. That case merely decides that separate *torts* against different persons cannot be joined. They could not be joined before the Judicature Act, neither can they since, and, as Sir F. Pollock remarks in the Law Quarterly Review, this ruling involves no mere matter of form, or if it is a

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matter of form the form is so bound up with the merits as to be a mere indication of what the merits are. There the two railway companies were each guilty of stopping up the way, and each liable for damages, the measure of which might or might not be the same ; but this case is widely different. The plaintiff's cause of action is for the death of her husband. Both defendants, it is said, are to blame. The plaintiff's cause of action is the grievance which she has suffered : *Jackson* v. *Spittall*, L. R. 5 C.P. 542. Here the plaintiff has only the one grievance, no matter how it has been brought about. If we severed the defendants and ordered separate trials, and the plaintiff recovered against one defendant, the damages would then have to be estimated in view of the fact that another action remained to be tried in which damages might be awarded. It is quite clear that the defendants should not be separated.

MCCREIGHT and WALKEM, JJ., concurred.

Appeal dismissed with costs.

CANADIAN PACIFIC RAILWAY CO. v. PARKE, *ET AL.*

BOLE, L.J.S.C.

1896.

Oct. 26.

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Nov. 6.

C.P.R. v. PARKE, ET AL

Practice—Action for Injunction—Right to jury.

An action for an injunction is proper for a trial by a jury.

APPEAL from a judgment of BOLE, L.J.S.C., dismissing a summons by defendants for a jury. The action was for damages for injury to plaintiff's right of way, caused by water brought by defendants upon their own land and allowed to escape therefrom so as to undermine the embankment of the plaintiffs' line, and for an injunction. The defendants applied for a jury, whereupon the plaintiffs moved to amend their statement of claim by striking out their claim for damages, and an order was made accordingly.

Statement.

L. G. McPhillips, Q. C., for the defendants, on the application for a jury.

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

BOLE, L.J.S.C.: This application is made by the defendants for an order to have the trial before a Judge and jury. At the time the summons was taken out, the plaintiffs were claiming damages as well as an injunction. Now the claim is confined to asking for an injunction, and the normal method of trying such a case is before a Judge. The defendants have not shewn any good ground why it should be otherwise, and the *onus* of doing so is, I think, upon them. The defendants have not such a *prima facie* right to a jury as to throw on the other side the burden of shewing that the case can be tried as well without a jury; *vide The Temple Bar*, 11 P.D. 6; *Coote* v. *Ingram*, 35 Ch. D. 117; *Timson* v. *Wilson*, 38 Ch. D. 72; *Atty.-General* v. *Vyner*, 38

Judgment of BOLE, L.J.S.C.

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W.R. 194, and as I think the case is one which should be tried by a Judge alone, I dismiss the application; costs to be defendants' costs in the cause.

Application dismissed.

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The defendants brought an appeal to the Full Court, which was argued before McCREIGHT, WALKEM and DRAKE, JJ., on the 3rd of November, 1896.

Argument.

A. E. McPhillips, for the appeal: The action is in effect one of trespass, though the only relief now asked is an injunction, and the claim for damages has been abandoned. It is apparent that a view by a jury will probably be necessary: *Jenkins* v. *Bushby*, (1891) 1 Ch. 484; *Timson* v. *Wilson*, 38 Ch. D. 72; *Fennessy* v. *Clark*, 37 Ch. D. 184; *Petar* v. *Lailey*, W.N. (81) 22; and see B.C. Rule 333, Ann. Prac. 1896, 702.

E. P. Davis, Q.C., contra: By Rule 330, causes or matters referred to in Rule 81 shall be tried by a Judge without a jury. Rule 81 specifies a number of causes of action, of which an action for injunction is not one, but such an action is "referred to" by the language of Rule 81 as being one of the "actions not by the rules of *this order* (XIII.) otherwise specially provided for," and therefore is within Rule 330, and must be tried by a Judge without a jury.

Cur. adv. vult.

November 6th, 1896.

Judgment of McCREIGHT, J.

McCREIGHT, J.: To give force to Mr. *Davis'* contention that it is only in cases mentioned in Rule 329, and the first ten rules of Order XIII., that a jury may be ordered, would be construing the rules in a manner contrary to the intention of the framers. Looking at Order XIII., it will

be seen that it mentions only cases of liquidated demand, liquidated damages, detinue, recovery of land, and actions of such nature, leaving actions of *tort* unreferred to. This contention would therefore result in depriving litigants of the benefit of trial by jury in all actions of *tort* other than those specified in Rule 329.

Upon consideration of the facts at issue upon the pleadings, it seems probable that a view by a jury will be required, and I think that a proper discretion to be exercised would be to set aside the order of Mr. BOLE, and direct that the trial be had with a jury—a special jury if the plaintiffs so desire.

WALKEM and DRAKE, JJ., concurred.

Appeal allowed with costs.

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June 7.

MACAULAY v. O'BRIEN.

Arrest—Ca. re.—Affidavit—Statement of cause of action—Alien temporarily resident.

MACAULAY *v.* O'BRIEN

Upon motion to set aside a writ of *ca. re.* and the arrest of defendant thereunder for irregularity:

Held: 1. A statement of the plaintiff's cause of action, in his affidavit to hold the defendant to bail, that the defendant "is justly and truly indebted to me in the sum of $1,323.80, as follows, namely: $2,000.00 for money received by him to my use, being the price of eight kegs of whiskey, of my property, which he sold for $2,000.00, and received the said sum, less the amount of $676.20, due by me to the said T. O'B.," was sufficient, as the defendant was liable whether the plaintiff authorized or requested the sale or not, as, if the defendant converted the whiskey, it was open to the plaintiff to waive the *tort* and sue for the proceeds.

2. The amount due was not uncertain by reason of the credit of $676.20, without saying "and no more."

3. It is not necessary to serve on the defendant a copy of an order for a *ca. re.*

4. Rule 979 requiring service of affidavits on which an *ex parte* order is obtained, only applies when the *ex parte* order itself has to be served.

5. The non-cancellation of the Law Stamps on the process by the officers of the Court, is not fatal to the process; *Smith* v. *Logan*, 17 P.R. 219 distinguished.

6. A variation in the statement of defendant's address, viz.: as "Yukon" in the writ, and "Victoria" in the affidavit to hold to bail, is immaterial.

7. An alien passing through the jurisdiction may be arrested on a *ca. re.* upon a cause of action arising in a foreign country.

8. In the absence of proof it will be assumed that the law of the foreign country is the same as that here.

9. It is not necessary in an affidavit for *ca. re.* to shew that the defendant is leaving the country with intent to defraud creditors.

Statement.

MOTION by the defendant, to the Court, for an order "that the writ of summons be set aside, and that an order of Mr. Justice DRAKE for the issue of a writ of *capias ad respondendum*, and all other proceedings had by the plaintiff

herein, be set aside, and that the defendant be discharged out of custody, and that the money deposited as Sheriff's bail be returned to the defendant." The affidavit to hold to bail was as follows :

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"(1) Thomas O'Brien of Forty Mile Post, in that part of the North West Territories of Canada known as the Yukon country, is justly and truly indebted to me in the sum of $1,323.80, as follows, namely: $2,000.00 for money received by him to my use, being the price of eight kegs of whiskey of my property which he sold for $2,000.00 and received the said sum, and he has not paid over any part thereof to me though I have demanded payment thereof; less the sum of $676.20, due by me to the said Thomas O'Brien. (2) The said Thomas O'Brien is now in Victoria aforesaid, but is, I verily believe, about to quit this Province unless he be forthwith apprehended. My reason for such belief is that the said Thomas O'Brien is now in Victoria buying supplies to take up to Circle City, Alaska, United States of America, where he keeps a store, and I was yesterday informed by John Grant, ex-Mayor of the said City of Victoria, that the said Thomas O'Brien was buying such stores for the purpose aforesaid, and that he, the said Thomas O'Brien, said that he intended to sail to-night from Victoria to Seattle in the State of Washington, United States of America, in the regular steamer between the two ports, and was going thence immediately to Alaska aforesaid."

Statement.

The grounds of the motion appear from the arguments and judgment. The motion was argued before DAVIE, C.J., on the 5th of June, 1897.

Gordon Hunter for the motion: No copy of the order for the issue of the *ca. re.* was served on the defendant. (DAVIE, C.J.: It is not necessary. It never was the practice to serve it.) Rule 979 requires service of the affidavits upon which an *ex parte* order is obtained. Under 1 & 2 Vic. 110, *capias* is a proceeding in the action, and governed by the rules. The statement of the cause of action in the affidavit to hold to bail, is insufficient. It does not say that the goods were sold by the defendant, or that the proceeds were received by him for or on account of the plaintiff and at his request: *Smith* v. *Heap*, 5 Dowl. 11; *Pitt* v. *New*, 8 B. & C. 654. It is consistent with the affidavit that the defendant converted the whiskey, and that the plaintiff's

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claim is for damages. (DAVIE, C.J.: It would appear that such is the fact. The plaintiff is entitled to waive the *tort* and sue for the price as money held to his use). The affidavit might have been sufficient if it had stopped at saying "money received by him to my use," but the subsequent explanation makes it ambiguous or impositive as in *Champion* v. *Gilbert*, 4 Burr, 2126; *Sands* v. *Graham*, 4 Moo. 18. The affidavit must allege the facts which constitute the debt: *Handley* v. *Franchi*, L.R. 2 Ex. 34; *Taylor* v. *Forbes*, 11 East. 315. The credit of $676.00 should state "and no more." Perjury could not be assigned if a greater sum was due. If this is an account stated and settled between the parties, it should be so alleged: *Jones* v. *Collins*, 6 Dowl. 526, at 531. There is no allegation of intent to defraud creditors: *Kimpton* v. *McKay*, 4 B.C. 196 did not consider *Hartney* v. *Onderdonk*, 1 B.C. Pt. II. 88. In *Stein* v. *Valkenhuysen*, 27 L.J.Q.B. 236, at p. 238,

Argument.

CROMPTON, J., says that the object of the statute is to reach debtors who are leaving the jurisdiction with intent to defraud. The writ of *ca. re.* is issued contrary to the provisions of the Stamp Act, inasmuch as the stamps thereon are not cancelled: *Smith* v. *Logan*, 17 P.R. 219 holds that it is the duty of the party suing out process to see that the stamps are cancelled. The residence of the defendant is stated in the affidavit to be in the Yukon country in American territory. In the writ of summons it is stated as Victoria. The defendant's full name, Thomas Miller O'Brien, is not given, and the plaintiff has not shewn that he made diligent enquiries to discover his full name: *Rossett* v. *Hartley*, 7 A. & E. 522, 4 B. & Ald. 536.

Robert Cassidy, contra: This application is not in proper form. The whole procedure is determined by 1 & 2 Vic. 110. By section 6 this motion should be by "an order or rule to shew cause" in so far as it is a motion to discharge the defendant from custody upon fresh materials. In so far as it objects to the sufficiency of the original materials, it is an

appeal and should be brought to the Full Court: *Damer* v. *Busby*, 5 P.R 356; *Needham* v. *Bristowe*, 4 M. & Gr. 262. In *Gibbons* v. *Spalding*, 11 M. & W. 173, an application was made to a Judge to discharge the defendant, and on its being refused he moved the Full Court for a rule *nisi* to set aside the original order for irregularity, which was also refused. As to interlineations and erasures, the proceedings may be amended: *Bilton* v. *Clapperton*, 9 M. & W. 473; *Richards* v. *Dispraile*, *Ibid.* 459. Rule 979 as to service of affidavits for *ex parte* orders, only applies to cases in which the order has to be served. The statement of the cause of action should not be too closely scrutinized: *Coppinger* v. *Beaton*, 8 T.R. 338; *Bryan* v. *Freeman*, 7 Man. 757. As to the variance between the defendant's address in the writ and the affidavit, see *Buffle* v. *Jackson*, 2 Dowl. 505; *Smith* v. *Hammond* (1896) 1 Q.B. 571. As to the arrest of a foreigner temporarily resident here on a cause of action arising out of the jurisdiction, see *De La Vega* v. *Vianna*, 1 B. &. Ad. 284; *Carrick* v. *Hancock*, 12 T.L.R. 59. In *Stein* v. *Valkenhuysen*, *supra*, the defendant was tricked into coming into England for the purpose of arresting him there; see also *Maule* v. *Murray*, 7 T.R. 470.

Argument.

Cur. adv. vult.

June 7th, 1897.

DAVIE, C.J.: The defendant, who was arrested on a writ of *ca. re.* indorsed to hold him to bail for $1,323.80, and who has made deposit with the Sheriff in lieu of bail, now applies under section 6 of 1 & 2 Vic. Cap. 110, to set aside the proceedings, and for a return of his deposit, on the ground, principally, that the affidavit to hold to bail is defective; that consistently therewith there is no cause of action. The statement in the affidavit is that "the said Thomas O'Brien is justly and truly indebted to me in the

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sum of $1,323.80, as follows, *viz.*: $2,000.00 for money received by him to my use, being the price of eight kegs of whiskey of my property, which he sold at Forty Mile Creek during the months of October, November and December, 1896, for $2,000.00, and received the said sum, and he has not paid over any part thereof to me though I have demanded payment thereof, less the sum of $676.20 due by me to the said Thomas O'Brien." It is objected to this statement that it does not shew the whiskey to have been sold for and on account of the plaintiff, or at his request. But it appears to me to have been unnecessary for the affidavit to have shewn as it purports to do, and perhaps properly, how the money came to be received by the defendant for the plaintiff's use. If the affidavit had stopped at saying that the defendant was indebted "for money received by him to my use," that I think would have been sufficient as it would comply exactly with the precedent given in Chitty's forms, for the statement in an affidavit to hold to bail in a case for money received, except that the word "to my use" is substituted for "for my use," which I do not think is material. I do not wish to be understood as expressing the opinion that the statement is defective for omitting the words "at request," or "for or on account of." On the contrary I think the plaintiff may have a good cause of action without these words. If it should turn out that the whiskey, which the plaintiff swears was "of my property," was sold not at his request or for his account, he would have an action of *tort* for the conversion, but he would be equally at liberty to waive the *tort* and sue for money had and received, as he is doing here. But it is also objected that it is consistent with the affidavit that the plaintiff is indebted to the defendant in an amount which overtops the plaintiff's claim, as, whilst it acknowledges $676.20, that may be portion only of a much larger indebtedness, and that if it should turn out that the counter indebtedness was $10,000.00 instead of $676.20, the affidavit

Judgment.

is so vague that the plaintiff could not be indicted for perjury, but I think the plaintiff's positive statement that the defendant is indebted in $1,323.80, negatives and is inconsistent with any set-off further reducing that sum.

I do not think that it was necessary to have served a copy of the order to hold to bail upon the defendant. It certainly was not necessary to do so under the old practice and Rule 979 of the S.C. Rules requiring the service of affidavits only applies where the order itself has to be served. There is no practice that I am aware of which requires that a judge's order to hold to bail shall be served. The non-cancellation of the law stamp before the issue of writ was the omission of the officer, for which, under section 17 of the Law Stamp Act, the plaintiff was not responsible. The remark of MACLENNAN, J.A., in *Smith* v. *Logan*, 17 P.R. 219, intimating that it was the duty of the solicitor to have seen the stamp cancelled, must have proceeded upon some different provision from section 17—particularly when you compare section 17 with section 9, which does cast a duty on the plaintiff's solicitor. It is no objection that the affidavit does not shew the defendant's intended departure to be with intent to defraud, etc.: *Kimpton* v. *McKay*, 4 B.C. 196 ; and as for source of information, I think the affidavit sufficiently shews that the defendant told John Grant of his movements. The defendant's permanent residence and place of business appears to be in the Yukon, and the affidavit describes him as of the Yukon, but the writ described him as of Victoria, where he was temporarily resident at time of arrest. I do not think that this variance is important : *Buffle* v. *Jackson*, 2 Dowl. 505. Temporary residence is sufficient to authorize the service of the writ and the *capias*: *De La Vega* v. *Vianna*, 1 B. & Ad. 284 ; *Carrick* v. *Hancock*, 12 T.L.R 59 ; see also *Stein* v. *Valkenhuysen*, 27 L.J.Q.B. 236, and *Smith* v. *Hammond*, (1896) 1 Q.B. 571, particularly when, as is the case here, there are no civil Courts in the Yukon, and this is the nearest spot where the plaintiff can litigate his rights.

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I have also considered the point that, the cause of action having arisen in the Yukon, the affidavit should have shewn that by the law of that country the plaintiff has a right of action, citing *Tenon* v. *Mars*, 8 B. & C. 638. The affidavit is silent upon this subject, and I think I am bound to assume, in the absence of proof to the contrary, that the law of the Yukon is the same as that of British Columbia. I dealt with the other objections upon the argument. In my opinion the proceedings are regular, and the motion must be dismissed with costs.

Motion dismissed.

IN RE FINLAYSON.

DRAKE, J.

1897.

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FINLAYSON, *ET AL* v. KEITH, *ET AL.*

Will—Construction—Specific devise subject to a prior life estate—Period of vesting—Advancement.

The testator, after leaving his property in trust for his widow for life with remainder to his children or their issue in certain shares, made certain specific devises to his children, to vest in possession on the death of his widow; and the will directed that in the event of the death of any of the children without leaving lawful issue, his her or their share should fall into residue and be divided among the survivors in the proportions named.

Held, that the word "share" applied as well to the specific devises, as to the remainder expectant on the widow's death; and, accordingly, until the specific bequests fell into possession, the children took no vested interest therein.

The will gave the trustees a power of advancement in favour of the testator's sons.

Held: That the power was, by the necessity of the case, exercisable during the continuance of the widow's life estate, but that, in order to protect the life interest, any son in whose favour an advancement was made, was chargeable with interest thereon at the rate of five per cent.

Statement.

APPLICATION by originating summons for the purpose of determining certain questions arising upon the true construction of a will. The facts of the case are sufficiently set forth in the judgment.

L. P. Duff, for the plaintiffs.

H. D. Helmcken, Q.C., for the defendants.

Judgment.

DRAKE, J.: The application now made is for the purpose of construing certain portions of this will, in order to ascertain, first, whether the estates specifically devised to each of the children of the testator vested (subject to the life interest of the widow therein) on the death of the testator, and secondly, whether, if such is the case, the clause

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relating to the death of any one of the children had the effect of divesting the estate, so that it falls into the residue, and thirdly, as to the proper construction to be given to the power of advancement for the benefit of sons contained in the will.

The will in question is dated 11th of June, 1895. By it the testator devises all his property real and personal to his trustees, in trust for his wife for life, and at her death whatever remains was to descend to his children in the proportions mentioned in his will, or to the survivors of them and to the issue of any deceased children—his intention being that his widow should receive a certain annual sum—and he also gave certain other annual sums to each child, subject to rebate in case the annual income from his estate was insufficient to provide the sum set apart for his widow.

Judgment.

The will then devises, after the death of his wife, to each child certain specific property. The last clause of the will is as follows: "In the event of the death of any of my children above named without leaving lawful issue, his, her or their share shall revert to my residuary estate, and be divided among the survivors in the proportions named."

Mary Finlayson, one of the children, died, having first made a will dealing with the estate left to her. John Finlayson, another child, died intestate and unmarried. The widow is still living, and all the children are of age. It is contended that this last clause only affects the residuary estate, which under the will would come to the several children, and not the specific devises of real and personal property, and that the term used, "share," has a restricted meaning, and does not affect the specific bequest. In order to establish this view, I should have to read into the will the words "not specifically devised or bequeathed" after the word "share," while if the ordinary meaning is given to the language used, it imports all the property given by the will, whether specific or general.

It is to be remarked that the clause says "in the event of the death of any of my children," without specifying whether such death is to take place in the lifetime of the testator, or of the mother, or at a future date. The will gives to the daughters their property absolutely on the death of the mother; the sons' shares are subject to certain trusts after that period, which are not in question now.

The ordinary rule is, that when a bequest is to A., and in case of his death to B., if A. survives the testator he takes absolutely, the period of death being limited to the lifetime of the testator. If the words "in the event of the death of any of my children" are to be construed to mean death at any time, the result would be that they would only take life estates, which a reference to the clause devising the homestead to Mary shews was not the intention of the testator, as he leaves the homestead over in case Mary dies in the lifetime of his widow, and there is no such limitation over in regard to any other of the devises. The rule above stated has been so long established by the cases, *Hinckley* v. *Simmons*, 4 Ves. 160, and *Miall, et al* v. *Brain, et al*, 4 Madd. 119 and subsequent cases, that it is hardly necessary to discuss it. But there being in this case an intervening life estate, a different rule of construction governs; and the words are considered as extending to the event of the legatee dying in the interval between the testator's decease, and the period of vesting in possession: See *Hervey* v. *M'Laughlin*, 1 Pri. 264; *Bolitho* v. *Hillyar*, 34 Beav. 180; *Monteith* v. *Nicholson*, 2 Keen 719, and the devisee takes a vested remainder expectant on the life estate; and I am of opinion that the meaning of the language here is, that the period of death indicated means a death before the estate has fallen into possession by the death of the tenant for life.

Judgment.

The case of *Merchant's Bank of Canada* v. *Keefer*, 13 S.C.R. 515 was cited, but a perusal of that case shews such a different state of circumstances that it can hardly be an

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authority, except as to the meaning of the word "share," which was used in that will, and was there held to apply to all property coming under the devise whether specific or not. The contention that the children's estate vested, on the death of the testator, in the specifically devised property is, I think, correct; but such vesting is subject to be divested in case of the death of any one or more of the beneficiaries in the lifetime of the widow; but such divesting has in fact taken place with regard to the two whose shares are now in question.

The duty of a Court in construing a will is to give effect to the language used in the will, and not to conjecture whether such a construction will lead to a result not contemplated by the testator. The clause as to advancement is as follows: "In the event of any assistance being required to start them or either of them (meaning the testator's sons) in any business or employment to enable them to work their own way in life, a sum of money, not exceeding $4,000.00, may be advanced by my trustees out of each of their shares for this purpose." This is, I think, a present power, and not depending on the termination of the life estate; to hold otherwise would practically render the advancement of little use. The trustees can therefore make such advances, but, in order to protect the life interest, if necessary, I think the trustees should charge the annuities given to the sons with interest on the money advanced at the rate of five per cent.

Judgment.

Order accordingly.

MACDONALD v. TRUSTEES OF THE PANDORA STREET (VICTORIA) CONGREGATION OF THE METHODIST CHURCH.

FULL COURT.
1897.
July 8.

MACDONALD v. METHODIST CHURCH

Trial—Questions to jury—Findings—Entering judgment against—Appeal — Time — Practice — Preliminary objection—Notice of—Supreme Court Amendment Act, 1897, Sec. 12.

The Trial Judge submitted certain questions to the jury with the following stated reservation: "Subject to the law governing the contract and its construction"; but judgment was given, for reasons stated by the Court, at variance with the findings of the jury thereon.

Held, on appeal by DRAKE, J. (Davie, C.J., and McCreight, J., concurring): That the Trial Judge should have explained the law governing the contract and its construction to the jury and then taken their opinion on the questions submitted; and that so long as the findings of a jury stand unreversed judgment must be entered in accordance therewith.

At the close of the appellant's argument, counsel for the respondents moved to quash the appeal on the ground that notice thereof was given before the signing or entry of the order for judgment. The order had been entered since giving of the notice of appeal.

Held, that this was a preliminary objection, and should have been taken before the appellant opened, and that notice thereof should have been given in pursuance of Supreme Court Amendment Act, 1897, Sec. 12.

APPEAL from the judgment of WALKEM, J., at the trial. The plaintiff sought to recover certain monies claimed by him for alleged extras and additional work in connection with a building contract into which he had entered with the defendants. The learned Judge left it to the jury to assess the value of the alleged additional items and extra work, "subject to the law governing the contract and its construction," intending thereby to get their valuation of the work

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charged for, so that the plaintiff might get the benefit of any item so valued which the Judge, on consideration, might hold was not included in the contract according to the true construction thereof. The jury found in favour of the plaintiff on certain of the items so submitted to them and assessed the value, but the learned Judge, holding that some of the items so assessed in favour of the plaintiff were in point of law included in the contract, gave judgment thereon for the defendant. From this judgment the plaintiff appealed, and the appeal was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on the 5th and 6th of July, 1897.

A. E. McPhillips, for the appeal.

After the close of the appellant's argument, *Thornton Fell* for the respondents, moved to quash the appeal: The appeal is prematurely launched, being from the reasons for judgment and not from the final judgment or order, which, at the time of giving notice of appeal, was not signed, entered or otherwise perfected. [DAVIE, C.J.: It was your duty, not that of the appellant, to take out the order.] The notice of appeal was given on the 11th of March and order drawn up on the 18th of March. The time for appeal is from the date of signing or entering of the order, *Koksilah* v. *The Queen*, (*post*). A new notice of appeal should have been given after the entry of the order.

Argument.

A. E. McPhillips, contra: Under the Supreme Court Amendment Act, 1897, Sec. 12, no motion to quash or dismiss an appeal and no preliminary objection thereto shall be heard unless notice stating the grounds shall have been served one clear day before the time set for the hearing.

Judgment of DRAKE, J.

DRAKE, J.: The order now being entered, this is a preliminary objection, and should have been taken before the opening of the appellant's argument. The notice prescribed by section 12 of the Supreme Court Amendment Act, 1897, should also have been given.

McCREIGHT, J.: It is an unwritten rule that preliminary objections should be taken before the appellant opens.

Objection overruled.

Thornton Fell, for the respondents.

Cur. adv. vult.

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DRAKE, J.: The jury find that the plaintiff undertook the work in the pleadings according to the plans and specifications. The learned Judge apparently reserved for his consideration the meaning to be given to the plans and specifications, leaving the jury to ascertain what would be a proper amount to be allowed to the plaintiff in case the items mentioned did not fall within the scope of the contract. The jury are not asked if they are extras, but what amount the plaintiff should be paid in respect of these claims. They find $1,160.00, and the learned Judge afterwards goes with great care through each item, and comes to the conclusion that all the items except two were covered by the contract, and he disallows them on this ground. Whether he was right or wrong depends on the evidence that was adduced, and which we have not before us. The plaintiff appeals against this finding, and in appeals the Court has only to look to see if judgment has been entered according to the verdict of the jury. The case of *Davies* v. *Felix*, 4 Ex. D. 32, held that so long as the findings of the jury were unreversed an appeal would not lie. Here the learned Judge has entered a judgment not in accordance with the findings of the jury, and an appeal will therefore lie. Here the learned Judge proceeded to review the findings of the jury in detail. The learned Trial Judge prefaced the questions to the jury with this qualification: "Subject to the law governing the contract and its construction, the following questions are submitted."

Judgment of DRAKE, J.

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The defendants should have objected to this preface, and desired the Judge to point out to the jury what the law was governing the contract and its construction, and then have taken the opinion of the jury. This Court has not before it the summing up of the learned Judge or the evidence, and cannot say whether it was correct or not. But, as laid down in *Ogilvie* v. *West Australian Mortgage Co.* (1896) A.C. 257, the Court is not empowered when it has set aside certain findings of the jury which have been objected to, to disregard other findings which have not been objected to, and so decide upon its own view of the facts which it is impossible to reconcile with the findings. Here the learned Judge has disregarded the findings of the jury, and has decided on his own view of the facts, and in *Rocke* v. *McKerrow*, 24 Q.B.D. 463, at p. 464, Lord ESHER says: "Suppose the learned Judge leaves the question to the jury, and after they had answered it comes to the conclusion that he was wrong, and enters judgment the other way, the proper mode of appeal is to the Divisional Court"; in other words, by an application for a new trial and to set aside the verdict. We are of opinion that as long as the findings of the jury are standing unreversed the only judgment that can be entered is one in accordance with the findings. We, therefore, allow the appeal with costs; with regard to the costs in the Court below, we consider that the plaintiff should have his costs of action, except such costs as have been incurred in respect of those issues which have been found in favour of the defendants, and that the defendants should have these costs as well as the costs of the counter-claim; one set of costs to be set off against the other, and judgment entered for the party to whom it appears there is a balance owing.

Judgment of DRAKE, J.

DAVIE, C.J., and MCCREIGHT, J., concurred.

Appeal allowed.

THE KOKSILAH QUARRY COMPANY, LIMITED LIABILITY v. THE QUEEN.

WALKEM, J.

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KOKSILAH QUARRY CO. v. THE QUEEN

Contract—Terms fixed by letter—Reference to a formal contract.

Negotiations were carried on by letter between the parties, whereby all the terms and conditions of a building contract between them were settled and assented to; and one of the letters to the plaintiff contained the following words: "An agreement and bond in the terms of your offer will be prepared and submitted to you for execution as soon as the contract for the erection of the buildings has been awarded."

The contract was awarded, and the bond (*viz.*, as a guarantee for the performance of the agreement) was executed, but no formal agreement was ever executed.

Held, that there was a binding agreement between the parties.

PETITION of right for damages for breach of contract. The facts sufficiently appear from the headnote and judgment. The action was tried before WALKEM, J., on the 31st of July, and 1st, 3rd and 4th of August, 1896. Statement.

E. V. Bodwell, for the plaintiff Company.

A. G. Smith, Deputy Attorney-General, and *H. E. A. Robertson*, for the Attorney-General.

January 12th, 1897.

WALKEM, J.: The suppliants are the owners of a quarry at Koksilah, and as such, received from the Provincial Government the following circular, which explains itself: Judgment.

LANDS AND WORKS DEPARTMENT, VICTORIA, August 5th, 1893.

Re New Parliament Buildings, Victoria.

GENTEMEN: The Honourable the Chief Commissioner of Lands and Works will be pleased to receive a careful estimate from you, up to noon of Saturday, 19th instant, according to the enclosed form of tender, for Koksilah stone, should this be adopted in the building. For your information a list of the sizes of the principal stones required is appended. It is roughly estimated that there will be a total of

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about 60,000 cubic feet of stone required, of the various descriptions, In case you propose to saw or so work your quarry that there will be a saving of labour to the contractor, kindly specify the nature and character of this.

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W. S. GORE,
Deputy Commissioner of Lands and Works.

To the Koksilah Quarry Company.

A fortnight afterwards, namely, on the 18th of August, the suppliants sent in the following tender, on the printed form which had been supplied to them :

NEW PARLIAMENT BUILDINGS, VICTORIA, BRITISH COLUMBIA,
Victoria, B.C. August 18th, 1893.

To the Hon. the Chief Commissioner of Lands and Works, Victoria.

SIR: We, the undersigned, hereby offer to quarry and deliver on the site of the New Government Buildings at Victoria, at the respective prices hereunder specified, the whole or any part of the Koksilah stone which may be required in the erection of the New Parliament buildings, at James Bay, Victoria, according to the plans prepared by F. M. Rattenbury, Architect, provided that there shall be at least 30,000 cubic feet of stone required from our quarries. (Here follows a list of prices.) We further agree to deliver at least 2,000 cubic feet of stone each week until the completion of contract. We will make the first delivery within three weeks from the notification to us of acceptance of this offer. We are prepared to furnish to you, or your contractors or assigns, bonds, satisfactory to you, in the sum of $20,000.00, for the due carrying out by us of any agreement entered into in pursuance of this offer. We enclose a certified cheque in your favour for the sum of $1,000.00 which shall be forfeited in case we refuse to enter into an agreement in the terms of this offer, or to furnish bonds for the due carrying out of such agreement. This offer shall be open and available to you or to any contractor of the works. The stone when delivered from our quarries will be according to the following description: (Here give information asked for in circular, as to working of quarry, etc.) Quarried in proper workmanlike manner.

Judgment.

We have the honour to be, etc.,

KOKSILAH QUARRY Co. Limited Liability.
By T. Lubbe, *Secretary.*

A dressed sample of the Company's stone had, prior to this, been sent to the Lands and Works Department. A week after the tender had been sent in, the Company's quarry was examined by Mr. Gore and the architect of the

buildings, the result being the following letter accepting the tender :

Victoria, September 2nd, 1893.

SIR: Referring to your offer to quarry and deliver on the site of the New Government buildings at Victoria, Koksilah stone at the respective prices mentioned in the said offer, I beg to notify you that the Honourable the Chief Commissioner of Lands and Works has been pleased to select your stone and that of the Haddington Island Quarry Co., to be used in the construction of the New Parliament buildings. An agreement and bond in the terms of your offer, will be prepared and submitted to you for execution as soon as the contract for the erection of the buildings has been awarded. I am also to urge upon you to proceed with all necessary quarry work, so that there may be no delay when stone is wanted.

I have the honour to be, etc.,

W. S. GORE,

Deputy Commissioner of Lands and Works.

To T. Lubbe, Esq., Sec'y Koksilah Quarry Co., Victoria.

On the same day the architect informed Mr. Lubbe that half of the 60,000 cubic feet, or thereabouts, required for the buildings, would be taken from each of the two quarries, *viz.*, from his and the Haddington Island one; and subsequent Government specifications shew that this had been decided upon.

Judgment.

The contract for the mason's work was let in December following, to one Adams; and on the 2nd of January following (1894) a bond for $20,000.00 was executed by the suppliants in Adams' favour, conditioned to supply him with stone according to the tender of the 18th of August, as accepted by the letter of the 2nd September, and, to quote the words of the bond, "In pursuance of the agreement contained in the said documents."

It is said on behalf of the Government that the documents thus referred to as an "agreement" do not constitute an agreement, inasmuch as the letter of acceptance states that "an agreement and bond in terms of your offer will be prepared and submitted to you for execution as soon as the contract for the erection of the buildings has been awarded," the acceptance being thus, impliedly, subject to a formal

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agreement being executed. There is sufficient in the two documents to constitute a complete contract, and if a formal contract had been prepared, no other terms than those contained in the documents should have been inserted in it. Such being the case, the absence of a formal contract is no answer to the suppliant's claim.

In *Bonnewell* v. *Jenkins*, 8 Ch. D. 70, the Court of Appeal held that an offer accepted by a letter "which referred to a future contract to be prepared by a solicitor," constituted a complete contract. In *Hawkesworth* v. *Chaffey*, 55 L.J. Ch. 335, at p. 337, KAY, J., refers to several decisions on this point. In *Crossley* v. *Maycock*, L.R. 18 Eq. 180, it was held that the acceptance of an offer accompanied by the expression of a wish for a more formal instrument, is sufficient to enable a Court of justice to hold that a final agreement has been arrived at.

Judgment.

Counsel for the respondent relied upon the following language of Lord WESTBURY, in *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638: "I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding although the parties have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." This authority is certainly not in favour of, but is against the respondent.

Hussey v. *Horne-Payne*. 4 App. Cas. 311, is not so much in point as any one of the above four cases; but it is useful, inasmuch as it lays down the principle that where, for instance, the first two documents, as in this case, might be fairly construed as forming a complete agreement in themselves, the whole of the correspondence must be looked at for the purpose of deciding whether an agreement has been come to or not. In the present case, therefore, the correspondence that took place between Mr. Lubbe and

the Chief Commissioner of Lands and Works and his representatives, has to be considered ; and more than this, as the case is not within the Statute of Frauds, the various interviews that occurred between them as to the agreement must also be considered. There is nothing in the correspondence on the part of the Government which suggests anything like the defence now set up. A contract, on the basis of the tender and acceptance, would seem to have been tacitly admitted, and the same may be said as to the interviews between Mr. Lubbe and the Chief Commissioner of Lands and Works. With respect to the fact that the bond for $20,000.00 was given by the Company to Adams, the contractor, Mr. Lubbe, explains that this was done by the suggestion of Mr. Gore. There is nothing inconsistent in the bond being thus given as an obligation to supply the stone, and in the Company contracting with the Government to pay for it. Beyond the obligation in the bond there were no contractual relations between the suppliants and Adams, and the Government was aware of this. No formal agreement on the part of the Company, either with the Government or with Adams, was ever suggested by the Government, or, for that matter, by Adams. The Government must have been satisfied with the agreement as it stood, otherwise it would not have returned the Company's cheque for $1,000.00; for that cheque was deposited as security that the Company, in effect, would abide by their tender, and also give the bond mentioned. It was said that no agreement could have existed, as there were no specifications when the tender was accepted. But the tender and acceptance contained all the terms necessary to form a complete agreement, *viz.*, the prices and quantities up to 60,000 cubic feet. The specifications could only refer, as in fact they do, to details ; for instance, as to the quantities to be used of dimension stone or ashlar, the price of each having already been agreed upon. As a matter of law, the substance of the tender could not have been altered by the specifications. One

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party to an agreement could not vary its terms without the consent of the other.

(The learned Judge then proceeded to discuss the causes of the rejection of the stone, and other aspects of the case which do not affect the point reported, and gave judgment for the plaintiffs for $12,417.00 and costs).

Judgment accordingly.

DAVIE, C.J.

1897.

July 2.

RE C——

IN RE C——

Legal Professions Act, 1895, Secs. 68, 72—Practising, etc., without qualification—Evidence—Contempt of Court.

Upon motion by the Law Society of British Columbia to commit the defendant, it appeared that the offence charged was that he had written two letters on behalf of clients, the first threatening that proceedings would be instituted for slander unless detraction was made, and the other stating that he had instructions to proceed against R. for taking certain goods without authority and for trespassing and forcibly removing goods subject to a lien. The defendant adduced evidence that he was a solicitor of Manitoba carrying on business in British Columbia as a debt collector, and had made application to be admitted in British Columbia, that no fees had been charged against or paid by the person to whom the letter was written, and that he had disclaimed being a solicitor entitled to practise in British Columbia, and had refused to accept legal business offered to him.

Held, per DAVIE, C.J.: That the first letter did not constitute an offence, and that any presumption of practising which may have been raised by the second letter was rebutted by the evidence adduced by the defendant. Motion dismissed without costs.

DAVIE, C.J.

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RE C——

MOTION under sections 68 (*a*) and 72 (*b*) of the Legal Professions Act, 1895, to commit C——— for contempt of Court. The notice of motion charged the defendant with contempt "in assuming to act as a solicitor of this Honourable Court, contrary to the provisions of section 68 of the Legal Professions Act, 1895, and for his contempt of this Honourable Court in holding himself out as a person qualified to practise, carry on or pursue the calling or profession of a solicitor of this Honourable Court contrary to the said provisions, and for his contempt of this Honourable Court in practising as such solicitor contrary to the said provisions, the said C——— not having been duly admitted as a solicitor of this Honourable Court under the provisions of the said Act, or of any other Act of the Province of British Columbia, which said contempt or contempts was or were committed by the said C——— during the month of March, 1897, at or near the said City of Rossland; or (in the alternative) that the Law Society of British Columbia

Statement.

NOTE (*a*)—"68. Except as hereinbefore provided, if any person shall without having been duly called or admitted as aforesaid, practise, or assume to act, or hold himself out to the public in any way as a person qualified to act as a barrister or solicitor, or to practise, carry on or pursue the calling or profession of a barrister or solicitor, or shall, in this Province, advertise or hold himself out, with the object of obtaining legal practise in the Province, to be a barrister, advocate or solicitor of any other province or country he shall be guilty of an offence under this Act, and shall be liable on conviction thereof before any Justice of the Peace to a fine not exceeding one hundred dollars, or to imprisonment for a term not exceeding six months for each offence."

NOTE (*b*)—"72. An offence against the provisions of any of the preceding five sections shall also be deemed a contempt of the Supreme Court, and may be punished accordingly on motion to such Court, made on behalf of the Society, or of any other person complaining thereof."

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RE C——

may be at liberty to issue a writ or writs of attachment out of this Honourable Court against the said C——— for his contempts aforesaid."

The offence complained of consisted of the writing by the defendant of the two following letters:

ROSSLAND, BRITISH COLUMBIA, March 13th, 1897.

H. E. Lippman, Esq., Rossland, B.C.:

DEAR SIR: Mr. John S. Patterson desires us to inform you that he proposes to take proceedings against you for slander unless you make a proper retraction forthwith. As to the letter you have informed him you have from J. W. Boyd, he wishes you to verify your statement by allowing *(sic)* to inspect it, and if it contains any such statements as you assert it does, he proposes to institute proceedings against Mr. Boyd. Let us hear from you on these points."

ROSSLAND, BRITISH COLUMBIA, 15th March, 1897.

Mrs. E. V. Ross, Rossland.

DEAR MADAME: We have instructions from Mrs. Emma Ogier to proceed against you for taking her goods from the Red Mtn. Ry. Co. without her authority. Also for tresspassing at her house and forcibly removing goods on which she had a lien for $25.00. This lien money must be paid at once, and the goods restored."

Statement.

The defendant fyled affidavits in answer to the charge. From these it appeared that the defendant had been carrying on business in Rossland, B.C., as a debt collector, conveyancer, and insurance agent. That he was a solicitor of the Province of Manitoba, and had made application to be admitted in British Columbia as a solicitor. That no fees had been charged against or paid by Mrs. Ross to him, and that the defendant had disclaimed being a solicitor entitled to practise in British Columbia, and had refused to accept legal business offered to him.

Gordon Hunter and *P. S. Lampman*, for the Law Society of B.C.: The letters are such as a solicitor usually writes before action, and which could be taxed against a client; see Tariff of Costs, xiii., Pulling on Attorneys, 3rd Ed. 155–6, 172. The inference is justifiable that the defendant was assuming to act as a lawyer from Manitoba. It is the duty of the Court to protect the public from illegal threats to use its

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process by unauthorized and irresponsible parties who make such threats on behalf of others for the purpose of gain to themselves. They also referred to Oswald on Contempt, 55; Pulling on Attorneys, 526; *Reg.* v. *Hall*, 8 Ont. 407; *Reg.* v. *Howarth*, 24 Ont. 561; *Reg.* v. *Barnfield*, 4 B. C., 305.

Archer Martin, *contra*: Contempt of Court is a criminal offence, and must be specifically and regularly charged and strictly proven: *In re Pollard*, L.R. 2 P.C. 106, *Ellis* v. *Regina*, 22 S.C.R. 7; *Ex parte Fenn*, 2 Dowl. 527. The application to commit should be made to the Court, and not to a Judge in Chambers: Short & Mellor's Cr. Prac. 397; *Rex* v. *Faulkner*, 2 C.M. & R. 532; *Southwick* v. *Hare*, 15 P.R. 239. The evidence adduced shews that the defendant never practised or assumed to practise as a solicitor: See *Re Clark*, 3 D. & R. 260; *Re Garbutt*, 2 Bing. 74; *Re King*, 1 A. & E. 560.

Argument.

DAVIE, C.J.: The first letter disclosed no offence. As to the second letter, the *prima facie* case established by the Law Society has been successfully rebutted, and, without considering the objections raised to the form of the proceedings, the motion should be dismissed, but, under the circumstances, without costs.

Judgment.

Motion dismissed without costs.

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GIBSON v. COOK, *ET AL.*

GIBSON v. COOK, ET AL

Appeal—Trial with jury—Costs following the event—Rule 751—"Court"

Under Rule 751 (*a*), the discretion as to costs in an action tried with a jury is exercisable by the Judge or Court of the first instance only; the Full Court has no power to make any order thereon, except on appeal upon the question, whether or not "good cause" has been shewn for depriving the successful party of his costs.

Remarks as to jurisdiction of Full Court.

Statement.

APPEAL from the judgment of WALKEM, J., on the finding of the jury at the trial, in favour of the plaintiff for $75.00 and costs. The appeal was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on the 9th and 10th of July, 1897.

Argument.

L. P. Duff, for the appeal, on the question of costs: The plaintiff should have been deprived of his costs, having recovered only a small sum, although claiming a large amount: *Huxley* v. *West London Extension Railway Co.*, 14 App. Cas. 26 at p. 32; *Forster* v. *Farquhar*, (1893) 1 Q.B. 564; *Moore* v. *Gill*, 4 T.L.R. 738; *Myers* v. *Financial News*, 5 T.L.R. 42; *Wood* v. *Cox*, *Ibid.* 272. "Court" in Rule 751 includes the Full Court. The Court of Appeal in England, is different from that here. Here the Full Court is part of the Supreme Court.

E. P. Davis, Q.C., contra: The term "Court," in Rule 751 means the Supreme Court sitting at *nisi prius*. As to depriving successful party of costs, see *Huxley* v. *West*

NOTE (*a*)—751. . . . . "Provided also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order.

London Extension, supra ; Rooke v. *Czarnikow*, 4 T.L.R. 669 ; *Collins* v. *Welch*, 5 C.P.D. 27 ; *Jones* v. *Curling*, 13 Q.B.D. 262 ; Ann. Prac. 1897, 1132. By allowing the costs the Judge negatived there being any good cause. Counsel also cited *Freeman* v. *Cooke*, 2 Ex. 663 ; *M'Kenzie* v. *British Co.*, 6 App. Cas. 82 ; *Angus* v. *Dalton*, 3 Q.B.D. 85, at p. 129.

L. P. Duff, in reply.

Cur. adv. vult.

July 19th, 1897.

DRAKE, J.: The action was brought by the plaintiff to recover damages for the wrongful seizure and sale of certain cattle and horses belonging to the plaintiff. The facts shewed that the Sheriff acted under an execution issued by the defendants against Allison. After the seizure the plaintiff gave to the Sheriff written notice that he claimed some sixty head of cattle and horses. Only a portion of this number was seized, and less than those seized were sold. After this notice the Sheriff referred to the defendants and they instructed him to proceed, and indemnified him. The evidence was of a very contradictory character, and the jury found the plaintiff entitled to one cow and calf, and assessed the damages at $75.00. If they had found for the plaintiff in respect of a larger number of horses and cattle, I think the verdict would have been one that the Court could say that reasonable men could not have reasonably arrived at. After the verdict the learned Judge directed the costs to follow the event, and certified for a special jury. The defendant's contention is that there should be a new trial on the ground that the verdict was against the weight of the evidence. On this, in my opinion, they fail. They also moved on the ground of misdirection in not leaving to the jury the question of whether the conduct of the plaintiff at and during the time of the seizure and sale amounted to leave and license.

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The Sheriff had written notice of the plaintiff's claim before he sold, and was indemnified by the defendants against such claim. There was no withdrawal of that notice only the expression of the plaintiff to the Sheriff, after driving away certain animals that belonged to other parties, "to whack away." In my opinion this language was used before any sale took place, in fact at or about the original seizure, and as the Sheriff had expressed his intention of selling all the animals claimed by the plaintiff, it was no withdrawal of the original claim, but merely amounted to this, that all the cattle belonging to others having been removed, the Sheriff might go on with his duty, subject to the plaintiff's claim. It did not amount to leave and license, and the learned Judge's summing up is not open to the objection raised. The next point taken by the defendants is that the plaintiff should be deprived of costs, for making an unfounded claim. There is no appeal on the question of costs; see section 65 of the Supreme Court Act, C.S.B.C. 1888. If the learned Judge had deprived the plaintiff of costs under Rule 751, that is appealable, but to let the verdict take its ordinary course is not appealable; the law gives the plaintiff his costs when the trial is before a jury. The cases cited: *Foster* v. *Farquhar* (1893), 1 Q.B. 564; *Huxley* v. *West London Extension Railway Company*, 14 App. Cas. 26, and *Jones* v. *Curling*, 13 Q.B.D. 262, are all cases where the Trial Judge had deprived the plaintiff of costs, and the general result is summed up in the *Huxley Case*, that so long as the Judge deals with the question of disallowing costs on account of unnecessary litigation and oppressive conduct on the part of the successful party, he is acting within his jurisdiction, but if the Judge acts on other considerations which do not constitute good cause within the rule, his decision is appealable. In *Garnett* v. *Bradley*, 3 App. Cas. 944, at p. 950, Lord HATHERLY says the meaning of the rule is that he who has succeeded in his cause shall, without regard to the amount of damages which he shall

recover, be entitled to his costs unless the Judge otherwise orders. It is suggested that the words "Court" or "Judge" in our rule, gave to the Full Court the jurisdiction to deprive a successful plaintiff of his costs for good cause. This construction is not the meaning of the rule; the term "Court" there means the Court before which the action is brought, presided over by one or more Judges. The Full Court is not a branch of the Supreme Court; it is the Supreme Court sitting as a Full Court for the purposes of appeal only. A Court acts by its seal, a Judge by his signature. The Supreme Court Act, C.S.B.C. 1888, Cap. 31, Sec. 37, enacts that the Court of *nisi prius* shall be presided over by one or more Judges of the Supreme Court, and section 65 enacts that no order made by the Supreme Court or any Judge thereof, by consent of parties or as to costs only, shall be subject to any appeal except by leave of that Court or Judge making such order. The use of the term "Court" in these sections clearly has no application to the Full Court, but to the Court of first instance. To hold otherwise would be contrary to the scope and intention of the Supreme Court Act, and would entail on the Full Court an endless list of appeals on questions of costs which the law says shall follow the event. The fact that the learned Judge ordered costs, which there was no necessity of doing, does not affect the question. His refusal to deprive the plaintiff of costs is not appealable. For these reasons I think the appeal should be dismissed with costs.

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DAVIE, C.J., and MCCREIGHT, J., concurred.

Appeal dismissed with costs.

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[In Chambers].
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SAN FRANCISCO MINING COMPANY, LIMITED v. J. & E. MARTIN.

Motion for judgment in default of statement of defence—Costs.

A plaintiff is entitled to costs of a motion for judgment in default of defence when the defence is fyled after service of the notice of motion.

SAN FRANCISCO v. MARTIN

MOTION by plaintiff for judgment in default of statement of defence. After service of the notice of motion, the defendants fyled a statement of defence. The plaintiffs thereupon abandoned the motion, leaving only the question of costs to be determined.

Statement.

H. E. A. Robertson, for the motion.

Archer Martin, for defendants: Though not so laid down by the rules, it is the practice amongst members of the profession to notify, verbally or by letter, solicitors on the other side before moving for judgment in default of pleading. Here no such notification was given, the service of the notice being the first intimation. By Rule 751, save as therein excepted, all costs are in the discretion of the Court or Judge. In the present case no costs should be allowed; to do so would mean that a solicitor would be able to serve a notice of motion immediately after default and get costs of the motion, thus fostering unnecessary applications.

Argument.

DRAKE, J.: The rules authorize a plaintiff to move for judgment on default, and I cannot overrule them. A plaintiff is entitled if he sees fit, to serve notice of motion the day after default, without prior notification of his intention.

Judgment.

Costs of motion allowed to plaintiffs.

CUNNINGHAM v. HAMILTON.

BOLE, L.J.S.C.

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CUNNINGHAM v. HAMILTON

Mortgage—Interest after maturity—Rate.

A mortgage contained no proviso for payment of interest at the rate therein specified after maturity, but merely a covenant to pay same "at the day and time and in manner above mentioned."

Held, That the interest after maturity was outside the covenant, and was recoverable only as damages for detention of the principal, at the statutory rate of six per cent., following *Peoples' Loan Co.* v. *Grant*, 18 S.C.R. 262.

APPEAL from the ruling of the Registrar, on reference, allowing interest on an overdue mortgage debt at the rate of ten per cent., the rate stipulated to be paid before maturity. The mortgage deed, which was in the statutory form, contained no covenant to pay interest at any rate after the day fixed for the repayment of the loan thereby secured. Statement.

R. L. Reid, for the plaintiff.

J. B. Cherry, for the defendant.

BOLE, L.J.S.C.: The writ herein is endorsed with a claim to have an account taken of what is due plaintiff by the defendant for principal, interest, taxes and costs on a mortgage dated 8th October, 1890, given by the defendant to the plaintiff, and for foreclosure and judgment, etc.

The matter having been referred to the Registrar to take an account of the amount due on the defendant's mortgage, an appeal has been taken from the Registrar's ruling with respect to the rate of interest payable after the maturity of the mortgage. The interest reserved in the mortgage, which is drawn up on one of the forms provided by the Act relating to short forms of mortgages, is ten per cent. per annum, and there is no covenant for payment of interest at that, or, indeed, any rate, or at all, after the 8th of October, 1892, the date when the principal became due. The Registrar calculated the interest at the rate of ten per Judgment.

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cent. since that date. The defendant appeals from that ruling, as he alleges the rate of interest since 8th October, 1892, should be calculated at six per cent., not ten per cent. As to the meaning of the mortgage there is no room for doubt that it contains no contract or covenant, express or implied, to pay interest at the rate of ten per cent. after the 8th October, 1892, and the only question for me to decide on this appeal is at what rate must interest given as damages be awarded, and in doing so I can hardly do better than quote the decision of STRONG, J. (now C.J.), in the *Peoples' Loan and Deposit Company* v. *Grant*, 18 S.C.R. 262, at p. 277, where he says: "The learned Judge who decided *Mellersh* v. *Brown* (45 Ch. D. 225), Mr. Justice KAY, held that interest subsequent to the day fixed for payment, and, therefore, recoverable only by way of damages, was to be at the rate of five per cent., not, however, because that was the rate reserved by the mortgage deed, but because it was the usual and current mercantile rate of interest. So far, therefore, the case is a strong authority for the respondents here. In England there is no statutory provision as to the rate of interest except as to judgment debts, which by Stat. 1 & 2 Vic., Cap. 110, Sec. 17, are to bear interest at four per cent. per annum. Here we have the statute fixing the rate of interest in all cases where interest is recoverable, and where by the contract the rate is not expressly stipulated for, at six per cent. . . . It follows that interest recoverable by way of damages in this country cannot exceed a yearly rate of six per cent."

The appeal must therefore be allowed, and interest, given as damages, be calculated from and after the 8th day of October, 1892, at the rate of six per cent. per annum.

Appeal allowed.

MADDEN v. THE NELSON AND FORT SHEPPARD RAILWAY COMPANY.

FULL COURT.

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MADDEN v. NELSON AND FORT SHEPPARD RY. CO

Constitutional law—Provincial Fence Act, 1888—Cattle Protection Act, 1891.

A Provincial Statute (54 Vic. B.C. Cap. 1), provided that every railway company operating a railway in the Province under the authority of the Parliament of Canada should be liable in damages to the owner of any cattle injured or killed on their railway by their engines or trains, unless there be a fence on each side of the railway similar to some one of the fences mentioned in section 3 of the (Provincial) Fence Act, 1888.

Held, ultra vires.

APPEAL from the judgment of FORIN, Co. J., at the trial, finding that the defendant Company not having fenced their railway in accordance with the provisions of the Cattle Protection Act, was, under section 1 thereof, liable for damages for injury to the plaintiff's cattle, which being lawfully on the adjoining land had strayed on to the line and been killed by a passing train. The defendant Company appealed on the ground, amongst others, that the Act was *ultra vires* of the Provincial Legislature. The appeal was argued before MCCREIGHT, WALKEM and MCCOLL, JJ., on the 12th of May, 1897.

Statement.

L. P. Duff, for the appeal.

G. Hunter, for the plaintiffs respondents, cited *Hodge* v. *The Queen*, 9 App. Cas., at p. 130; *Bank of Toronto* v. *Lambe*, 12 App. Cas., at p. 587; *Canada Southern Railway Co.* v. *Jackson*, 17 S.C.R. 316; *Citizens Insurance Company of Canada* v.

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Parsons, 7 App. Cas. 96, 115; *Tennant* v. *Union Bank of Canada*, (1894), App. Cas. 31; *Attorney-General of Ontario* v. *Attorney-General of Canada*, *Ibid.* 189.

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Cur. adv. vult.

August 19th, 1897.

McCREIGHT, J.: The plaintiffs sue the defendant Company for the loss of two horses belonging to the plaintiffs. The case was tried by His Honor Judge FORIN and a jury, and they found in substance that the animals were driven into a trestle by an engine on the Company's track, and sustained serious injuries. One, I gather, was killed, and the other so injured that it had to be destroyed. The jury found that the railroad was not fenced. The Nelson & Fort Sheppard Railway Company was incorporated by an Act of the Legislature of British Columbia, but by petition prayed that the railway be declared to be a work for the general advantage of Canada, and the Company a body corporate within the jurisdiction of the Parliament of Canada. Accordingly, by Stat. Can. 56 Vic. Cap. 57 the railway of the Company was declared to be a work for the general advantage of Canada, and by section 2 it was provided that the Railway Act of Canada should apply instead of B.C. Railway Act (1890) to all matters and things to which the Railway Act 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. The question argued before the Full Court was whether section 1 of the Cattle Protection Act of 1891 (B.C.) was *intra vires*, or, in other words, was the Company bound to fence under section 1. Mr. *Hunter*, in an argument for which I feel obliged to him, argued for the plaintiffs, and he contended first there was a greater *onus* in

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attacking local legislation as regards railroads on the ground of unconstitutionality than on other subjects, because the subject is dealt with by exception in section 92, sub-section 10 of the B.N.A. Act, but I think the remarks of SPRAGGE, C.J., in *Monkhouse* v. *G.T.R. Company*, 8 O.A.R. (which was cited by Mr. Duff), at pp. 640 and 641, fully answer this contention, and I proceed to consider the other portions of his argument. He argued that the only object of the local Act was protection of cattle and not to interfere with the railway, and he seemed to consider that it did not conflict with Dominion legislation, and he argued that it was the duty of the Courts to avoid as far as practicable a decision that there was a conflict of jurisdiction, and he referred to the remarks of the Judicial Committee in the *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas., I presume at pp. 108, 109, which, however, seem only to indicate that the Imperial Legislatures could not have intended that a conflict should exist between the powers given to the Federal and those given to the Provincial Legislatures. And he argued that section 194 of the Railway Act of 1888, (Can.) requiring fences and cattle guards to be erected in the cases and under the circumstances therein mentioned was not inconsistent with section 1 of the local Act, and further that the Dominion has not sought to cover the ground covered by the Local Legislature, a point which I shall deal with presently. Now it seems to me that there is an obvious inconsistency in section 194 and its sub-section 3, as amended by sub-section 3 of section 2 Cap. 28, 53 Vic., with section 1 of the local Act ; for perusal of the Dominion and local legislation respectively shews that companies under the former will often and in many cases be considered exempt from liability, where local legislation, supposing it to be constitutional, must unquestionably reach them. Indeed, we have no better illustration than that afforded by the present case, for it was not disputed that according to Dominion legislation the Company was not liable, and that according to local

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legislation they were liable. As to the point that the Dominion has not sought to cover the ground covered by local legislation, I think the answer is plain that at common law the occupiers of adjoining closes are not bound to fence either against or for the benefit of each other, but "each occupier of land is bound to prevent his cattle from trespassing on his neighbour's premises": See Addison on Torts, 7th Ed. 297, referring to *Lawrence* v. *Jenkins*, L.R. 8 Q.B. 274, and see Gale on Easements, 6th Ed., referring to notes to *Pomfret* v. *Ricroft*, 1 Saunders 322, where it is said: "The general rule of the law is that I am bound to take care that my beasts do not trespass on the land of my neighbour; and he is only bound to take care that his cattle do not wander from his land and trespass on mine." In this case, the Company are clearly not liable by common law.

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Now, if we take this doctrine in connection with the law as to the construction of statutes, that "it requires a distinct and positive legislative enactment to alter any clearly established principle of law, and that statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare": Hardcastle on Statutes, pp. 138, 139, we have a distinct answer to Mr. *Hunter's* objection that "Dominion legislation does not displace that which is local, inasmuch as it is silent." The author refers to *Arthur* v. *Bokenham*, 11 Mod. R. 150, and *Rolfe and Bank of Australasia* v. *Flower*, L.R. 1 P.C. 27; but, as the point formed an important part of Mr. *Hunter's* argument, it may be right to refer to more of the numerous authorities on this subject. At page 112 of the same authority we find the following passage referring to *Heydon's Case*, 3 Co. Rep. p.: "That for the sure and true interpretation of all statutes in general, etc., restrictive or enlarging of the common law, four things are discerned and considered: (1.) What was the common law before the making of the Act? (2.) What was the mischief

and defect for which the common law did not provide? (3.) What remedy the Parliament hath resolved and appointed to cure the disease of the commonweath? (4.) The true reason of the remedy," etc. Again at pages 321 and 322 of the same work we find the following: "The common law, says Lord COKE, in 1 Institute 155b, has no controller in any part of it but the High Court of Parliament, and if it be not abrogated or altered by Parliament it remains still." And the author proceeds: "If it is clear that it was the intention of the Legislature, in passing a new statute, to abrogate the previous common law on the subject, the common law must give way and the statute must prevail," etc. And in page 322 we find as follows: "It is a sound rule, said BYLES, J., in *Reg.* v. *Morris*, L.R. 1 C.C.R. 90, p. 95, to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law." These authorities satisfy me that section 194 of the Railway Act (Can.) of 1888, should be construed in effect as if the Act had said that the common law should remain, except as altered by section 194. No draughtsman, of course, would think of inserting such a provision. Innovations of that nature have given rise to several attempts at misapplication of the maxim, *expressio unius est exclusio alterius;* see Maxwell on Statutes, 3rd Ed. at pp. 438, 461. In Wilberforce on Statutes, 20, it is said: "We are bound to assume that in passing a statute the Legislature has before its mind's eye an exact outline of the law affecting the particular subject with which it is dealing; the new statute is intended, as far as possible, to fit into the existing frame work. No greater change is to be made in the law than is absolutely necessary." In *Lawson* v. *Laidlaw, et ux.*, 3 O.A.R. 77, a case on the Married Woman's Property Acts, at p. 89, we find the following quotation of a judgment of DRAPER, C.J., in *Kraemer* v. *Gless*, 10 U.C.C.P. 475: "Every provision for

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these purposes is a departure from the common law, and, so far as is necessary to give these provisions full effect, we must hold that common law is superseded by them ; but it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give." The same matter is put in a quaint and amusing manner by Bishop in his treatise on Statutory Crimes, 2nd. Ed., Sec. 7 : "Prior law and statute combining: Every statute, as just said, combines and operates with the entire law whereof it becomes a part ; so that, without a discernment of the original mass, one can form no correct idea of the action of the new element. As, if the provision is, 'that he who steals another's watch shall be imprisoned in the penitentiary for five years'—a babe of two years seizes the watch and throws it into the fire. Here is an act, not speaking now of the intent, apparently within the statutory terms. No exception in favour of babes is written in the enactment. So, if we do not look to the prior law, the babe must go to the penitentiary. But the unwritten law has already provided that no child under seven years of age shall be the subject of criminal prosecution. By interpretation, therefore, the statutory provision is limited by this one of the common law," etc.

Mr. *Duff* pointed out in his reply that section 194 had only limited the operation of the common law, but I think it is well to call attention to the authorities which I have quoted, and which I think shew that by interpretation the common law as to fencing in reference to Dominion railways, has been altered by the Act of 1888, Sec. 194, and no further, and consequently that the plaintiffs cannot recover inasmuch as they do not fall within the purview of section 194, and that Provincial legislation purporting to extend the liability beyond the operation of section 194 must be inoperative as being unconstitutional.

I think the decision of the learned County Court Judge must be reversed with costs in the Court below, and that

this appeal must be allowed with costs. Mr. Justice McColl agrees with this judgment.

WALKEM and MCCOLL, JJ., concurred.

Appeal allowed.

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TROUP v. KILBOURNE.

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Mineral Law—Action to enforce adverse claim—Abandonment of—Setting aside adverse—Practice.

Plaintiff having commenced an action to enforce an adverse claim, did not serve the writ within a year as provided by Rule 31.

The defendant moved in the action to set aside the writ and to vacate the adverse claim.

Held, That the action was out of Court, and no order could be made therein.

Semble. That an application to set aside an adverse claim is not properly made in an action brought to enforce it.

MOTION to set aside the writ of summons in the action and all proceedings thereunder, and to vacate the adverse claim. The facts fully appear from the judgment. Statement.

A. E. McPhillips, for the motion.

Gordon Hunter, contra.

August 19th, 1897.

DRAKE, J.: The plaintiffs on 20th March, 1896, commenced an action against the defendant, being in the nature of an adverse under the Mineral Act. The adverse claims were fyled at New Denver, West Kootenay, on 25th February, 1896, and affect the "Ajax" and "Treasure Vault" claims. The writ in the action has never been served, and by Rule Judgment.

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31 is no longer in force, and there is no action pending in the Court. The defendant, on the 10th of August, moved to set aside the writ and proceedings, and applied to vacate the adverse claims.

Proceedings which are non-existent cannot be set aside and vacated. The Mineral Act Amendment Act, 1892, Sec. 14, enacts that a failure to commence or prosecute proceedings by the adverse claimant, shall be deemed to be a waiver of his adverse claim. It is clear that the adverse claimant has waived by non-service of process, all rights given him by the Mineral Act to stay proceedings of the mine owners in applying for a Crown grant, but the Act does not point out how such waiver can be taken advantage of in case the Recorder does not cancel the claim. In this case there has been no application to him. I do not see how I can make an order in this motion which is entitled in an action practically defunct. The Court can only deal with proceedings entitled in an action which is pending. If there is no action pending, but the assistance of the Court is required, it has to be applied for in some other way. It is to be noted that the notice of adverse was not fyled in a pending action, but as a proceeding taken prior to an action, differing in this respect from a *lis pendens*, which can only be fyled after action is brought (*a*). The motion must be refused, but under the circumstances without costs.

Judgment.

Motion dismissed.

NOTE (*a*)—But see the mode of fyling adverse claim now in force: Mineral Act, 1896, Sec. 37 (*z*).

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Municipal Law—Municipal Clauses Act, 1896, Sec. 50, Sub-Sec.(90) and Sec. 81—By-law—Unreasonableness—Whether distress necessary before commitment.

The Municipal Clauses Act, 1896, Sec. 50, Sub-Sec. 90, gave to the Council of every Municipality the power to pass by-laws in relation to "Public morals, including the observance of the Lord's Day, commonly called Sunday." The Municipal Council of Richmond passed a by-law thereunder, "that no person shall do or exercise any worldly labour, business, or work of his ordinary calling upon the Lord's Day or any part thereof, works of necessity or charity only excepted," etc.

Sec. 81 provides: "Every fine may be recovered and enforced with costs, by summary conviction, before any Justice of the Peace, etc.; and in default of payment the offender may be committed to the common gaol," etc.

Sec. 81, Sub-Sec, (2) provides: "The Justice may by warrant cause any such pecuniary penalty, etc., if not forthwith paid, to be levied by distress, etc. In case of there being no distress found, etc., the Justice may commit the offender to the common gaol."

The defendant was, for an offence against the by-law, committed to gaol for non-payment of the fine, without previous issue of any distress warrant.

Held, upon motion for *certiorari*, quashing the conviction, that the by-law was bad for unreasonableness.

2. That the power of recovering the fine by imprisonment, given by Sec. 81, is not limited to the power of issuing distress warrant, etc., provided by Sec. 81, Sub-Section (2) and that the form of the commitment was regular.

APPLICATION for a writ of *certiorari* to quash a conviction. The facts and the grounds of the application sufficiently appear in the headnote and judgment. Statement.

A. Williams, for the applicant.

C. B. Macneill, contra.

DRAKE, J.: This is an application for a writ of *certiorari* to remove the proceedings relative to the conviction of Judgment.

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Simon Petersky for breach of a by-law of the Richmond Municipality, being a by-law for the better observance of the Lord's Day, commonly called Sunday. The objections taken to the conviction are several: 1. That the by-law does not comply with the provisions of the statute, and the Corporation had no power to pass such a by-law. 2. That the Magistrate acted without jurisdiction. 3. That the conviction is bad in that it does not state the amount of the costs payable, and that it does not provide for distress in default of payment. 4. That there is no such by-law as the Sunday Observance By-Law, 1897. The third and fourth objections do not appear in the conviction returned to the Court to be well taken. By the Municipal Clauses Act, 1896, Sec. 50, Sub-Sec. 80, the Municipal Council has power to make by-laws relating to public morals, including the observance of the Lord's Day, commonly called Sunday. Accordingly the by-law in question was passed, section 2 of which enacts that no person whomsoever shall do or exercise any worldly labour, business or work of his ordinary calling, upon the Lord's Day or any part thereof, works of necessity and charity only excepted, and no person shall publicly cry forth or expose for sale, or sell or permit to be exposed for sale or sold, any wares, merchandise, fruit, fish, game, or other goods and chattels whatsoever, on the Lord's Day. Any person guilty of an infraction of this by-law, shall upon conviction forfeit or pay a sum not exceeding five pounds sterling, or an equivalent in Canadian currency, together with costs of prosecution, and in default of payment of such fine and costs within a time to be named by the Justice, the Justice may commit such person to the common gaol for any period not exceeding two months, without hard labor, unless the fine and costs are sooner paid. The objection taken by Mr. *Williams* to this conviction is, that under section 81 of the Municipal Clauses Act, 1896, the limit of imprisonment for non-payment of fine is thirty days, and the Magistrate sentenced the appellant to one

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month, and secondly that the conviction did not provide for distress of the appellant's goods before inflicting imprisonment. As regards the first objection, section 81 only deals with those cases where the by-law makes no other provision for its enforcement, and the period of imprisonment is limited to thirty days. In such cases here the by-law fixes the maximum of imprisonment at two months, which is not unreasonable. This objection therefore fails. The second objection raises a question as to the construction to be placed on section 81 and its sub-sections. Section 81 enacts that in default of payment of the fine the offender may be committed to gaol; sub-section 2 provides for awarding the penalty as the Justice thinks fit, and goes on to say that he may by warrant cause the penalty to be levied by distress, and in case of no sufficient distress may commit for the term specified in the by-law. This section 81 is very similar to sections 420, 421, 422 and 423 of the R.S.O., Cap. 184, and it was held by GALT, J., in *Reg.* v. *Blakeley*, 6 P.R. 244, that there must be a distress warrant issued prior to commitment. This is an authority to which every respect is due, but neither the argument nor the reasons are given, and the language of the statutes may differ. In my opinion the section is to be read as relative to separate and distinct courses of procedure; in the one case imprisonment in case of non-payment of the fine; in the other fine to be levied by distress, and followed by imprisonment in case of insufficient distress. I therefore consider these objections to the conviction fail.

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It is necessary, therefore, to consider the objections to the by-law itself. The legality of the by-law may be questioned on these proceedings, although no application is made to quash it; see *Reg.* v. *Osler*, 32 U.C.Q.B. 324; *Reg.* v. *Cuthbert*, 45 U.C.Q.B. 19. The contention of Mr. *Williams* is that the by-law is unreasonable in that it purports to affect all persons without exception, and would include a minister of religion, farmers and others who are not

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included in Statute 29, Car. 2 Cap. 7. That statute carefully limits the operation of the Act, and is the law of the Province to-day, and so far as that Act extends it seems useless for a Municipal Corporation to pass a by-law practically to confirm that which is the law whether they adopt it or not, and which can be enforced by the ordinary tribunals. The by-law is too wide in its scope and is unreasonable. The conviction must be set aside. Costs are seldom granted when the conviction is quashed, unless it appears the Magistrate has been guilty of conduct which would call for the animadversion of the Court. There is no such suggestion here.

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Judgment accordingly.

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Municipal Corporation—Highway Authority—Statutory duty or power —Negligence—Misfeasance or nonfeasance—Findings of Jury.

In an action for negligence it is not sufficient to shew general negligence on the part of the defendant, but the plaintiff must shew a negligent act "whereby" the injury was caused.

There is, at law, no cause of action for damages for negligence in not performing a statutory duty, or for not exercising a statutory power, but only for negligent acts in the performance of the duty, or in the exercise of the power.

The jury found *(inter alia)* that the injury, which resulted from the collapse of a bridge built by the Provincial Government, but afterwards brought within the City limits, was caused by the breaking of a hanger supporting one of the floor beams. The City had substituted stirrup hangers with welds, made by their orders on some of the beams, in place of unwelded straight hangers. When asked whether it was one of the substituted hangers which broke, the jury said there was no evidence, but in their opinion a missing stirrup hanger must have broken at the welds, otherwise it would have been attached to the floor beam. To the question whether the Corporation was blameable for the cause of the accident, and how, the jury answered: "A. Yes, because having been made aware of the bad condition of the bridge, through the report of the engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure. In our opinion it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy cars to pass over it."

Upon motion for judgment:

Held. 1. That there was no finding of actionable negligence "whereby" the disaster was caused.

2. That the acts of negligence to which the jury attributed the disaster, were mere nonfeasance.

Statement.

ACTION by plaintiff, under Lord CAMPBELL'S Act, against the City of Victoria and the Consolidated Railway Company, to recover damages for the death of her husband, which was caused by the collapse of a bridge known as the Point

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Ellice bridge, while a tram car of the Company, in which the deceased was a passenger, was running across it. The tramway line across the bridge was maintained and operated by the Company under powers contained in their charter under a Provincial statute. The bridge had been built in 1885 by the Provincial Government, but the City limits were extended in 1891 so as to include the bridge within its area. The bridge was constructed on the truss system. In June, 1892, one of the wooden floor beams having become rotten at both ends, where it was pierced by its supporting iron hangers which depended from the upper chord of the bridge, broke, whereupon the City replaced it and also a number of the other floor beams, and lengthened the hangers by welding additional pieces of iron to them, carrying them around the ends of the new beams, instead of through them in the form adopted by the original hangers, with a view of avoiding the rot which had previously taken place at the hanger holes. The other beams and hangers were left as they were. In May, 1896, a large and heavy car, weighing ten tons, with seating capacity for twenty passengers, was passing over the bridge, loaded with over one hundred and twenty passengers. A span of the bridge collapsed when the car had reached about to its centre, precipitating the car and its passengers into an arm of the sea spanned by the bridge, and the deceased and over sixty other passengers were drowned. The further facts and matters of inducement to the liability of the Corporation, are more fully reported in *Patterson* v. *Victoria*, *post*, the above being sufficient for the purpose of this decision.

The action was tried at Vancouver, before DAVIE, C.J., and a special jury, on the 12th, 13th, 14th, 15th, 18th and 19th of May, 1897.

Argument.

Charles Wilson, Q.C., *Lindley Crease*, and *J. H. Senkler*, for the plaintiff.

Robert Cassidy and *C. D. Mason*, for the City of Victoria.

E. P. Davis, Q.C., *L. G. McPhillips*, Q.C., and *A. E. McPhillips*, for the Consolidated Railway Company.

The findings of the jury were as follows:

1. What was the proximate, that is to say, the immediate cause of the accident? A. We find that the accident was caused by the breaking of a hanger. This we consider proved by the fact that one was broken, and no other strain so great could have been put upon it at the time of the accident as that caused by the cars passing over it. We further think the missing hanger strengthens this conclusion.

2. Was the Corporation blameable for such cause, and how? A. Yes, because having been made aware of the bad condition of the bridge from the report of their engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure. In our opinion it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy cars to pass over it.

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3. Was the accident due to any act or negligence on the part of the Railway Company, and if so describe such act or negligence. A. No.

After having answered the above questions, please say whether in your belief any of the substituted stirrups put in by the Corporation, broke, whether at the welds or otherwise, and how? A. There is no evidence to shew that. In our opinion the missing stirrup hanger must have broken at the welds, otherwise it would have been found attached to the floor beam.

(*a.*) Did the Corporation, at the time of the repairs made in 1892, know the plan and design of the bridge, the method of construction and the nature of the material employed, and the capacity of the bridge? A. No.

(*b.*) If not, could the Corporation have readily acquired that information, and did they refrain from so doing? A. Yes.

(*c.*) Did the Corporation assume the entire charge, control

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and management of the bridge, and if so, when? A. Yes; Jan. 8th, 1891.

(*d.*) Did the Company first begin to run big cars across the bridge before or after the Corporation assumed control of the bridge? A. After.

(*e.*) Did the Corporation, with a view to increased traffic and the use by the Company of larger cars, effect any alterations in the bridge? A. Yes.

(*f.*) Were such alterations, if made, done properly, having regard to the intended use by the Company of large cars, such as the one in which the deceased was carried? A. No.

(*g.*) Did the then Company, in 1892, with the consent of the Corporation, make any alteration in the bridge? A. Yes.

(*h.*) Were such alterations by the Company proper, having regard to the intended use by the Company of large cars, such as the one in which the deceased was carried? A. They might have been better.

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(*l.*) Was the bridge, after the changes made by the Corporation and the Company, strong enough to carry the large cars alone? A. No.

Ditto when loaded to their fullest capacity? A. No.

(*m.*) Was the car in which the deceased was carried, overloaded at the time of the accident? A. No.

(*n.*) Did the Company with the consent of the Corporation, use cars of a size and weight beyond the strength of the bridge to carry? A. Yes.

Upon these findings the action was at once dismissed as against the Consolidated Railway Company, and on the 4th of June both the plaintiff and the City of Victoria, moved for judgment on the findings, before DAVIE, C.J.

Charles Wilson, Q.C., and *Lindley Crease*, for the plaintiff: The defendants are in the same position as if they had built the bridge themselves: *Harold* v. *Simcoe*, 16 U.C.C.P.

43, 18 U.C.C.P. 1. (On Appeal). Dillon on Municipal Corporations, 4th Ed. Vol. II., Sec. 1009.

The duty to keep in safe condition follows from the control. In *Rex* v. *County of Bucks, etc.*, 11, Rev. Rep. 347, the bridge was built by the Crown, and upon indictment it was held that the inhabitants were bound to repair unless they could shew that some other party was so bound: *Rex* v. *Kent*, 15 Rev. Rep. 330; *Reg.* v. *Southampton*, 19 Q.B.D. 690, at p. 592.

The finding that the repairs were not sufficiently well done is a misfeasance for which the defendants are liable: *Bathurst* v. *McPherson*, 4 App. Cas. 256; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400.

There is a sufficient finding that one of the substituted stirrup hangers broke at the welds. The expression of the jury that "There was no evidence to shew," must be rejected as referring merely to direct evidence, for the rest of the answer, "Otherwise it would have been attached to a floor beam," states a fact which is quite sufficient to support the inference of expressed opinion, *i.e.*, finding of the jury. Negligence need not be expressly found by the jury: *Foreman* v. *Canterbury*, L.R. 6 Q.B. 214.

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It was the duty of the Corporation to inform itself of the condition of the bridge, and it is liable for the result: *May* v. *Chapman et al.*, 16 M. & W. 355; *Jones* v. *Gordon*, 2 App. Cas. 616 at p. 625; *Mildred* v. *Maspons*, 8 App. Cas. 874 at p. 885; *Mersey Docks* v. *Gibbs*, L.R. 1 H. of L. 93; *Pendlebury* v. *Greenhalgh*, 1 Q.B.D. 36; *Glossop* v. *Isleworth*, 12 Ch. D. 102.

Robert Cassidy, contra: The plaintiff cannot succeed where there is no finding of negligence on the part of the defendants, "whereby" the disaster was caused; *Wright* v. *The Midland Ry. Co.* 51 L.T.N.S. 539, 544; *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 193. The *causa causans* must be taken out of the region of mere conjecture: *McQuay* v. *Eastwood*, 12 Ont. 402, at p. 410.

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On the question of proximate cause and sole cause, see *LeMay* v. *C.P.R.* 18 Ont. 314; Jones on Negligence of Municipal Corporations, pp. 14, 383. There is here no sufficient finding of any negligence by defendants. It is plain, at all events, that the negligence attributed to the defendants by the findings, if any, was mere nonfeasance.

Cur. adv. vult.

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DAVIE. C.J.: As bearing upon this case the following summary of the law, taken from the Law Times of May 22nd last, may be usefully quoted: "It was at one time generally considered that any person injured by the non-performance of a statutory duty, was entitled to recover against the person on whom this duty rested: cf. *Couch* v. *Steel*, 3 E. & B. 402; *Hartnell* v. *Ryde Commissioners*, 8 L.T. N.S. 574; 4 B. & S. 361. This proposition can no longer be accepted as correct, and an important distinction has now been established between misfeasance and nonfeasance. In the case of nonfeasance, *i.e.*, the omission to perform some duty imposed by the statute, no action for damages will lie except at the instance of a person who can shew that the statute imposed on the defendants a duty towards himself which they negligently failed to perform: *Sanitary Commissioners of Gibraltar* v. *Orfila*, 63 L.T.N.S. 761; 15 App. Cas. at p. 411; *Atkinson* v. *Newcastle Waterworks Co.*, 36 L.T.N.S. 761; 2 Ex. D. 441. Thus, although by section 149 of the Public Health Act, 1875, the duty is imposed on an urban sanitary authority for repairing the highways in their district, a person who has sustained injuries resulting from the omission of the authority to perform this duty, has no cause of action: *Cowley* v. *Newmarket Local Board*, 67 L.T.N.S. 486; (1892) A.C. 345. Upon the same principle, if a waterworks company put down a fireplug in a highway, which, although having no defect in itself,

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becomes dangerous owing to the roadway being worn away, no action shall lie at the instance of the party injured, either against the waterworks company, *Moore* v. *Lambeth Waterworks Co.*, 55 L.T.N.S. 309; 17 Q.B.D. 462, or against the highway authority, *Thomson* v. *Mayor of Brighton*, 70 L.T.N.S. 206, (1894) 1 Q.B. 332. Nor does it make any difference that the duties of both authorities are combined in the same body: *Thompson* v. *Mayor of Brighton*, *supra*; the case of *Glossop* v. *Isleworth Local Board*, 40 L.T.N.S. 736, 12 Ch. D. 102, furnishes another example of the application of this principle. In that case the defendants were bound as sanitary authorities to supply sufficient sewers for their district, and, in consequence of their having omitted to perform this duty, a nuisance was caused to the injury of the plaintiff. Lord Justice JAMES, in giving judgment for the defendants, said: "If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed, by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons or to persons who might be anxious to make profit and costs out of this Act of Parliament." This decision has recently been followed in the case of *Robinson* v. *The Corporation of Workington*, 75 L.T.N.S. 674 (1897) 1 Q.B. 619, where the sewers, though properly constructed and in good repair, were so insufficient that the sewerage overflowed into the plaintiff's houses. It was there held that the plaintiff had no cause of action.

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On the other hand, it must be borne in mind, if the case of misfeasance as opposed to mere nonfeasance can be established, if that which was done was itself a legal wrong

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apart from the provisions of the statute, a person injured thereby has a good cause of action. Thus, in cases where a local authority put a defective grating in a highway, and where they failed to keep a barrel drain in proper repair, they have been held liable for misfeasance: *White* v. *Hindley Local Board*, 32 L.T.N.S. 460, L.R. 10 Q.B. 219; *Borough of Bathurst* v. *McPherson*, 4 App. Cas. 256. So, too, a vestry was held liable, which had sunk a water meter in a street, and allowed the iron flap, which covered it, to become slippery and dangerous: *Blackmore* v. *The Vestry of Mile End Old Town*, 46 L.T.N.S. 869, 9 Q.B.D. 451. Again, if a local authority construct sewerage works so defectively as to cause a nuisance, or if they drain their sewerage into the plaintiff's stream, they will be liable: *Goldsmid* v. *Tunbridge Wells Commissioners*, 13 L.T.N.S. 332; L.R. 1 Ch. 349.

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The present action was by a widow to recover damages against the Corporation of the City of Victoria, and the Consolidated Railway Company, on account of the death of her husband, which occurred on the 26th May, 1896, while the deceased was riding on a tram car of the defendant Company, and travelling over a bridge within the limits of the City of Victoria. The jury having acquitted the Tramway Company of negligence, judgment was entered for them at the trial. On the day in question, which was a holiday, the deceased Jesse B. Gordon was a passenger on a densely crowded tram car going to a naval review being held in the neighbourhood of Esquimalt, to which place the Company ran cars from Victoria, passing over two bridges on the way, the first, Rock Bay bridge, the second, Point Ellice bridge. On reaching Point Ellice bridge, another car, similarly crowded, was just ahead of the car in question, and had emerged from the bridge on the Esquimalt end just as this car commenced to cross. It was a truss bridge, containing two spans, and upon the car reaching the first span, the bridge collapsed, and the car plunged through

into the water below, and fifty or more passengers, including Jesse B. Gordon, were drowned, or killed by the falling timbers.

The bridge was not built by the Municipal Corporation; neither was it within the corporate limits at the time of its construction. It was built under contract for the Provincial Government in the year 1885, and was then outside the City limits. The limits were extended in the year 1890, the extension taking effect on January 8th, 1891, so as to expressly include Point Ellice bridge. The contract price of the bridge was $11,800.00, and it was constructed partly of wood and partly of iron. The spans were two of 120 feet, and two of 150 feet long, supported by iron cylinder piers, of which there were four, nineteen feet in length. The floor system of the bridge was connected with the truss by means of iron hangers, which were originally let into the wooden floor beams, through holes bored for the purpose, and fastened beneath by iron plates, secured by nuts. The vertical posts and hip verticals, diagonals and counters, and also the sway rods being connected with the hanger by means of an iron pin, which was passed through the bend or eye of the hanger, thus holding the top structure and flooring together. The bridge was designed to bear 1,000 pounds per lineal foot, with a factor of safety of five, that is to say, that although the designed capacity of the bridge would be 1,000 pounds to the lineal foot, yet its extreme limit of safety would be five times that load. The bridge, however, did not come up to its design, that is to say, its weight exceeded the estimate by 300 pounds per lineal foot, so that its designed capacity should be placed at only 700 pounds per lineal foot, and its factor of safety as shewn by the evidence, instead of five was only four and one-half. The bridge, then, being designed for an ordinary traffic of 700 pounds to the lineal foot, that weight must not ordinarily be exceeded. To do so would be to reduce the factor of safety. The ordinary traffic of the bridge, without tram

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cars, would exhaust its design capacity of 700 pounds to the foot.

In the year 1890, a Company named "The National Electric Tramway and Lighting Co., Limited Liability," obtained a private Act, (Cap. 52,) empowering them to construct, maintain, and operate, tramways over the bridges between Victoria and Esquimalt, including, of course, the bridge in question, and under that authority the Company were operating cars at the time of the extension of the City limits. Such operation was subject to the supervision of the Chief Commissioner of Lands and Works, and at the time of the extension of the limits the cars which were operated by the Company were less than half the weight and carrying capacity of the car in use at the time of the accident. By the extension of the limits, the control and management of the bridge passed from the Chief Commissioner of Lands and Works to the civic authorities, who

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under section 96 of the Municipal Act, 1891, Sub-Secs. 89, 106, 113, 119, and 120, had power to pass by-laws for purposes of regulating the traffic thereon, and in all matters relating thereto. The 57 Vic. Stat. B.C. Cap. 63, after reciting an agreement with the City of Victoria, dated 20th November, 1888, for the running of tramways within the City, the 33rd clause of which agreement stipulated that the parties of the second part (of whom the Company were the successors) might construct and operate street railways over any bridge in the City, provided that they should, at their own expense, furnish and lay a new flooring over any bridge so crossed, and provided also that the location of any such bridge line, and the work done thereon and the material provided therefor, should be to the satisfaction of the City Surveyor; enacts in section 12, that in addition to the powers conferred by the agreement the Company might, "upon the terms and conditions as fully set forth in the agreement, lay their tracks and operate their railways upon and along (among other places) the bridges lying in and

between Victoria and Esquimalt." Under these powers, then, the City had full authority to dictate the size, character, and weight of the cars to be run upon the bridges, and it appears that after the City had taken control, cars of double the weight and capacity of the former cars were permitted to operate there, the cars weighing, together with trucks and motors, about ten tons. This, added to the ordinary traffic of the bridge, would, of course, materially reduce the factor of safety, and, besides this, the elastic strain of the bridge, which is only half of the breaking strain, would be exceeded, and the bridge thereby permanently injured. On the 31st of May, 1891, the City authorities were informed by a letter written to their Engineer by one West, a practical bridge builder, and laid before the Council, that the bridge was decidedly unsafe, owing to the tram car traffic. The letter said: "In my mind all that is required to tip the spans up the Gorge is a strong west wind, aided with a little assistance from the tram cars. Although none of my business, I deem it my duty for the safety of the public to notify you, as you may not be aware of the danger that is lurking there." Nothing was done, however, in response to this warning until the month of June, 1892, when an accident happened, owing to the breaking of one of the floor beams whilst the car was passing over it. This breakdown and its temporary repair was immediately reported to the Council by their Engineer, who also reported that eight more of the floor beams were rotten, and recommended the putting in of iron beams throughout, at a cost of $1,500.00. No action was taken until 29th of June, when the City Engineer wrote the Council: "I beg to call your attention to the fact that tram cars and heavily loaded waggons still cross Point Ellice bridge, although that structure was reported unsafe for such traffic at a meeting of the Council held on the 15th inst., and a notice to the same effect published in one of the daily newspapers. If the bridge is not closed at once, a serious accident is liable to occur at any moment,

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as the bridge is in a decidedly dangerous condition." The Council then determined to repair the bridge by merely replacing the rotten beams with new wooden ones, leaving the rest untouched. They also authorized the then Tramway Company to execute certain other works on the bridge. The City put in nine new floor beams, and the Tramway Company put in wooden longitudinal stringers, 10x12, under each rail for the length of the bridge, and divided the planking, which had hitherto extended the complete width of the bridge, diagonally and without break, into sections, thus enabling them to lay their rails upon the stringers instead of upon the planking as theretofore. The whole work was done under the supervision of the Engineer. In putting in the new beams it was deemed better, instead of boring holes through the beams to admit of the hangers, to pass the hangers round the ends of the new beams, in the form of a stirrup. This required longer and differently shaped hangers. For this purpose so many of the old hangers as had been used in the old beams, were taken to a blacksmith's, and were each severed in two places, and pieces of fresh iron spliced or welded into them, so as to increase them to the required length, and in this shape were attached to the beams, and connected as the hangers were formerly. Iron welded in this way is of treacherous capacity. The rails for passage of the cars were laid on the side of the bridge. The effect of this was, of course, to cast the weight on that side, and the cutting of the flooring into sections added somewhat to that weight, in that the burthen was no longer distributed to the same extent as when the flooring was intact. But the plaintiff's witness, Bell, attaches but trifling importance to the cutting and change in the flooring, and as there is no finding regarding this matter by the jury, the accident cannot be attributed to this cause. The plans and specifications of the original construction of the bridge were at all times open to inspection at the Government offices, as well as the strain sheet, shewing what the capacity

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of the bridge was destined to be. Yet the City officers never inspected them, and the evidence shews that no intelligent repairs or supervision of the bridge and the load it could carry, could be made or had without such inspection. The bridge was never constructed to carry cars at all, much less cars of the weight permitted by the City. The ordinary carrying capacity of the bridge, as before stated, was 700 pounds to the lineal foot, or a total of about six and one half tons in the panel of eighteen feet, nine inches, whereas the car itself was ten tons, and at the time of the accident, load and all, weighed twenty tons, or more than three times the ordinary capacity of the panel.

Immediately after the accident the Corporation caused the broken portions of the bridge to be removed, and one of the old hangers was found to be broken and disconnected at the eye or bend, but still attached to the beam. Mr. Bell, who examined the wreckage at the time, in conjunction with the City Engineer, and reported thereon to the Corporation, but the particulars of whose report were not in evidence at the trial, when asked whether there was any other broken hanger, or stirrup, says: "No, I think not. If my memory serves me right, there was one missing, but I don't remember any broken, but one."

The findings of the jury, in reply to the several questions put to them, are that the proximate cause of the accident was the breaking of the hanger. This they consider proven by the fact that one was broken, and no other strain so great could have been put upon it at the time of the accident as that caused by the car passing over it, and they add: "We further think the missing hanger strengthens this conclusion." In reply to the question, "Was the Corporation blameable for such cause? and how?" they reply: "Yes, because having been made aware of the bad condition of the bridge through the report of the Engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure. In

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our opinion it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy cars to pass over it." Then the jury find that although they could readily have acquired that information, the Corporation at the time of the repairs in 1892, did not know the plan and design of the bridge, the method of construction and the nature of the material employed, and the capacity of the bridge; and they also find that the Corporation, with a view to increased traffic, and the use by the Company of large cars, effected alterations in the bridge, but that such alterations were not done properly, having regard to the intended use by the Company of large cars, and all that the jury have to say about the alterations effected by the Tramcar Company was that they might have been better; and they also say that the Company, with the consent of the Corporation, used cars of a size and weight beyond the strength of the bridge to carry.

Judgment.

But negligent as all this may shew the Corporation to have been, culpably so, criminally perhaps, does it carry the case beyond mere nonfeasance? It is not sufficient to shew general negligence on the part of the Corporation. Of that, apparently, there is plenty, but the plaintiff must shew a negligent act "whereby the accident occurred": *Wright* v. *Midland Ry. Co.*, 51 L.T.N.S. 539.

The cause of the accident, the jury find, was the breaking of a hanger. To find any other cause, now, would be inconsistent with their findings, and on motion for judgment I am bound by the findings. If they had found that the hanger was one of the Corporation stirrups, and that it broke because of the weld, or defective welding, that probably would have been a sufficient case of misfeasance; but the jury are careful not to find this. On the contrary, their finding negatives the breaking of a welded stirrup as the cause of the accident. They merely say that they think the missing hanger strengthens the conclusion that it was the breaking of a hanger which caused the accident, and

when asked to express their belief whether any of the substituted stirrups put in by the Corporation broke, either at the welds or otherwise, and how, the jury reply: "There is no evidence to shew, but in our opinion the missing stirrup hanger must have broken at the welds, otherwise it would have been found attached to the floor beams." All of which simply means that it was one of the original hangers which broke and caused the accident, and that as a consequence, although there is no evidence to shew, the missing stirrup hanger broke also at the welds. The cause of the accident is therefore not in any way connected with the substituted stirrups put in by the Corporation. Then the findings of insufficiency in the repairs to the bridge, the Corporation's neglect to consult the plan and design of the bridge before making repairs, is a finding of nonfeasance, and falls far short of any positive act causing the accident. It is nowhere found or suggested that the repairs in any way caused the accident, or in any way weakened the bridge, although they might not have strengthened it. That the Corporation permitted to run cars beyond the capacity of the bridge to carry, merely means that the Corporation failed to exercise their powers, (whether by by-law or otherwise), of regulating the traffic on the bridge. Nonfeasance at most, just the same as if they had permitted too heavy waggons to pass over the bridge.

Judgment.

In *Geddes* v. *Ban Reservoir*, 3 App. Cas. 430, Lord BLACKBURN says, at p. 455: "I take it that it is now thoroughly established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one. But an action does lie for the doing that which the Legislature has authorized, if it be done negligently." And continues: "I think that if by a reasonable use of their powers, the damage could be prevented, it is within this rule, negligence, not to make such reasonable use of their powers."

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But this language must be read subject to the qualification that the exercise of power is something of a positive and active character, as pointed out in *Thomson* v. *Mayor of Brighton*, 9 R. 118, where A. L. SMITH, L.J. says in reference to the language of BLACKBURN, J., above quoted: "I do not doubt this as a general proposition, but I must point out that Lord BLACKBURN was not dealing with the case of the liability or non-liability of surveyors of highways, which is in itself peculiar, (and Municipal Corporations here stand in the same position as surveyors of highways). If this general proposition be applied to the case of a surveyor of highways, it appears to me that his immunity from being sued for nonfeasance would be gone. By a reasonable exercise of his powers he could always repair a highway, and according to that proposition he would be guilty of negligence, and liable to be sued if he did not do so. But this is not the law. Moreover, this same argument was addressed to the House of Lords in *Cowley's case*, (1892) A.C. 395, and though the case of *Geddes* v. *Ban Reservoir*, *supra*, was not cited, others to the like effect were. It will be seen that they were dealt with by Lord Herschell in *Cowley's case*, and held not to apply. And DAVEY, L.J., says: "It may be conceded that the Corporation is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance. But the question remains, in what respect have the Corporation failed to discharge this legal obligation, and is there any right of action in respect of such default? Turn the case any way you will, it seems to me that you will come back to the proposition that the breach of duty was in not repairing the highway, and for that no action will lie."

Judgment.

That seems precisely the case here. Turn these findings as you will and they come back to the same thing, a neglect by the Corporation to exercise the powers they possessed. They might, and probably should, have passed by-laws

preventing heavy tramcars running, as well as heavy traffic of any kind beyond the capacity of the bridge; but an action does not lie for omitting to pass a by-law, (*Ogston* v. *Aberdeen Tram. Co.* (1897) A.C. *per Lord Watson*, at p. 120), nor for mere omission to do anything else. All these omitted duties come within the scope of the immunity for nonfeasance, and are not misfeasance. In the *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, which was a case where a retaining wall had been originally built by Government but afterwards came under the control of the Sanitary Commissioners, it is remarked that: "If the accident was due to original defects in the structure of the wall, and the Commissioners' only fault was to neglect to repair that defect, there will be no liability." In *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 104, Lord BLACKBURN says: "In every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created."

Judgment.

In most of the cases to which reference has been already made, there was a statutable obligation to repair, but in the case of Corporations governed by the general Municipal Act of this Province, there is mere power without the obligation, so that the principle relieving for nonfeasance seem *a fortiori* to apply. And in the *Sanitary Commissioners of Gibraltar* v. *Orfila*, *supra*, at p. 411, Lord BLACKBURN continues: "It is a material consideration that the injury complained of arose, not from any act of the Commissioners or their servants, but from their nonfeasance. Their Lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interests in the trusts which they administer, can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care But in the case of mere nonfeasance, no claim for reparation will lie except at the instance of a person who can shew

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that the statute or ordinance under which they act imposed on the Commissioners a duty towards himself which they negligently failed to perform."

In *Pictou* v. *Geldert*, 1 R. 447, it was held that the transfer of an obligation to repair a highway, to a public Corporation, does not of itself render such Corporation liable in respect to mere nonfeasance. To establish such liability the Legislature must have used language indicating an intention that this liability should be imposed, and in *The Municipal Council of Sydney* v. *Bourke*, 11 R. 482, it was decided that where a statute empowers a Corporation of a town to maintain and repair the highways of a town, and the Corporation allows one of the highways to fall into disrepair, in consequence of which a member of the public is injured, such failure to repair being a nonfeasance and not a misfeasance, the injured party cannot maintain an action, but the remedy (if any) is by indictment.

Judgment.

I am of opinion, therefore, that upon these findings the plaintiff cannot have judgment, and as I am bound by the findings, and cannot, consistently therewith, draw any inferences of my own which would give the plaintiff judgment, there seems to be no course open but to give judgment for the defendants. It would be useless for me to accede to the defendants' application for nonsuit, even if I had the power after verdict, which I think is open to question.

A nonsuit would not help the plaintiff, as she would then have to commence her action afresh, and the Statute of Limitations would probably be a bar. I have no power to award a new trial—the plaintiff must go to the Court of Appeal for that. Judgment must therefore be entered for the defendants. I have already dealt with the question of costs up to and including the first day of the trial. Regarding the other costs the law will take its course.

Judgment for the defendants.

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Contract—Unlawful consideration—Stifling prosecution—Agreement to restore trust funds—20 & 21 Vic. (Imp.) Cap. 54, Sec. 12: 32 & 33, Vic. (Can.) Cap. 21, Sec. 87—Section 363, Criminal Code.

A member of a partnership, having, after dissolution, real property of the firm standing in his own name, fraudulently mortgaged same and converted the proceeds to his own use.

A criminal prosecution was instituted against him, charging that he, as Trustee, unlawfully converted, etc., and he was committed for trial. Before trial he agreed to make good the value of the interests converted, by deed under seal containing covenants, to which a number of other persons were sureties. The agreement was made on the understanding that the Trustee should not be further prosecuted, which was carried out.

Held by DAVIE, C.J., at the trial, giving judgment for the plaintiff:

1. That 20 & 21 Vic. (Imp.) Cap. 54, Sec. 12, permitting such an agreement, introduced into this Province by No. 70 of R.L.B.C., 1871, is still in force.
2. That section 12 by implication validated the contract of suretyship to the agreement of the Trustee.
3. It was immaterial that the Trustee might have been prosecuted with effect under provisions of the Criminal Code not limited to defaults of trustees as such; for his crime, if any, was as a trustee.

Upon appeal the Full Court reversed the judgment.

Per McCREIGHT and DRAKE, JJ.: That 20 & 21 Vic., Cap. 54, Sec. 12, is not in force in Canada. That its re-enactment by 32 & 33 Vic., Cap. 21, Sec. 87, and Cap. 164, Sec. 72, Rev. Stat. Can., was repealed by the Criminal Code, which, while retaining the defalcation of trustees as a crime, omitted the section permitting the restoration by them of trust property notwithstanding, etc.

Per McCREIGHT, J.: That as the trusteeship did not arise under an express trust within section 363 of the Criminal Code, as interpreted by section 4 (*bb.*) there was no criminal offence as charged, capable of being compounded, and the agreement would therefore be valid, following *Davies* v. *Otty*, 35 Beav. 208, but, as the Trustee might have been prosecuted with effect without charging him as Trustee, and the consideration of the agreement was to stifle all charges against him, that it was void as a compounding of such other charges.

WALKEM, J., concurred with McCREIGHT, J.

Statement.

APPEAL from a judgment of DAVIE, C.J.. at the trial

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entering judgment for the plaintiff in an action for an instalment of interest upon a covenant in an agreement whereby the defendant McCraney and the other defendants, being a number of persons who had joined as sureties to his obligation, agreed to pay to the plaintiff $7,000.00 and interest.

Statement.

The defence to the action, as pleaded, was that the agreement was executed and delivered for an illegal consideration, *to wit:* the stifling of a criminal prosecution; giving as particulars that the plaintiff had laid an information before a Justice of the Peace, charging "that the said H. Percy McCraney did, on, etc., without the knowledge or the consent of the plaintiff, unlawfully and with intent to defraud, convert to the use of him, the said H. P. McCraney, certain property of the plaintiff and one Thomas Robson Pearson, by executing a mortgage upon lot 18 in block 3, etc., in Vancouver, for the sum of $5,000.00, and received the said moneys and converted them to his own use, he, the said H. P. McCraney being then trustee for the said C. J. Major and T. R. Pearson, of a one undivided one-half share or interest in the said lands, and having no authority so to mortgage the same." That the defendant, McCraney, was committed for trial upon the charge, and afterwards the agreement sued on was executed in consideration that the said prosecution should be stifled. It appeared that the plaintiff, and the defendant McCraney, and Pearson, had been in partnership as land speculators; that the lands stood in the sole name of McCraney, and that the partnership had been dissolved before the making of the mortgage complained of. There was evidence that the parties considered that there were other charges which could be brought against McCraney for the particular act of misconduct in question, but no other charge than that set out in the defence, had been brought. The action was tried at New Westminster, before DAVIE, C.J., on the 22nd and 23rd of February, 1897.

G. E. Corbould, Q.C., and *L. G. McPhillips, Q.C.* (*Andrew Leamy* with them), for the plaintiff.

E. P. Davis, Q.C., and *Charles Wilson, Q.C.*, for the defendants.

Cur. adv. vult.

February 23rd, 1897.

DAVIE, C.J.: If it is admitted that section 12 of 20 & 21 Vic., Cap. 54 (Imp.), is in force, there seems to be no defence to this action. It has not been argued that section 12 is inapplicable, but only that its provisions do not cover this case, in that H. P. McCraney was punishable, or might have been proceeded against under other sections of the Code, and, moreover, that the agreement might be valid as regards the debtor himself, but void as against the sureties. I am unable to assent to either of these propositions. The information laid against H. P. McCraney, was for the distinct charge of being a defaulting trustee. But, apart from that fact, whilst it is perfectly true that a defaulting trustee might be proceeded against under other sections of the Code than 363, yet the fact could never have been lost sight of that his alleged peculations occurred in his character of trustee, that he was a trustee in fact, and, as alleged, a defaulting trustee. His crime (if any) was in that character, and it is to the defalcations of trustees that section 12 applies, and says distinctly that nothing in the Act is to prevent any agreement or security by a defaulting trustee for repaying or restoring trust property misappropriated.

Judgment of DAVIE, C.J.

Misappropriation by a trustee was for the first time made an offence cognizable under the criminal law by the statute, of which section 12 is one section. The offence is created by section 1, which is in almost identical terms with section 363 of the Criminal Code. Section 363 is a mere reproduction of section 1 of 20 & 21 Vic., Cap. 54. According to the

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well known principle laid down in *Waterlow* v. *Dobson*, 27 L.J.Q.B. 55, Acts *in pari materia* are to be read together, and the Code is to be read therefore as if section 12 was incorporated with it. The contention that the agreement, although valid as against the principal, is illegal and void as against the sureties, is, in my opinion, equally untenable. Section 12, I think, is not capable of bearing such a narrow construction. It is true that it refers to securities "given by the debtor," but surely this includes the sureties which he gives. If it is legal for the debtor to give sureties, how can it be illegal for the sureties themselves to enter into the suretyship? It has not been argued that section 12 has been repealed or modified in any way, or that the Code is in any way repugnant to it; nor do I think that any such contention could be successfully set up. Rev. Stat. Can. Cap. 144, Sec. 2, distinctly applies the criminal laws of England, in force prior to 1858, to British Columbia, except as repealed, modified or altered by subsequent competent legislation.

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I was quite prepared to hold, but for section 12, that the plaintiff's case failed under *Williams* v. *Bayley*, L.R. 1 H. of L. 290; *Kier* v. *Leeman*, 9 Q.B. 371; *Egerton* v. *Brownlow*, 4 H. L. Cas. 1, and other cases cited in the argument, shewing that a security given in pursuance of an agreement for stifling a prosecution (which this undoubtedly was) is utterly void. But section 12, of which I confess I was altogether unaware but for Mr. *McPhillips'* industry in unearthing it, expressly permits, in the case of trustees, that which the authorities cited shew would otherwise be contrary to public policy and void.

I, therefore, hold the contract in this case to be valid, and I give judgment in the amount claimed, with costs.

Judgment for the plaintiff.

Statement.

From this judgment the defendants appealed to the Full

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Court, and the appeal was argued before McCREIGHT, WALKEM and DRAKE, JJ., on the 28th and 29th of July, 1897.

E. P. Davis, Q.C., for the appeal: The 20 & 21 Vic., Cap 54, makes the fraudulent conversion of trust property a criminal offence, and then proceeds by section 12 to enact that "nothing in this Act contained" shall prevent an agreement for the restitution of trust property. It is not a general provision in favour of the legality, under all circumstances, of such agreements, and it does not abrogate the general rule of law. At most it goes to this, that if a trustee be prosecuted for the offence created by the statute, he may make such an agreement, notwithstanding such prosecution. The 20 & 21 Vic. was introduced into this Province in 1867: See R.L.B.C., 1871, No. 70, Sec. 2. The 37 Vic. Cap 42 (Can.) extending the Canadian criminal law to B.C., in effect repeals 20 & 21 Vic., Cap. 34, as to British Columbia, and brought into force in British Columbia the 32 & 33 Vic. Cap. 21, of which section 87 is the same in effect as section 12 of 20 & 21 Vic. Cap. 54 (Imp.) Section 87 (*i.e.* section 12 of the English Act), appears in the R.S. Can. 1886, Cap. 164 as section 72. Cap. 70 of R.L.B.C. 1871, and 37 Vic. Cap. 42 (Can.) were repealed by Schedule A, R.S. Can. last line of p. 19, and No. 42, p. 39. This repeal did not revive section 12 (Imp.) or section 87 (Can.): See Interpretation Act, 49 Vic. (Can.) Cap. 4, Sec. 6. The Rev. Stat. Can., Cap. 144, introduces the English Law as to criminal offences, but as "repealed, altered, varied, modified, or affected, etc., by any Act of the Parliament of Canada," so that section 12 of the English Act was not thereby revived. The schedule in the Code of repealed Acts includes as repealed R.S. Can. Cap. 164, and the Code, while enacting section 363, providing that fraudulent conversions by trustees shall be criminal, makes no provision allowing such agreements as the present. The Code is a complete body of law in itself: *Robinson* v. *C.P.R.* (1892) A.C. 481. It may be that McCraney could not have

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been successfully prosecuted under section 363 as interpreted by section 4 (*bb.*) (Taschereau, p. 5) as the trust under which he held was not an express trust, but he could have been prosecuted independently of it: See *Reg.* v. *Johnson*, 8 Q.B. 102; *Re Casanova* v. *The Queen*, L.R. 1 P.C. 268; Lord WESTBURY at p. 277, and see section 311 of Code. The evidence shews that all parties understood that there were five or six charges impending over McCraney in connection with the same transaction, and the agreement was general that he was not to be prosecuted.

L. G. McPhillips, Q.C., contra: The defence is that the agreement in question was executed in consideration that a prosecution which had been instituted should be stifled, and referred to a specific prosecution under section 363 of the Code for converting trust property, and it is submitted that it is only with this defence that we have to deal. The information set forth in the defence does not charge an express or written trust, and the evidence on the preliminary investigation, which had been taken at the time the agreement was made, shewed that there was no written or other express trust or such facts as indicated an offence under section 363. The facts do not shew a criminal offence under any section of the Code. Section 311 only covers theft of articles capable of being stolen. The charge here is regarding land. McCraney was therefore in error in supposing that there was anything to compromise or compound, and the agreement cannot be treated as void: Lindley on Partnership, Ed. 1891, 456, 457 Note *(a)*, indicates that no criminal charge could have been laid under 20 & 21 Vic. Cap. 54 (Imp.) in England, and as section 363 of the Code is a reproduction of section 1 of 20 & 21 Vic., Cap. 54, neither could it be laid here; nor can any criminal proceedings be now taken under it by one partner against another, because 31 & 32 Vic. (Imp.) Cap. 116, only covers the offence stated, and does not enlarge 20 & 21 Vic. Cap. 54 (Imp.) and the law is the same in Canada.

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Section 311 of the Code is a reproduction of 31 & 32 Vic., Cap. 116, but it only refers to theft of things capable of being stolen, whereas the charge here has reference to land, which is not capable of being stolen.

Though it may be the law that it is not lawful to compromise a supposed offence, still it is submitted that it would be extending the rule too far to hold this agreement void under these circumstances, for not only was there no offence committed, but even that alleged was not an offence under the existing state of the law; besides Parliament indicates that the offence, such as was attempted to be set up, is of the nature of a private offence, and it is treated in the Code on different terms from other offences, as a prosecution cannot be commenced without the consent of the Attorney-General: Section 547.

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It is admitted that 20 & 21 Vic. Cap. 54 (Imp.) was in force at one time by virtue of an Act, R.L.B.C. 1871, No. 70, p. 214; so that at Confederation the laws of the new Province (B.C.) and of the Dominion were the same, *i.e.*, section 12 of 20 & 21 Vic. (Imp.) Cap. 54 in the Province, and section 87 of 32 & 33 Vic. (Can.) Cap 21, in the Dominion. At the union, the Statute of the Dominion governing the matter of criminal law, (1886, Sec. 2 of Cap. 144, R.S.C.) provided that the criminal law of England, on November 19th, 1858, as modified by the Colony before union, or by any Act of the Dominion, should be the criminal law of British Columbia. The law remained so, both provisions standing, 20 & 21 Vic., Cap. 54 (Imp.) being the law of British Columbia until Cap. 42 of 37 Vic. (Can.) was passed. The provisions of section 7 of that Act do not repeal section 12 of 20 & 21 Vic., Cap. 54, because the matters dealt with by section 12 are not such as are left to the Dominion, and the fact that the Dominion did enact a similar clause, 32 & 33 Vic., Sec. 87, cannot be said to be an indication of an intention to repeal section 12. The provisions of the English Act were re-enacted, as a whole, by 24 & 25 Vic. (Imp.) Cap. 96, Sec. 86.

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Argument.

Neither does the leaving out of the section from the Code indicate an intention to change the law, but it rather indicates an intention on the part of the Dominion not to interfere with a Provincial question, and to leave the Province to legislate on the point, as being within the jurisdiction of the Province. An intention to interfere with a question over which the Province has original and primary jurisdiction should not be implied, but should only be acceded to in case it is necessary to make the laws of the Dominion workable on a point over which the Dominion has jurisdiction, and then only when the Dominion has by legislation made it plain beyond question that it intended to legislate thereon, and intended to affect, change or alter the existing state of the law in the Province. On the facts in the case, there is no right in the Dominion to interfere by legislation in this matter as it is one by the B.N.A. Act reserved to the Province by section 92, sub-section 13: "property and civil rights in the Province," and if the Dominion has legislated on this question it is *ultra vires*: *Tennant* v. *Union Bank*, (1894) A.C. 31, at p. 46; *Cushing* v. *Dupuy*, 5 App. Cas. 409, 415 & 416, 1 Cart. 252; *Merchants' Bank of Canada* v. *Smith*, 8 S.C.R. 512, at p. 540.

If section 12 of 21 & 22 Vic. (Imp.) is in force, there is no difficulty in reading it with the repealed section. See Stat. B.C. 1893, Cap. 19, Sec. 2. And if it is in force, then this agreement is good and valid: Lewin on Trusts, 9th Ed. p. 1026.

Cur. adv. vult.

July 31st, 1897.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: This is an action on a deed given to the plaintiff by the defendants, on the 25th day of October, A.D. 1894, whereby, among other provisions, the defendant, H.

P. McCraney and the other defendants, covenanted to pay the plaintiff the sum of $7,000.00 at the end of three years, and in the meantime to pay interest thereon at the rate of eight per cent. per annum, as therein mentioned, and this action is brought for a half year's interest on the said sum of $7,000.00.

The defence, so far as it is material, is that the said deed was given to the plaintiff for an illegal consideration, that is, to stifle a prosecution for breach of trust by the defendant, H. P. McCraney, who was then a trustee for the plaintiff and T. R. Pearson, of an undivided share in certain lands, as to which he, the said H. P. McCraney, was also owner of the other one-half share, and notwithstanding such trusteeship as to the said half share of the plaintiff and T. R. Pearson, he, the defendant, H. P. McCraney, in November, 1892, without the knowledge or consent of the plaintiff, unlawfully and with intent to defraud, converted to the use of him, the said H. P. McCraney, the said half share of the said plaintiff and T. R. Pearson, by executing a mortgage upon the entirety of the said land, for the sum of $5,000.00, to one A. Neil McLean, and receiving the said monies and converting the same to his own use.

Judgment of McCREIGHT, J.

From the evidence it seems that the plaintiff and T. R. Pearson, and H. P. McCraney, had been in partnership together for the purpose of buying and selling land, and sharing the profits, and in this way he, H. P. McCraney, I gather, held the legal estate of the entirety of the said lands, by which he was enabled to mortgage such entirety without the knowledge or consent of the plaintiff and T. R. Pearson. The partnership expired or ceased to exist at the end of 1891, and the action of H. P. McCraney in executing the said mortgage of the entirety, on the 17th of November, 1892, was manifestly illegal, and whether it was also criminal should now be examined; but a previous question was raised whether, assuming it to be a criminal breach of trust, the proviso in section 12 of 20 & 21 Vic. Cap. 54

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(Imp.), which was alleged to be in force in British Columbia, did, notwithstanding, permit an instrument like the present to be given by the defaulting trustee and his sureties, and an action to be maintained thereon.

From the language of Rev. Stat. Can., Cap. 144, it might be, or at least it was in the Court below, successfully contended that the above statute, section 12, was still in force. No allusion seems to have been there made to 37 Vic., Cap 42, Sec. 7 (Can.), and that Act generally, nor to the Rev. Stat. Can. Cap. 164, Sec. 72, which section 72 and the sections therein referred to contained the law as to criminal breaches of trust until Cap. 164 was in turn repealed by the Criminal Code of 1892, which contained in section 363 the law now in force on the subject, and is silent as to agreements always at common law considered illegal, and contrary to public policy.

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On perusing section 363 a difficulty arises in consequence of section 3 of the Code (*bb.*) which provides that "the expression 'trustee' means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, or otherwise," etc. Now the evidence in this case by no means discloses an express trust, but on the contrary negatives it. I gather H. P. McCraney bought this land for partnership purposes, during the partnership, and it seems he made the mortgage complained of and the misappropriation of the proceeds in November, 1892, after the partnership had expired. After such expiring there would be only an implied trust at most, on his part, for the plaintiff and Pearson, and section 363 of the Code would not be satisfied, or it would be inapplicable to the present case. The case of *Knox* v. *Gye*, L.R. 5 H.L. 656, seems to make a further difficulty in the way of holding that H. P. McCraney was a trustee for the plaintiff and T. R. Pearson, because that case seems to shew that after the dissolution of the partnership the legal relations of the former partners to each other is not that of a trustee and a *cestui que trust;*

see the argument of Messrs. *Jessel* and *Lindley* at p. 670, and per Lord WESTBURY, at pp. 675 and 676, and Lord CHELMSFORD at pp. 685 and 686, contrary to what was said by Lord HATHERLEY at pp. 678 and 679, and pp. 681 and 682.

At first I relied much more on section 58 of Cap. 164 of the Revised Statutes already referred to, than on the sections dealing with original breaches of trust either in that Act or in the Code, and I thought the present case fell within the second member of the above section 58, which deals with the case of " one of two mere beneficial owners of money or other property stealing, etc., or unlawfully converting the same, or any part thereof, to his own use," but on looking further it seems that there is no provision in the Code similar to the said section 58 of Cap. 164.

If there was no other consideration for the giving of the deed of 25th October, 1894, than that disclosed by the defence of stifling the prosecution for the unauthorized mortgage and misappropriation of the proceeds, it might be difficult to hold that there was a good bar to the action. The parties to the deed would in that case appear to be in a position similar to that of the plaintiff in *Davies* v. *Otty*, 35 Beav. 208, where he made a conveyance intending to prevent a forfeiture to the Crown in case he should be convicted of bigamy, and it turned out that he was mistaken in supposing he had committed an offence, and that the Master of the Rolls held that there was nothing to prevent him from recovering the land from the party to whom he had made the conveyance whilst labouring under the mistake. But the evidence here shews that the mortgage transaction was only one of six or seven criminal charges which might have been brought against H. P. McCraney, and in respect of which no doubt it was intended that prosecutions were to be stifled, as well as that appearing in the pleadings in this case. (After discussing the evidence on this point, the learned Judge proceeeded):

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The portions of the evidence to which I have referred, and I think there are others, leave no doubt there were other criminal charges, and the deed was given to stifle prosecutions therefor. From the form of the pleadings in the well known case of *Collins* v. *Plantern*, 1 Sm. L.C. 355, it seems not necessary for the defence to aver that the charges could be proved; indeed, the successful stifling of the prosecution of course would render such proof impracticable. In the *Meriden Brittania Co.* v. *Bowell*, 4 B.C. 520, we have a case dealing with stifling of criminal prosecutions; at page 524 in the judgment, there is the following quotation from the judgment of LINDLEY, L.J., in *Scott* v. *Brown*, 67 L.T.N.S., at p. 783: "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, etc., and it matters not whether the defendant has pleaded the illegality, or whether he has not." This observation applies to the present case.

Costs were dealt with at the time of giving the oral judgment in the Full Court, and I have only to add that I think the plaintiff's action cannot be maintained, and the decision of the learned Trial Judge must be reversed, but without costs of the appeal. I forgot to refer to an argument by the plaintiff's counsel to the effect that the Federal Legislature had no power to repeal the proviso to section 12 of 20 & 21 Vic. Cap. 54 (Imp.), as that was a matter appertaining to civil rights in B.C. But I think the case of *Cushing* v. *Dupuy*, 5 App. Cas. 409, affords a complete answer to this argument. There would be but little use in the British North America Act assigning the subject of criminal procedure to the Federal Legislature, if the Provincial Legislature had substantially the power of embarrassing the prosecution of grave crimes by allowing agreements calculated to stifle prosecutions, and actions thereon to be maintained. The Federal Legislature certainly has the power to regulate the restitution of property obtained by

theft or false pretences. Forfeitures by escheat or attainder, deodands and such like are subjects affecting civil rights as much as the proviso to the above mentioned section 12, as introduced into British Columbia by the English Law Ordinance, 1867 (R.L.B.C. 1871, No. 70).

WALKEM, J., concurred.

DRAKE, J.: The learned Chief Justice who tried the case came to the conclusion that the agreement set out in the evidence was made in fact for the stifling of a prosecution, and in this view I think he was quite right. Whether section 363 of the Code relating to frauds by trustees is applicable or not to the case of a partner defrauding his co-partner, does not call for our decision. There are other sections in the Code, relating to theft, especially section 311, which would be sufficient to cover the charge made against McCraney, if proved. Under these circumstances it is not necessary to discuss the effect of section 363. The evidence clearly discloses that there was a formal prosecution properly instituted; that in order to obtain the withdrawal of this prosecution the defendants entered into a deed whereby they agreed to pay the prosecution the sum of $7,000.00, and it is of little consequence whether there were other terms in the agreement involving the dealing with lands which were a protection *pro tanto* for the persons who were bound to the plaintiff. The point on which the Chief Justice (while admitting the validity of the objection to the impeached contract) decided in favour of the plaintiff, was the contention by Mr. *McPhillips* that section 12 of 20 & 21 Vic., Cap. 54 (Imp.) which was made law in British Columbia by No. 70, R.L.B.C., 1871, applied, and what has been done was covered by that section. It will answer no useful purpose to discuss the extent and bearing of that section, because the Act in which it is contained is no longer in force, and this is decisively shewn by a reference to the course of legislation dealing with the criminal law.

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The Dominion Parliament after Confederation introduced into this Province the 32 & 33 Vic., Cap. 21, and section 87 of that Act is similar to section 12 of 20 & 21 Vic., Cap. 54, (Imp.) And by Schedule A to Rev. Stat. Can., 1886, p. 19, so much of the ordinance which was passed by British Columbia on 6th March, 1867, as relates to the adoption of the English criminal law, was repealed. It was under this Act of 6th March, 1867, that the 20 & 21 Vic., Cap. 54 (Imp.) was adopted by Provincial law. Under the British North America Act the Dominion Parliament has the control of the criminal law, and by section 129 the existing laws of the Confederated Provinces only continue until repealed and abolished or altered by the Parliament of Canada and the Legislature of the respective Provinces, according to the authority of the Parliament or the Legislature under the authority of that Act. The result is that 32 & 33 Vic., Cap. 21, remained the law until altered by the Criminal Code. The section in question is omitted in the Code, and all the existing criminal laws of the Dominion were repealed by the Code.

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I do not consider that the defendants, by raising the defence they have, are entitled to much consideration from the Court. They entered into a liability presumably with the intention of carrying it out, but their views have changed and they now assert that their deed was contrary to public policy, and that they should not be invited to fulfil their obligations. The case of *Jones* v. *Merionethshire Permanent Building Society* (1892) 1 Ch. 173, at p. 187, is in many respects a similar case, and there the Court refused them their costs of appeal, and in my opinion the same course should be followed here. The appeal should be allowed without costs. The defendants will be entitled to their costs of action.

Appeal allowed without costs.

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Criminal Law—Evidence—Improper admission of—Whether miscarriage thereby—Code, Sec. 746.

Under section 746 of the Code, the improper admission of evidence at a criminal trial cannot be said in itself necessarily to constitute a wrong or miscarriage, but it is a question for the Court upon the hearing of any appeal, whether in the particular case it did so or not. *Makin* v. *A.G. for N.S.W.* (1894), A.C. 57, distinguished.

APPEAL by way of case stated for the opinion of the Court of Criminal Appeal, by WALKEM, J., who presided at the trial with a jury, from a conviction of the accused for murder.

The question involved was whether certain declarations made by the deceased after the assault and before his death, were properly admitted as dying declarations, and if not properly admitted, whether the conviction should on that ground be set aside.

Statement.

The circumstances under which the declarations were made sufficiently appear from the judgments.

The declaration was in the following terms :

I, Samuel M. Woods, make oath and say as follows : " On the night of October the first, A.D. 1896, I was in bed in my house on Josephine street, Nelson, B.C I heard some one in the lower part of the building. I went below to see who was there. I met a man at the corner of the shop and the alley. I asked him what he was doing there. He said (*sic*) had just that instant stopped there. I then took hold of him, and he walked into my smithy or workshop, and I had my hand upon his shoulder. I took my hand from his shoulder, and turned on the electric light. He then put his hand to his hip pocket and pulled out a pistol, a bright one. He raised his hand in which was the pistol, and presented

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it at my breast, and fired it. I tried to catch the pistol before it was fired. As nearly as I could judge the pistol was a 32-calibre, or possibly a 38. On being shot I staggered against the side of the building, and fell to the floor. After shooting me the man ran away towards the river. Before I was shot I called for my helper, who sleeps in the same room with me, to come down. He came down and found me lying on the floor. The man who shot me was young, about twenty-eight years, smooth-faced, except as to his moustache, which was light or sandy; his hair, which was short, was also light or sandy. Small soft black hat. I think his outward clothing was all of one colour, a kind of grey."

The above document was read to the deceased man and signed by him as a dying deposition, but as the prisoner was not present when it was made, the learned Judge rejected it as a deposition, but admitted it as a dying declaration.

Statement.

Shortly after the deposition had been signed, the prisoner with four or five men, selected at random to tally with the prisoner, was taken into the bedroom of the deceased to see if the latter could identify him. The deceased was lying at the time with his face to the wall, and, on being turned round by the doctor, he pointed out the prisoner as being the man who shot him. The men were then taken out of the room, re-arranged, and brought in in different order. The deceased, after scanning them over, again pointed out the prisoner as the man who shot him, remarking at the time that his hat was more "slouched" when the shooting took place.

The learned Judge at the trial admitted the above-mentioned document as a dying declaration, and also admitted the identification of the prisoner by the deceased as evidence. Objection was taken thereto on behalf of the prisoner, and the learned Judge refusing to reserve the point, the present case was submitted for the opinion of the

Full Court, under section 744 of the Criminal Code. The question was argued before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., on the 18th and 19th of August, 1897.

L. P. Duff, for the prisoner, Woods.

E. P. Davis, Q.C., and *A. G. Smith*, for the Crown.

Cur. adv. vult.

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DAVIE, C.J. Irrespective of the written dying declaration of the deceased, I think the case is abundantly established against the prisoner, and as section 746 of the Code, Sub-Sec. f., provides that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some mis-direction given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial, I think the appeal fails.

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The prisoner was charged with the wilful murder of Samuel M. Woods, a blacksmith, who kept his forge or smithy at Nelson, and together with his assistant, one Beard, lived and slept upstairs over the shop. Beard had already retired on the night of Friday, 2nd of October, when he was awakened about midnight by the deceased talking to some one just outside the shop. Deceased asked the stranger what he had been doing in the shop, and the stranger denied having been in the shop. The deceased replied, "I saw you turn down the light," and then himself turned the electric light on, whereupon the stranger, (and the action was seen by Madame Malette, who was just closing her hotel opposite), drew a revolver and shot the deceased, inflicting a wound from which death ensued some fifty hours later. The assailant ran away, immediately upon the shooting, towards the C.P.R. station. He was seen by several, but

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owing to the dark could not be identified further than by Mrs. Malette, who, when she saw the deceased and his assailant standing together, describes him as a smaller man than the deceased. At 10:30 next morning, the attention of an engine driver, Alexander Dow, was attracted to the actions of a man lying alongside of the track leading from Nelson to Robson, at about sixteen miles from Nelson, and from information given by Dow to the police, and the description given by the deceased, the prisoner was arrested the same night at Robson, thirty miles from Nelson. Prisoner said nothing when arrested, further than to ask for food. On him was found a 38-calibre Smith & Wesson revolver, carrying a bullet of the same size as that extracted from the body of the deceased upon the *post mortem*. He had no money or means, and the only other article found on the prisoner's person was an iron "billy" as it is termed, or wrench. Two chambers of the revolver had been discharged, and four were loaded. On the Sunday afternoon prisoner was taken to the bedside of the dying man, being first informed that he was taken there for identification. Four or five other men were taken in with the prisoner, and the deceased there and then pointed out the prisoner as the man who had shot him. The men were then taken out of the room and brought in again in different order, when the deceased again identified the prisoner as his assailant. Prisoner made no remark either time. There can be no question that at the time of the identification the deceased was dying, and knew that he was dying. As a fact, he died twelve hours afterwards. The prisoner was subsequently committed for trial, and we are not informed that he made any statement upon his committal. He was tried on the 30th of June, 1897, and the deceased's description of the man who shot him was brought out of one of the Crown witnesses upon cross-examination, and agreed in all essential particulars with the description of the prisoner. The prisoner did not avail himself of the opportunity which

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the law affords him of going into the witness-box, and after being found guilty remained silent in response to the demand whether he had anything to say why sentence should not be passed upon him.

Objection is now urged on prisoner's behalf to an *ante-mortem* statement of deceased, reduced to writing, describing the assault and the person of the assailant, and of certain oral statements to the same effect; but the description of the shooting is immaterial, because already described by one eye-witness and another ear-witness, and the description of the assailant as given by the dying declarations seems unimportant also, because given distinctly upon cross-examination at the trial. I am far from saying that they were not admissible as dying declarations, for the evidence shews, I think, that from the time of the shooting, deceased was in a hopeless expectation of death. He told the doctor who attended him within a few minutes of the shooting, and upon the evidence, I think, before any other statement, that he was done for. The doctor tells us that from the very first to the last he had no hope of recovery, and when the written deposition was being taken, Constable Miles tells us (according to the stenographer's note) deceased said he thought he was going to die, and he wanted to have this thing over as soon as possible. The learned Trial Judge's note is, "Hurry up or I'll die," both notes practically meaning the same thing. In *Reg.* v. *Bernadotti*, 11 Cox 316, the injured man, in reference to a deposition he was about to make, remarked, "Be quick or I shall die," and BRETT, J., after consulting LUSH, J., said, "I think this statement admissible. I take the law to be that two facts must concur, (1) that the deceased was at the time of making the statement in such a condition that he believed his death was imminent and impending, and (2) that he was in danger of dying in a short time, without hope of recovery." If these two circumstances concur, the statement is admissible. Many other cases are to the same effect. There must be a settled

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hopeless expectation of death. *Reg.* v. *Gloster*, 16 Cox 471; *Reg.* v. *Jenkins*, L.R. 1 C.C.R. 187; *Reg.* v. *Reaney*, D. & B. 151, and whether such was the case is a question for the Judge at the trial, who in this case has found that this condition existed. It would require a very strong case for the Court of Appeal to interfere with his ruling, arrived at after seeing the witnesses and observing their demeanour, an advantage which the Court of Appeal is without. In this case, however, I do not hesitate to say that after perusal of the evidence I agree with the reasons of the learned Trial Judge, which he gives in the case stated. It was not quite clear whether the written declaration was read over before being signed, and moreover the case of *Reg.* v. *Mitchell*, 16 Cox 503, may be an authority for saying that the written declaration must express the *ipsissima verba* of the dying man, in which case the declaration in this case might be defective. The point does not appear to have been taken at the trial, but rejecting the written declaration altogether, the case against the prisoner is not weakened. It was strongly urged by Mr. *Duff*, on the authority of *Makin* v. *A.G.N.S.W.* (1894) A.C. 57, that in case any of the declarations were held to have been wrongly admitted, then that such admission itself constituted a substantial "wrong or miscarriage," and reliance was placed upon the following language of the Privy Council in the case referred to: "In their Lordships' opinion, substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court, founded merely on a perusal of the evidence."

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But it is to be remarked that the statute of N.S.W. upon which the *Makin* case proceeded, and section 746 of the Canadian Code, differ materially. They both provide that the conviction is not to be disturbed, the one simply, "unless for some substantial wrong or other miscarriage of justice," the other expressly, "although it appears that some evidence

was improperly admitted or rejected, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial." The Canadian Code expressly requires the Court to ascertain whether the admission of evidence has caused substantial wrong or miscarriage, and if they find that it has not done so, then bids them not to interfere with the conviction. There is nothing like this in the N.S.W. Act.

Being then clearly of the opinion that nothing occurred whereby any substantial wrong or miscarriage was occasioned at the trial, I am of opinion that this appeal should be dismissed and the judgment affirmed.

McCREIGHT, J.: I think that in this case there may possibly be doubt as to whether the statement made, and, when written, signed by the deceased, on the 4th day of October, as to circumstances connected with his having been shot, was properly received in evidence, inasmuch as it is not clear on the evidence that it was read over to the deceased before he signed it, or rather affixed his mark, or that he understood its contents if read, although I gather from the evidence that his intellect was not then much impaired. Our attention was properly called to the case of *Makin* v. *Attorney-General for New South Wales*, 6 R. 373, at pp. 379 and 380, and if the language of 746 of our Code had been the same as that of the N.S.W. Code or Criminal Law Amendment Act of 1883, I should have felt that there was a very serious question whether we were not bound in strict conformity with the reasons given by the judicial committee to decide that there should be a new trial, but the section 746 of our Code, instead of the words of the N.S.W. Act, which are, "provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case as stated, unless for some substantial wrong or other miscarriage of justice," contains a very different provision in the following words, "provided that no conviction

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shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial." Now it seems plain that the Dominion Legislature contemplated the very case of evidence being improperly admitted, etc., etc., as in itself not a sufficient reason for a new trial, "unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial," and the question arises whether if the dying declaration of 4th of October had not been received in evidence, the jury, having regard to the other evidence, could reasonably have come to a different verdict from that arrived at, so that in the opinion of the Court, some substantial wrong or miscarriage had occurred. I don't understand that any complaint is made of the Judge's statement of the case, though his view of the law in reference to dying declarations is questioned, and so I refer to the case stated by him as far as regards the facts:

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"On 30th of June, 1897, James Woods was tried at Nelson, at a special assize, on a charge of having on 2nd of October, 1896, murdered one Samuel Woods, a blacksmith, by shooting him through the body in his smithy. He was convicted of the charge, and sentenced to be executed. The evidence at the trial tended to show that the accused was a stranger in Nelson, without money, and without any fixed place of abode. The shooting took place about midnight, on Friday, 2nd of October, and from the description given of the accused to the police by the wounded man, the accused was arrested the next evening at Robson, a C.P.R. station, about thirty miles from Nelson. He had been seen in the morning by a driver of a train, when sixteen miles out of Nelson, sleeping alongside of the track, and this fact was at once communicated to the police at Nelson. When arrested a 38-calibre Smith & Wesson pistol, with three

barrels loaded and two empty, together with a weapon called a "billy," such as "cracksmen" use, was found on his person. He had no money. The wounded man died fifty hours after he was shot. The bullet, which was extracted from his body, was of the weight and calibre required and used for pistols such as that taken from the prisoner. It, moreover, corresponds in its markings, with a bullet fired, in the hands of the police, for purposes of comparison, from the prisoner's weapon, by an experienced gun-maker.

The evidence as to what occurred immediately preceding the shooting, is to the effect that the deceased was heard asking some person outside of his shop what he had been doing in the shop. The person so addressed denied that he had been in it. The deceased then said, "I saw you turn down the light." The deceased thereupon turned the light on. The altercation was heard by the blacksmith's "helper," who lived overhead, and by a Madame Malette, who had just closed her hotel, which is a short distance from the smithy in question. The latter witness, moreover, saw the deceased turn on the light while holding a man "much smaller" than himself, whom she could not more fully describe, as she was about fifty feet from him at the time. She heard the deceased ask the man what business he had there, and saw the man immediately afterwards raise a pistol and fire it at the deceased, and then run away in the direction of the C.P.R. station. Other witnesses saw the man running in the same direction, but none of them could identify him, owing to the night being very dark. The deceased was visited by Dr. La Bau within a few minutes of his being wounded, and attended to by him until he died. Death, according to the doctor's evidence, was caused by the bullet found by him in the body of the deceased on a *post mortem*—the bullet being that which I have already referred to.

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A minute description of the prisoner, as given by the

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deceased, was brought out on the cross-examination of Harper, the second witness for the Crown, and it accurately represented him (save as to his hat), as he appeared in Court. The remaining evidence for the prosecution consisted of statements proved to have been made by the deceased, which were admitted as dying declarations, inasmuch as it was in the opinion of the Judge satisfactorily proved that when declarations were made the deceased was in actual danger of death; secondly, that he knew it, and lastly, that death ensued from the wound inflicted by the prisoner.

I refer, also, to the evidence given by the witnesses, especially of Mallette and Beard, Harper and Miles, which does not seem to have been contradicted or shaken. On the afternoon of Sunday, the 4th, immediately before the taking of the deposition which was objected to, Miles, the constable, was in the room with the deceased, and as to this he is asked on the trial: "Did he (the deceased) say anything about his health?" And the answer was, "Yes, he said he thought he was going to die, and he wanted to have this thing over as soon as possible." Q. "What was this thing?" A. "Taking the deposition objected to." The learned trial Judge's note is that deceased also said, "Hurry up, I am going to die." Miles then shews that subsequently the prisoner was brought into the room where the deceased lay in bed, and in company with several men in appearance similar to the prisoner, and the deceased pointed to or singled out the prisoner among the others as the man who had shot him, and this was repeated in a manner apparently quite fair, the deceased recognizing the prisoner on the second occasion as well as the first, as the man who had shot him. The evidence is that the mental condition of the deceased was at the time unimpaired. The statement objected to really contained little or nothing but what was abundantly proved by reliable witnesses, not shaken in cross-examination, and there seems to be no reasonable

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doubt that "no substantial wrong or miscarriage" was thereby occasioned, and I think there should be no new trial, as I am quite unable to say that "some substantial wrong or miscarriage" was thereby occasioned on the trial. Indeed, I am inclined to think that the evidence was properly received.

DRAKE, J.: This case comes before us under section 744 of the Code. The learned Judge who tried the case refused to reserve the point as to the admissibility of certain statements of the deceased which were admitted as dying declarations, and in consequence, with leave of the Attorney-General, the matter comes before this Court for consideration under the form of a case stated.

By the case it appears that about midnight on Friday, 2nd October, 1896, at Nelson, the prisoner, James Woods, shot one Samuel Woods, a blacksmith. Dr. La Bau was called in a few minutes after the occurrence, and the deceased said "I am done for," and he described the shooting and gave a description of the person who had fired the shot. Mr. *Duff* objects that this evidence was improperly admitted, as the words, "I am done for," are of an ambiguous character and insufficient to bring his subsequent statement into the category of a dying declaration, so as to be admissible against the prisoner, and in this he is possibly right. But when the language spoken to by the doctor on this occasion is read, it does not fix the prisoner with shooting, it is a general description of the occurrence by an unknown man. This, before the scope and validity of hearsay evidence was fully understood and reduced by repeated decisions to a more restricted and definite operation, would have been admissible, and there are authorities, of, however, doubtful force, to this effect. I think it may be said that this was hearsay evidence. But it did not touch the prisoner in any way, and he was subsequently fully described to John Miles, a witness for the Crown, and this evidence was

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placed before the jury by the cross-examination on behalf of the prisoner. Miles knew the prisoner and had seen him on several previous occasions, and acting on the information he received from the deceased, arrested him at Robson. The shooting itself was witnessed by Mrs. Malette, who detailed the circumstances. The statement which the deceased made to the doctor on this interview does not appear important, unless some substantial wrong or miscarriage of justice was thereby occasioned. Here we have other evidence, both of the shooting and a description of the prisoner, and if the whole of the doctor's evidence on this point were eliminated, there is ample evidence without it of the facts he detailed.

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Mr. *Duff* further objects that the exact words of the deceased were not given by the doctor on the subsequent interviews, but after the lapse of eight months it would be difficult to give the exact words. What the doctor says is quite clear and distinct. He says the deceased always expressed himself "That he did not expect to recover." "He was always satisfied that he was not going to recover from his injuries." The doctor says he tried to encourage him, but in spite of his attempts he remained of the same opinion, that he was going to die; that he was not going to recover from that shot; that he never changed his conviction, and this conviction was repeated two or three times, and is confirmed by the evidence of Miles, when he stated to him he thought he was going to die, and wanted to have this thing over as soon as possible, referring to the deposition which was admitted in evidence. I think it a sufficient indication of the state of the deceased's conviction of impending death, without any hope of recovery. In the numerous cases cited, the Judges have used various terms to express the same meaning; death must be impending, immediate, imminent, approaching, but they all insist on the same thing, that the person making the statement must have a firm conviction that there is no hope of present

or ultimate recovery; that death is certainly approaching. In *Reg.* v. *Reaney*, D. & B. 151, the deceased made a statement concluding: "I have made this statement believing I shall not recover;" and on the same day he said, "I have seen the surgeon to-day, and he has given me some little hope that I am better, but I do not think myself that I shall ultimately recover," the Court of Criminal Appeal held that the evidence was properly received, and POLLOCK, C.B. there said that it is necessary that the person making the statement should be under an apprehension of death. The question turns upon the state of mind rather than the interval between the declaration and the death. Here we have repeated statements shewing a hopeless conviction at all times from Friday night until the death on Sunday night. It is true we are not at liberty to accept the doctor's opinion of the bodily condition of the injured man as shewing that his case was hopeless, but the evidence of the doctor was not the expression of his own opinion of the hopelessness of recovery, but the statement made to him by deceased. These statements were made before the written declaration was taken, and before his identification of the prisoner. The identification appears to be complete, and was taken with all due care and precaution to prevent mistake. I think, therefore, that the evidence both of his written declaration and of his identification, were properly admitted. It is to be remarked that the identification is much more important as a dying declaration than the written statement.

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Mr. *Duff* strenuously urged that the written declaration was not admissible because it was not shewn that it was read over to the deceased before he signed it; but that it was taken down and read over to him, and that he signed it, was proved by Dr. La Bau, one of the witnesses. The prisoner's counsel at the trial objected to it on the grounds that being in writing the Crown could not go behind it, and that it was not made in the presence of the accused or his

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counsel, and that there was no *jurat*. No other objection was offered to it, not a suggestion that it was not proved that it was read to him before he signed it. In the case of *Reg.* v. *Mitchell*, 17 Cox 503, it was shewn that the statement was extracted by questions and the questions were not put down. There is no evidence of that here.

The other point which was urged, that under section 746, sub-section (*f*), which is as follows: "Provided that no conviction shall be set aside, or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court some substantial wrong or miscarriage was thereby occasioned on the trial." Under the authority of *Makin* v. *Attorney General for N.S.W.* (1894) A.C. 57, the Court could not be substituted for the jury, the argument being that if any inadmissible evidence was admitted, its reception vitiated the verdict, it being a matter of speculation whether the jury would have convicted in the absence of the evidence impugned, and to sustain the conviction in its absence is not to uphold the verdict of the jury, but to substitute the verdict of the Court. The language of the clause under the consideration of the Privy Council was "That the Judge by whom a question is reserved shall state the facts and circumstances out of which the question arose, and the Supreme Court may affirm, amend or reverse the judgment, provided that no conviction or judgment therein shall be reversed, arrested, or avoided, on any case so stated, unless for some substantial wrong or other miscarriage of justice." The Privy Council points out that evidence improperly admitted might have chiefly influenced the jury, and the rest of the evidence, which might appear to the Court sufficient to support the conviction might have reasonably been disbelieved by the jury.

Judgment of DRAKE, J.

The very point which impressed the Privy Council is specially dealt with by the Code: "No conviction shall be

set aside or new trial directed, although it appears that some evidence was improperly admitted or rejected." The Court under this section has to deal with the question of admission or rejection of evidence expressly, and will no doubt exercise the gravest caution when such a matter comes up for consideration. In my opinion in the present case the evidence was admissible, and the verdict must stand.

Appeal dismissed.

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THE KOKSILAH QUARRY COMPANY, LIMITED LIABILITY v. THE QUEEN.

Practice—Appeal—Time—Extending—Res judicata—Crown—Estoppel against—Supreme Court Amendment Acts, 1896, 1897—Statutes—Retroaction.

At the trial judgment was given for the suppliants, and the order for judgment was duly entered.

Upon application by the Crown to extend the time of appealing from the judgment on the ground that the solicitor misapprehended the effect of section 16 of the Supreme Court Amendment Act, 1896, DRAKE, J. refused the application, holding that the formal judgment not having been entered on the order for judgment, the time for appealing had not commenced to run; and intimated that the certificate of judgment granted to the suppliants under Sec. 16 of the Crown Procedure Act, C.S.B.C., 1888, Cap. 32, should not have been obtained *ex parte*.

Upon motion to the Full Court that the appeal might be brought on notwithstanding the non-entry of the formal judgment, or for a stay of proceedings until it was entered, or, in the alternative, to extend the time for appealing.

Held, per MCCREIGHT, WALKEM and MCCOLL, JJ.:

1. (After consulting the other Judges), That the time for appealing from a final judgment commences to run when the decree or order for judgment is put into intelligible shape, so that the parties may clearly understand what they have to appeal from, and not from the entry of the formal judgment upon the order of the Court.
2. (After examining the Manager of the Bank of B.N.A. as to the *bona fides* of an assignment of the judgment to it), That no grounds had been shewn by the Crown to warrant an extension of the time.

After the passing of the Supreme Court Amendment Act, 1897, the Crown gave a new notice of appeal to the next Court, and the suppliants moved the Full Court to quash the appeal, the Crown making a cross motion to extend the time if necessary.

Held, per MCCREIGHT, DRAKE and MCCOLL, JJ.: That the former decision of the Full Court had finally determined the rights of the parties, and the appeal should be quashed.

Per DRAKE, J.: Statutes affecting the right to appeal are not statutes relating to procedure, and are not retroactive.

Statement. THE action was by petition of right by the suppliants for

$12,500.00 damages in respect of an agreement to supply stone for the construction of the New Parliament buildings at Victoria. On 29th of December, 1896, WALKEM, J. ordered judgment to be entered for the suppliants for $12,417.00 (see *ante* p. 530) and the order for judgment was entered on 31st of December, 1896. Costs were taxed on 5th of January, 1897. On 8th of January a summons was taken out by the solicitor for the Crown to stay proceedings pending appeal to the Full Court, the affidavit of the solicitor in support stating that he had been instructed by the Crown to appeal, but was unable to draw the notice of appeal owing to no written reasons for judgment having been handed down, and a stay was accordingly granted until 16th of January. Supposing that the time for appeal commenced to run when the order for judgment was perfected, the last day for giving notice of appeal, under the Supreme Court Amendment Act, 1896, Sec. 16, was 16th of January, *i.e.*, fourteen days before the next Full Court to sit on 1st of February. On 15th of January the stenographer extended and handed out the notes of evidence at the trial.

Statement.

On 9th of February the trial judge granted, *ex parte*, the certificate of the judgment prescribed by section 16 of the Crown Procedure Act, C.S.B.C. 1888. On the same day the solicitor for the Crown was notified of the obtaining of the certificate, and on 10th of February he wrote the suppliants' solicitors, asking them to do nothing as he was about to see the Attorney-General. On 11th of February the suppliants assigned their judgment to the Bank of B.N.A. On 12th of February the Crown gave notice of appeal from the judgment at the trial, and on the same day took out a summons to extend the time to appeal on the ground that the solicitor for the Crown misconceived the effect of section 16 of the Supreme Court Amendment Act, 1896, thinking that the section was only intended to deal with the mode of giving notice of appeal, etc., and not to abridge the

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time for appeal, which had been, under Rule 684, one year. (*a*).

The application was argued before DRAKE, J.

A. G. Smith, Dep. A.-G., for the Crown.

P. Æ. Irving, for the suppliants.

A. L. Belyea, stated that he appeared for the Bank of British North America, but was held to have no status on this application.

Cur. adv. vult.

February 16, 1897.

Judgment of DRAKE, J.

DRAKE, J.: The application is made to extend the time for appealing against the judgment rendered against the Crown. The judgment was rendered on 29th December, 1896, and an order for judgment made on 31st December. The costs were taxed on 5th of January. On 8th of January a summons was taken out to stay proceedings pending an appeal to the Full Court, and the affidavit of Mr. *Robertson* in support, stated that he was instructed by the defendant to appeal from the said judgment, but was unable to give notice of appeal owing to a written judgment not having been handed down, and the notes of evidence not having been extended. A stay was granted for eight days, that is, until 16th January. The notes of the stenographer were not extended until 15th January. The respondent did not renew his application for further time. On 9th of February the suppliant obtained, *ex parte*, a certificate certifying the tenor or effect of the said judgment under section 16 of the Crown Procedure Act, Cap. 32, C.S.B.C. 1888, the effect of which certificate is declared by section 17 to be equivalent

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NOTE (*a*). See *Reinhard* v. *McClusky*, *ante* 226; *Kinney* v. *Harris*, *ante* 229.

to a direction to the Provincial Treasury to pay the amount of moneys or costs, as to which a judgment shall be given, out of any moneys legally appliable, or which may be thereafter voted by the Legislature.

I am informed by the Registrar that no judgment has been signed or entered on the order for judgment of 31st of December, 1896. The new rule 673 enacted by Sec. 16 of the Supreme Court Amendment Act, 1896, does not deal with the date when a final judgment first becomes appealable. It is, however, specific as to the period from which time runs in the case of interlocutory judgments. Part of Rule 684 is repealed by implication, as to the periods within which final or interlocutory judgments can be appealed, but so much of that rule as defines the time when the judgment becomes appealable is not repealed, and that period is from the time when the judgment is signed, entered, and otherwise perfected. A party with an order for judgment may postpone signing the same unless compelled by the opposite party. See *Baker* v. *Saunders*, 7 C.B.N.S. 858. The order in this case is not a final judgment, as it has not been perfected; it is merely an order enabling the suppliants to take a step to complete their judgment. The result is that the time has not commenced to run against the respondent, (the Crown). With respect to the certificate which was given by the learned Judge under the 16th section of the Crown Procedure Act, I think that such an application should not have been made *ex parte*, and where an order has been made *ex parte* which should have been by summons, the Court will always allow a re-hearing. What the effect of the certificate thus obtained may be, or what position the Bank stands in, having obtained such an order and having in consequence released, if they have released, other parties, I am not prepared to say, as it is not before me for decision. The argument addressed to me was based on the views that the Court has taken in numerous cases, as to when and in what

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circumstances the Court will grant leave to appeal after the time for giving notice has expired. In the view I take of the present application, these become immaterial. The respondent is entitled to give a fourteen day notice of appeal to the then next sittings of the Full Court after the judgment of the suppliant has been perfected. As both parties appear to have overlooked a necessary step in the proceedings, there will be no costs of this summons.

Summons dismissed.

In pursuance of this judgment the solicitor for the Crown wrote to the suppliant's solicitors, requesting them to enter up formal judgment in order that the Crown might be in a position to prosecute its appeal. This they refused to do, and a summons was taken out to set aside the certificate granted *ex parte* by the Trial Judge. On 25th February notice was given by the Crown of a motion to be made to the Full Court that the appeal might be brought on notwithstanding the formal judgment had not been entered, and for a stay of proceedings, or, in the alternative, to extend the time for appeal. The motion came on before McCREIGHT, WALKEM and McCOLL, JJ. (WALKEM, J. sitting to form a quorum), on 6th of May, 1897.

Statement.

Gordon Hunter, for the motion.

P. Æ. Irving, contra: We take the preliminary objection that this, being an application to extend the time to appeal, should, under Rule 686, be made in the first instance to a Judge. This application was made to DRAKE, J., who held that it was not necessary to extend the time, as the formal judgment had not been entered. The Crown should, if they were dissatisfied with this order, have appealed.

Argument.

Gordon Hunter, in reply: The principal part of the motion is for leave to set down the appeal from the final judgment, or for a stay of proceedings until it is entered.

The application to extend was made in the first instance to DRAKE, J., and the Crown has now a right, as an additional precaution, to include it in this motion.

Motion directed to proceed.

Gordon Hunter, for the motion, cited *Carroll* v. *Provincial Gas Co.*, 16 P.R. 518, STREET, J.; *Re Helsby* (1894), 1 Q.B. 742; S.C. Rules 361, 448, 449.

P. Æ. Irving, *contra*, referred to *Holtby* v. *Hodgson*, 24 Q.B.D. 103; *In re Helsby*, *supra*; *Kelly* v. *Wade*, 14 P.R. 69; *Standard Discount Co.* v. *La Grange*, 3 C.P.D. 67.

Judgment of McCREIGHT, J.

McCREIGHT, J.: Until an order, other than on a refusal is drawn up, the parties do not know from what they are to appeal; as to what is a final judgment, see *Salaman* v. *Warner* (1891), 1 Q.B. 734. The Court will confer with the other Judges as to when the time for appeal commences.

Cur. adv. vult.

May 7th, 1897.

Judgment.

McCREIGHT, J.: All the Judges are of opinion that the time for appeal commences when the decree or order for judgment is put into intelligible shape, so that the parties may clearly understand what they have to appeal from. This order was drawn up and duly entered. The time for appealing has therefore expired, and the Crown is left to its application to extend it.

Argument.

Gordon Hunter, for the Crown, on the application to extend the time to appeal: There was no *laches* on the part of the Crown, there being practically only one day after receiving the stenographer's notes, to draw the notice of appeal and the grounds of the appeal which under our

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rules must be stated in the notice. In *Onslow* v. *Commissioners of Inland Revenue*, 25 Q.B.D. 465, there was a misapprehension, as here, as to the effect of an order, and the time was extended.

P. Æ. Irving, contra: The Crown was in default for over a month; although their solicitor says he was instructed to appeal on 7th of January, no notice was given until 12th of February. The assignment by the suppliants to the Bank, brings the case within the decision of BURBIDGE, J., in *McLean* v. *Queen*, 4 Exch. (CAN.) 257, where it was held that the Crown was in the same position as any subject, and that as the McLeans had assigned their judgment, and no special circumstances were shewn by the Crown, the time should not be extended. The Court in *Trask* v. *Pellent*, 5 B.C. 1, decided that mistakes of counsel and attorney are no grounds for extending time. As to what are circumstances sufficient to warrant an extension after expiration of time, where it has been shortened by the Legislature, see *Curtis* v. *Sheffield*, 21 Ch. D. 1, JESSEL, M.R. at p. 5. (MCCREIGHT, J., *In re Manchester Economic Society*, 24 Ch. D. 480, shews that respondent must have misled the appellant to give him a right to relief). As to the ground of having misunderstood the effect of the Statute of 1896, see *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241. There a mistake was made under a rule which was ambiguous. JAMES, BAGGALLAY and THESIGER, L.JJ., held that a misunderstanding of parties as to the meaning of a rule, is not sufficient. There must be very special circumstances. See also, *Craig* v. *Phillips*, 7 Ch. D. 253, JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.; *McAndrew* v. *Barker*, *Ibid.* 701, at p. 705, JESSEL, M.R., in giving judgment of Court; *Re Mansell*, *Ibid.* 711, where a mistake of solicitor's clerk in not setting the appeal down, was held insufficient. The opposite party must have misled the appellant. In *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368, BAGGALLAY, BRAMWELL and THESIGER, L.JJ., point

Argument.

out the distinction between the position of the parties in interlocutory matters, and after judgment. In interlocutory matters the indulgence granted to the appellant may be compensated to the respondent by costs, but after a final judgment the holder of it should not be kept in suspense as to whether there may or may not be an appeal. Here the respondents cannot be put in the same situation as before, as the Court cannot restore the Bank to its former position. The Court in *Cusack* v. *L. & N. W. Ry.* (1891), 1 Q.B. 347, whilst perhaps not agreeing with the strictness of the decision in *Collins* v. *Vestry of Paddington*, did not interfere with the principle there enunciated. *In re Manchester Economic Building Society*, 24 Ch.D. 488, at p. 499, COTTON, L.J. says that when an Act of Parliament and Rules give a time for appeal, a party should not be allowed to appeal after the expiration of that time unless there are very special circumstances. *In re New Callao*, 22 Ch. D. 484, and *In re Blyth and Young*, 13 Ch. D. 416, shew that a mere suggestion that the party is going to appeal is not sufficient. *Reg.* v. *Kettle*, 17 Q.B.D. 760, at p. 763, also shews that a mistake as to the effect of a rule is not sufficient, and points out that there is a grave distinction between extending the time after and before judgment. *In re Helsby* (1894) 1 Q.B. 742, (C.A.) decided after *Cusack* v. *L. & N. W. Ry.*, by HALSBURY, L.J. LOPES and DAVEY, L.JJ., shews that a party has a vested right in a judgment in his favour, which should not be disturbed unless he has done something to mislead the opposite party.

Argument.

Gordon Hunter, in reply: The Crown made an application to stay proceedings under the judgment, pending appeal. The order was granted and it directed that costs should "abide the appeal." It was therefore understood that an appeal was to be taken, and the assignee of the judgments takes subject to that. In *McLean* v. *Queen*, cited, the judgment was by consent. The English decisions hardly apply here, as there the giving of notice of appeal is a mere

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formal act, which can be done as soon as judgment is pronounced, whilst here the grounds of appeal must be stated, and these cannot be properly ascertained until the reasons for judgment are handed down, and the evidence extended. [MCCREIGHT, J.: The Bank should be represented and their manager examined as to the *bona fides* of the transaction.] The only equity that the Bank could have would be by not knowing that an appeal was to be taken. The knowledge of the suppliants is the knowledge of the Bank. The Crown is not called on to enquire as to *bona fides*, for this question can only be material in an issue between the suppliants and the Crown if there is a vested right in the Company to the judgment, the Bank being in no better position than its assignor; for it cannot be contended that a right not well vested in the assignor can become well vested in the assignee, independent of statute.

Argument.

There is no vested right: *Cusack* v. *L. & N. W. Ry.*, *supra*. The Bank must be taken to have known that the Court had jurisdiction to allow an appeal after the lapse of time, and that dealing with the judgment would be subject to this risk.

Per curiam: The Bank should be heard, and the motion adjourned so that they may be notified.

Order accordingly.

The manager of the Bank was afterwards examined as to the circumstances under which it took the assignment.

May 10th, 1897.

E. P. Davis, Q.C., appeared for the Bank and resisted the motion by the Crown to extend the time for appealing.

Cur. adv. vult.

May 17th, 1897.

Judgment of MCCREIGHT, J.

MCCREIGHT, J.: I think that the motion to extend the time for appealing in this case must be dismissed. The recent cases of *Trask* v. *Pellent*, 5 B.C. 1; *Reg.* v. *Aldous*,

Ibid. 220; *Tollemache* v. *Hobson*, *Ibid.* 223; *Reinhard* v. *McClusky*, *Ibid.* 226, and *Kinney* v. *Harris*, *Ibid.* 229, in this Court cited by my brother McColl, shew that we endeavour to act in all cases according to the decision of the Lords Justices. The Judicial Committee in *Trimble* v. *Hill*, 5 App. Cas. pp. 342, 344, 345, point out that it is our duty to do so. *In re Manchester Economic Building Society*, 24 Ch. D. 488, Cotton, L.J., at p. 499, says: "This, I think, may be laid down, that when the rules and the Act of Parliament say that an appeal is to be within a certain time, unless special leave shall be given by the Court of Appeal to appeal after that time, the Court does not grant leave unless there is something which in the opinion of the Court entitles the person who applies for extension of time to be relieved against the bar established by the Orders and the Act of Parliament. It has been called an equity, but that is not a proper term; it is something which entitles him to ask for the indulgence of the Court, to ask to be relieved from the legal bar that there is in the Orders and Act of Parliament." The appellants have shewn no such case for indulgence. In this view of the case it is unnecessary to consider or deal with the alleged rights of the Bank of British North America as assignees of the judgment against the Crown.

Judgment of McCreight, J.

Should a similar case in this respect arise, the opinions of the Lords Justices in *In re Manchester Economic Building Society*, *supra*, at pp. 498, 503, 504, may be of service. The motion must be refused, with costs.

Walkem, J., concurred.

McColl, J.: In view of the elaborate and forcible arguments which were addressed to us, and the importance of the question, I wish to give briefly my reasons for concurring in the opinion which I understand is held by the other members of the Court, that this motion must be dismissed.

Judgment of McColl, J.

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Judgment of McCOLL, J.

The sole substantial ground, if any, upon which the indulgence is asked, is that the intended appellant's solicitor misconceived the effect of section 16 of the Supreme Court Amendment Act, 1896. I say nothing as to the effect of the assignment made by the Company to the Bank of British North America, because I have not taken it into consideration. In the case of *Trask* v. *Pellent*, 5 B.C. 1, this Court adopted the now well settled practice of the Courts in England upon this question, and followed that decision in the recent cases of *Reg.* v. *Aldous*, 5 B.C. 220; *Tollemache* v. *Hobson*, *Ibid.* 223; *Reinhard* v. *McClusky*, *Ibid.* 226, and *Kinney* v. *Harris*, *Ibid.* 229. Personally I would have preferred a less rigid interpretation of the rule, having regard to the different conditions existing in this Province, and the difference in our practice, as, for instance, the requirement here that the grounds of appeal must be stated in the notice of appeal. But it is of lesser importance to have a practice for which the "most plausible" reasons might be given, than that there should be unanimity upon some practice as nearly certain in its operation as it is possible to be obtained without incurring the danger pointed out by BOWEN, L.J., *In re Manchester Economic Building Society*, 24 Ch. D. 488, at p. 503. The ground relied upon in support of the present motion was expressly decided to be insufficient in *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241. If the Court were now to relax a practice unanimously and deliberately adopted, and frequently acted upon, I do not know how it will ever be possible for suitors to determine when they may safely deal with property declared to be theirs by a judgment of the Court, without being exposed to the risk of having to defend it in another contest, or when their opponents should deem it too late to take a chance of such momentary impression as they may be able to produce upon the Court, as it may happen to be constituted at the time, on any ground appealing to sympathy. Although the question has lost much of its

importance as regards future cases, by reason of the Supreme Court Amendment Act, 1897, I cannot see why this circumstance should affect the decision. It is, I think, not unimportant that the Legislature, when making important changes in favour of appellants, during the session just closed, should have carefully abstained, in face of the decisions referred to, from derogating from their authority upon this particular point.

Motion dismissed.

The time for appealing from final judgments having been by the Supreme Court Amendment Act, 1897, extended to six months from the time at which the judgment order or decree is signed, entered, or otherwise perfected, the Crown, on 15th of June, gave notice of appeal to the Full Court to be held on 5th of July, 1897, from the judgment of WALKEM, J., at the trial. The suppliants moved to quash the appeal, and the Crown moved to extend the time to appeal if necessary. The motions were argued on 8th of July, before DAVIE, C.J., MCCREIGHT and DRAKE, JJ., who ordered a re-argument, and the motions were accordingly re-argued before MCCREIGHT, DRAKE and MCCOLL, JJ., on 23rd of July, 1897.

Statement.

E. P. Davis, Q. C., and *P. Æ. Irving*, on motion to quash the appeal: No right of appeal existed at the time the Act of 1897 came into force, and a lost remedy cannot be revived by a new Act: *Lawrie* v. *Renad* (1892), 3 Ch. 402, at pp. 420, 421. A statute conferring a right of appeal is not a statute relating to procedure. The right of appeal is a question of jurisdiction, although the machinery relating thereto may be procedure: *Taylor* v. *The Queen*, 1. S.C.R. 65; *Hough* v. *Windus*, 12 Q.B.D. 224; *In re Phœnix Bessemer Steel Co.*, 45 L.J.Ch. 11; *Budgett* v. *Budgett* (1894), 2 Ch. 555. It is a general rule in the construction of

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statutes, that an Act, even though it be one relating to procedure, is not to be considered as interfering with rights that are ascertained and determined. The judgment of the last Full Court, refusing to extend the time to appeal, decided the suppliants' judgment to be unassailable, and their right therein became a vested one, so that now to grant the Crown an indulgence by extending the time would be to take away the suppliants' vested right, and render it useless. See *Re Helsby* (1894), 1 Q.B. 742. The matter is also *res judicata* by the judgment of the former Full Court. The Crown has not shewn any special grounds for extending the time, and this is absolutely necessary.

Argument.

Gordon Hunter and *H. E. A. Robertson*, for the Crown: The Supreme Court Amendment Act 1897 is retrospective. It is plainly an Act relating to procedure, and all such Acts are retrospective and applicable to pending suits, unless it appears expressly by implication from their language that they are not intended to be so: *Attorney-General* v. *Sillem*, 10 H.L.C. 704, at p. 764; *Wright* v. *Hale*, 6 H. & N. 228, at p. 230; *Gardner* v. *Lucas*, 3 App. Cas. 582, at p. 603; *Hornby* v. *Caldwell*, 8 Q.B.D. 329, at p. 335; *Warner* v. *Murdoch*, 4 Ch. D. 750, at p. 752; Endlich (Maxwell) on Statutes, 391. This rule is made a part of our own code of laws by section 39 of the Interpretation Act, C.S.B.C. 1888, Cap. 1. The privilege of appeal can only be given by statute, but it is none the less a matter of procedure. The only right a party has is to have his action conducted according to the mode of procedure from time to time in force: *Watton* v. *Watton*, 35 L.J. P. & M. 95; *Graham* v. *Temperance Life Assurance Co.*, 17 P.R. 271; *Boston* v. *Lelicore*, 39 L.J.P.C. 17; *Lopez* v. *Burslem*, 4 Moo. P.C. 300; *Attorney-General* v. *Sillem*, *supra*. [*Per Curiam:* Was this a pending suit at the time of the Act of 1897?] Yes; so long as a judgment is unsatisfied, an action is pending: *Howell* v. *Bowers*, 2 Cr. M. & W. 621; *Redfield* v. *Wickham*, 13 App. Cas. 467; also, there is still an application to set

aside the certificate pending before WALKEM, J. If you can take any proceedings in an action it is pending: *Re Clagett's Estate*, 20 Ch. D. 637, at p. 653. That the Legislature did intend to make the Act of 1897 retrospective, is shewn by their omission to insert in it a saving clause such as section 19 of the Act of 1896, and by the use in section 7 of the expressions: "Provided where any appeal arises," not "shall arise." The Legislature plainly regarded an appeal as a matter of procedure, because by the proviso in section 12, sub-section 1 of the Act of 1897, the time for appeal is excepted from matters of procedure referred to in sub-section 1. The argument that the Legislature is thwarting the decision of the former Court is inadmissible: *Attorney-General* v. *Hertford*, 3 Ex. 670, PARKE, B., at p. 684; PLATT, B., at p. 688. A former decision cannot affect a right acquired under a subsequent statute: See *Larkin* v. *Saffarans*, 15 Fed. Rep. 147, at p. 150. The Courts constantly allow appeals to be taken after lapse of the time prescribed: See *e.g. Cusack* v. *L. & N.W. Ry. Co.* (1891), 1 Q.B. 347; *Onslow* v. *Commissioners of Revenue*, 25 Q.B.D. 465; *Carter* v. *Stubbs*, 6 Q.B.D. 116. The Legislature has expressly confirmed the Rule of Court giving the Court power to extend the time after its expiration: See Rule 743, Supreme Court Amendment Acts, 1896, Sec. 21; 1897, Sec. 11. The suppliants cannot take advantage of a repealed enactment. All proceedings that have been taken must be disregarded, the sole question being whether, on the law as it now stands, the Crown may appeal: See *Quilter* v. *Mapleson*, 9 Q.B.D. 672. The decision in *Budgett* v. *Budgett*, *supra*, is distinguishable; being based on an English rule, it cannot form any better guide to the intention of the British Columbia Legislature, than could the judicial decisions on enactments or Rules of Court in Ontario or Australia: See *Ex parte Blaiberg*, 23 Ch. D., at p. 254; *Grey* v. *Pearson*, 6 H.L.C. 61, at pp. 106, 108.

Argument.

Section 10 of the Crown Procedure Act, C.S.B.C. 1888,

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Cap. 32, provides that "the laws and statutes in force for the time being, as to appeals, etc., should be applicable, and apply and extend to such petition of right." The Act of 1897 is an Act as to "appeals," and applies. Enactments adversely affecting Crown prerogatives should be narrowly construed: See 8 Campbell's Ruling Cases, 273; *Tomline* v. *Reg.*, 4 Ex. Div. 252.

The Crown should not be prejudiced by the *laches* or inadvertence of its officers: Clode on Petition of Right, 60. No sittings of the Court would have been lost if the appeal brought on 12th of February, 1897, had been admitted and heard: *Johnston* v. *Petrolia*, 17 P.R. 332. As to the question being *res judicata*: All that was decided on the first motion to the Full Court, was that the time for appealing under the law of 1896 had gone by, and no special circumstances had been shewn why the time should be extended. What is now to be decided is, has the Act of

Argument.

1897, passed after the decision, given the right of appeal, and if not, the Legislature having declared six months to be a reasonable time, should not the time be extended *nunc pro tunc* in view of this declaration? *Quilter* v. *Mapleson*, *supra*; *Hunter* v. *Stewart*, 31 L.J. Ch. 346; *Re Anglo-French &c. Society*, 14 Ch. D. 533; *Heath* v. *Weaverham*, 10 R. 274; *Stuart* v. *Mott*, 23 S.C.R. 384, at p. 388; *Dodgson* v. *Scott*, 2 Ex. 457; Everest & Strode, pp. 7, 52, 58, 59; *Re Wiggins Ferry Co.* v. *Ohio Ry. Co.* 142 U.S. 396, at p. 410. Counsel also cited *Queen* v. *Vine*, L.R. 10 Q.B. 195; *Page* v. *Bennett*, 2 Giff. 117, at p. 120; *Ex parte McCardle*, 7 Wall. 506.

Cur. adv. vult.

July 31st 1897.

Judgment of McCREIGHT, J.

McCREIGHT, J.: I am of opinion that we cannot entertain the appeal, even under the Act of 1897. The Full Court decided in May that they could not hear the appeal,

that is, either hear or extend the time for hearing, and that binds the present Court, at least unless it were very clearly made out to us that the decision was wrong, which seems to me impossible. To entertain this case it is necessary to read into the Act of 1897 a provision to the effect that any appeal, or rather decision that an appeal was out of time, determined at any time during the six months antecedent to the Act of 1897 coming into force, might be reopened and the appeal heard under the last Act, and the case determined as if no previous decision had been given.

There are no words warranting any such extraordinary construction, and if a clause had been inserted to that effect it would of course have been challenged and disallowed by the House.

I think the motion to quash must be allowed with costs, and motion to extend the time for appeal refused with costs.

Judgment of DRAKE, J.

DRAKE, J.: The defendant is the appellant, moving for leave to extend his time to appeal, and the plaintiffs by a cross motion move to quash the notice of appeal. The only point is whether the appellants, having attempted to take advantage of the appeal given by section 16 of the Supreme Court Amendment Act, 1896, and having failed and a judgment of the Full Court having been rendered against them, can treat that judgment as a nullity and make a fresh application and appeal under section 7 of the Supreme Court Amendment Act, 1897, which extends the time for appealing to six months from final judgment.

The argument addressed to us was that the right of appeal and method by which the appeal should be brought, are matters of procedure only, and therefore the Act is retrospective as to all cases which fall within the six month's limit. I do not consider that the right of appeal is a mere matter of procedure. The right is a statutory right, but the means by which it is to be enforced are procedure. It is not possible to define what procedure is in all cases, or

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to say generally when such procedure is retrospective; to do so would be laying down a canon of construction which would not be correct in all cases, but in the present case, even if the section in question is retrospective, something else intervenes, and that is the judgment of the Full Court rendered in respect of the procedure as it existed prior to the passing of the Act in question.

In *Williams* v. *Smith*, 4 H. & N. 559, it was held that the Mercantile Law Amendment Act, which provided that a writ of *fi. fa.* should not prejudice the title to the goods of a *bona fide* purchaser before actual seizure, did not apply when a writ had been delivered to the sheriff before the Act passed, as the statute, if retrospective, would have divested him of a right he had so acquired. The plaintiff in that case had obtained a right under the law as it existed, of which he was not to be divested by fresh legislation; so here the plaintiffs have obtained a right by the decision of the Court that their judgment was not appealable, and the defendant seeks to set aside that right by subsequent legislation. I am not prepared to say that if no appeal had been taken and decided, the defendant would be barred by the present Act from giving a notice of appeal within six months from the rendering of his judgment at the trial, but that case does not arise here, and I am of opinion that the motion to quash must be allowed with costs, and the motion for leave to appeal dismissed, one set of costs.

Judgment of DRAKE, J.

McCOLL, J.: This is a motion to quash appeal and application to extend time for appeal if necessary.

Very learned arguments were addressed to us by counsel upon the question whether section 7 of the Supreme Court Amendment Act, 1897, should receive such construction as to enable an appeal to be brought from a final judgment made within six months from the passage of the Act, notwithstanding that the time limited for the appeal had then expired, as being a question of procedure only, but I

Judgment of McCOLL, J.

am of opinion that we are not called upon to decide such question on the present occasion, and I wish to be understood as expressing no opinion upon it. Before the passage of the Act the Crown had appealed, and this Court had dismissed the appeal with the result that the rights of the parties had been in effect finally determined in accordance with the judgment. That the appeal was not heard upon the merits, but dismissed as out of time, is, I think, immaterial.

Even admitting the question to be one of procedure only, it seems to me to be perfectly clear that the case falls within the limitation of the general rule stated by Lord BLACKBURN in *Gardner* v. *Lucas*, 3 App. Cas. 582, at p. 603, that such legislation is "retrospective unless there is some good reason or other why it should be held not to be." That such reason does not exist here, is, I think, obvious.

Judgment of McCOLL, J.

The application to extend the time must be dismissed because of our former decision.

Motion to extend time dismissed, and appeal quashed.

McCOLL, J.

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RE NEW WESTMINSTER GAS CO

RE THE NEW WESTMINSTER GAS COMPANY.

Company—Appointment of Liquidator.

All the creditors of an insolvent company having agreed upon and recommended the appointment of E. as liquidator of the Company. *Held*, that the fact that E. was a shareholder of the Company was not a valid objection to his appointment.

APPLICATION for the appointment of a liquidator of an insolvent company. All the creditors recommended for such appointment a Mr. Ewen, one of the shareholders in the Company, and this recommendation was supported by a majority of the shareholders and opposed by others of them.

Statement.

G. E. Corbould, Q.C., with *G. O. M. Dockrill*, for the creditors.

G. O. M. Dockrill, for the shareholders in favour of the appointment.

J. S. Yates, for the shareholders adverse to the appointment, cited the *Central Bank of Canada*, 15 Ont. 309; *Re Alpha Oil Co.*, 12 P.R. 298; and *In re Northern Assam Tea Company*, L.R. 5 Ch. 644.

Argument.

McCOLL, J.: Of a total of 4,001.76 shares all fully paid up, the holders of 2,510.86 were represented by Mr. *Yates*, 1,147.70 by Mr. *Dockrill* and 343.20 were not represented. Mr. *Corbould, Q.C.*, and Mr. *Dockrill* represented creditors having claims amounting to $21,787.99, being apparently the only indebtedness of the Company. None of these creditors suggested any inaccuracy in the claim of any of the others, and all united with the shareholders represented by Mr. *Dockrill* in asking that Mr. Ewen, the provisional liquidator, be continued. Mr. *Yates*, while expressly disclaiming any imputation that Mr. Ewen was not

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personally well qualified for the position, relied upon the cases of the *Central Bank of Canada*, 15 Ont.; *Re Alpha Oil Co.* 12 P.R. 298, and *In re Northern Assam Co.*, L.R. 5 Ch. 644, as shewing that Mr. Ewen being a shareholder and liable to the Bank of Montreal in respect of its claim against the Company should not be appointed. The question of the failure to press the claim against the City of New Westminster would only be material if for any reason apart from the chances of success Mr. Ewen was unwilling to insist upon it. But it hardly required Mr. Cunningham's affidavit to shew that the real reason for not embarking upon proceedings, necessarily very expensive from the determined opposition naturally to be expected, was the absence of any fund of the Company to draw upon, and the reluctance of the shareholders to contribute for such a purpose. And Mr. Cunningham's explanation, corroborated on behalf of Mr. Ewen, who was present upon the application, was received by Mr. *Yates* as satisfactory.

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The only person besides Mr. Ewen whose appointment was suggested was Mr. J. W. McFarland, of Vancouver, the nominee of the shareholders for whom Mr. *Yates* appeared. The circumstance that Mr. McFarland resides in Vancouver while the assets and the books of the Company are in New Westminster, where its office is, would preclude his appointment according to one of the cases cited by Mr. *Yates*, *Re Alpha Oil Co.;* while another of them, *Re Northern Assam Co.*, shews that shareholders as such have no real interest in the question of the appointment. In the latter case, the appellant was made to pay costs solely upon that ground though himself a contributory. The rule referred to by Mr. *Yates* is merely a general rule by which, in a contest between interested parties, a choice may be made where the persons suggested are all personally equally well qualified. In this instance, Mr. Ewen is the unanimous choice of all the creditors, or at least of all those known to exist, and of (though this I think counts for nothing) about

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one-third of the shareholders. He is also, from his long connection with the Company, having lived in New Westminster, and from being provisional liquidator, better qualified to act than a person not familiar with property of the kind in question, which necessarily is incapable of being realized as readily as most kinds of property.

It must not be forgotten that in two of the three cases referred to three liquidators were appointed, only one of whom was neither shareholder nor creditor, thus obtaining the advantage of having persons interested, which may be of importance in some cases, and is peculiarly desirable in this for the reasons mentioned.

Then the appointment of more than one liquidator is not usual, and was not suggested in this matter. It is impossible to doubt from reading the affidavits that the Company is insolvent, and that the reason is because it was never upon a proper footing. While it is to be hoped that some means may yet be found to continue its operations, I am satisfied that this result will best be aided by giving due weight to the wishes of the creditors, who alone, in the circumstances, are really interested in the appointment of a liquidator, and leaving them to work together in a task in which they are so happily united. I took time to consider, not because I had any doubt what I ought to do, but because there may not, though I express no opinion, be any appeal in a matter of this kind under section 74 of the Act, and because the case of the *Northern Assam Co.* shews that, in any event, none of Mr. *Yates'* clients as being shareholders only would have such right, and that the appointment of a qualified person as liquidator will not be interfered with on appeal. Not having been referred to any case in our own Court, and as it is desirable that the practice in matters of discretion should be uniform, I took occasion to consult with Mr. Justice McCREIGHT, who authorizes me to say that he entirely agrees in the opinions I have expressed as to the respective questions of shareholders and creditors and as

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to Mr. Ewen's position. Let Mr. Ewen be appointed; security by consent of all parties in $3,000.00 to be given by 22nd of September, with two sureties to the satisfaction of the Registrar or of the local Judge; accounts to be passed quarterly commencing 22nd of December; money to be deposited in the Bank of Montreal. Summons adjourned for any necessary purpose before the local Judge, by whom anything necessary from time to time may be done. One set of costs only to creditors and none to shareholders, following the cases referred to.

Order accordingly.

BOLE, L.J.S.C.

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Oct. 6.

AUGBERG v. ANDERSON.

STEWART v. ANDERSON.

AUGBERG v. ANDERSON

STEWART v. ANDERSON

Execution—Exemption—Homestead Act—Small Debts Court—Jurisdiction.

A Magistrate sitting as Judge of the Small Debts Court, has no jurisdiction to decide the validity of a claim of exemption under the Homestead Act, of goods seized under process of execution issued from that Court.

Statement.

APPLICATION to prohibit R. A. Anderson, a Stipendiary Magistrate, from adjudicating a claim of exemption under the Homestead Act, 1888. The facts sufficiently appear from the judgment.

O. L. Spencer, for the defendant, the applicant.
H. C. Shaw, for the plaintiffs.
A. E. Bull, for the Sheriff.

Judgment.

BOLE, L.J.S.C.: In these cases judgment was obtained and execution issued by both the plaintiffs against the defendant, Anderson, in the Vancouver Small Debts Court, before R. A. Anderson, S.M. Acting under these instructions the Sheriff of Vancouver seized the sloop "Argo." The defendant claimed the said sloop as being within the exemption to which he is entitled under the various Homestead Acts, and the Magistrate had summoned the parties before him for the purpose of adjudicating on the claims so made. I am now asked to prohibit the Magistrate from further dealing with the matter as being beyond his jurisdiction. The Homestead Act, C.S.B.C. 1888, Sec. 15, enacts as follows: "On the return of any process of law, or in equity, in case any question shall arise, in whole or in part, touching any matter, provided for by this Act, the Court out of

which such process shall issue shall dispose of such question between the parties interested therein, by way of summons and order in a summary way," and provides for trial of matters of fact before a jury. Neither of these expressions appear to me to contemplate homestead claims being dealt with by a Court which cannot be said to have any power to deal with a matter by summons and order in a summary way, and has no power whatever to call in a jury to assist its deliberations. The provision is easily workable in either the Supreme or County Court, which possess the necessary procedure, and moreover, there are a number of other provisions in section 15 that seem as if the Legislature did not contemplate exemption claims being contested in courts not of record.

Moreover, Stat. B.C. 1890, Cap. 20, Sec. 8, in an amendment to the Homestead Act, provides that the debtor may appeal from the decision of the appraiser, or from any act of the Sheriff, to the nearest County Court Judge, upon giving such security as the Judge may order, and the appeal shall be decided summarily without delay, and I think this provision must be read into section 3 of the Small Debts Act, 1895. It therefore appears to me that the Stipendiary Magistrate has no jurisdiction to deal with or determine the claim made by the debtor for homestead exemption. The rule will therefore be made absolute. No costs.

Judgment.

Order made.

BOLE, L.J.S.C. 1897. Oct. 26.

FENSON (APPELLANT) v. CITY OF NEW WESTMINSTER (RESPONDENT).

FENSON v. CITY OF NEW WESTMINSTER

Statute—Performance of Judicial Act—Words and Phrases—"May"—Criminal Code, 1892, Sec. 880 (e).

In a statute providing that the Court may perform a judicial act for the benefit of a party, under given circumstances, the word "may" is imperative.

APPLICATION by the respondent Corporation for the payment to them under sub-section *(e)* of section 880 of the Criminal Code *(a)* of a fine and costs, out of certain monies deposited in Court by the appellant under sub-section *(c)* of the said section *(b)*. The appellant had appealed from an order of a Justice, imposing a fine, and the appeal was dismissed.

Statement.

R. McBride, for the appellant, submitted that the word "may," as used in the sub-section *(e)*, left it in the discretion of the Court to grant or refuse the application.

Argument.

G. O. M. Dockrill, for the respondent Corporation.

NOTE *(a)* Sub-Sec. *(e)*. " . . . And whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant."

NOTE *(b)*. Sub-Sec. *(c)* " . . . . If the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant . . . . . may deposit with the Justice convicting or making the order, such sum of money as such Justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal."

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BOLE, L.J.S.C.: In this case I am asked, under section 880 of the Code, to direct that the fine, costs, and costs of appeal be paid, out of the deposit in Court, to the respondent, the appeal having been dismissed, and Mr. *McBride* relies on the wording of the section, which uses the word "may," as giving me some discretionary power in the matter as to granting or refusing the application; but the rule, I think, is that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arrives, and its exercise is duly applied for by a party interested and having the right to make the application: *MacDougall* v. *Paterson*, 11 C.B. 755; *Julius* v. *Bishop of Oxford*, 5 A.C. 214. In the present case I entertain no doubt as to the sense in which the word "may" is used. I must therefore grant the application and direct the fine, costs and costs of appeal to be paid forthwith to the respondent, out of the deposit in Court, and that the balance, if any, be paid to the party entitled thereto. Judgment.

Order made.

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STEVENSON v. BOYD.

Contract—Public policy—Evading secrecy of tenders for municipal work.

STEVENSON v. BOYD

Tenders were invited for certain municipal public works. Defendant, having already put in a tender, met the plaintiff, who also proposed to tender for the work. It was agreed between them that the defendant should withdraw his tender and put in another at a higher figure, and that the plaintiff should tender at a still higher price; that, in the event of the defendant's tender being accepted, the profits of the contract should be equally divided between them. The defendant's tender was accepted. In an action to declare a partnership:

Held, That the agreement constituted a partnership, and was not void as against public policy.

Statement. ACTION for an account under an alleged partnership. The facts of the case are sufficiently set forth in the head-note and judgment.

C. B. MacNeil, for the plaintiff.

W. J. Bowser, for the defendant.

Judgment. BOLE, L.J.S.C.: In this case the plaintiff alleging the existence of a partnership between himself and the defendant comes into Court to have the usual accounts taken. The defendant admits the partnership, but says as it was formed for an illegal act, and as the consideration therefor was illegal and contrary to the public policy, the agreement is void and should not be enforced against him. The facts, as I gather them from the evidence, appear to be that some time ago the Corporation of Vancouver invited tenders for certain works in connection with the water works of that city. The defendant had handed in his tender when he met the plaintiff, who also proposed tendering, and, in consequence of a conversation that then took place, the defendant withdrew his tender. Thereupon defendant and plaintiff

agreed that each should send in a separate tender for the work, defendant's to be the lower one, and if it was accepted, as both contractors thought it probably would, then they were to share the profits and loss of the contract equally between them in pursuance of this agreement. Defendant put in another tender for a higher price than the tender withdrawn, and the plaintiff sent in his tender at a higher figure than that of the defendant. The defendant's tender being the lowest was accepted, and the work was commenced and carried on thereunder. I have only at present to decide whether there is a partnership between the litigants or not, I think there is, as while such an agreement as the one under consideration does not commend itself to those who rightly entertain high views of commercial morality, I am unable on legal grounds to declare it void. In my opinion, it is lawful to make such an agreement, as it appears to me to fall within the judgment given by BACON, V.C., in *Jones* v. *North*, L.R. 19 Eq. 426. I may add that the City have it in their own power to guard against such abuses of the contract system in future.

Judgment.

Judgment for plaintiff.

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PATTERSON v. THE CORPORATION OF THE CITY OF VICTORIA.

Municipal Corporation—Highway authority—Liability—Misfeasance—Findings of jury—Proximate cause—Negligence—Nonsuit.

Per McCOLL, J.: At the trial, on motion for judgment (concurred with by McCreight, J., on appeal): If a Municipal Corporation knows, or ought to know, that a highway bridge within its limits is unsafe, yet throws it open to the use of the public, that act is a breach of a positive duty which it owes to the public, and is an act of negligent misfeasance which renders the Corporation liable for injuries resulting from the subsequent collapse of the bridge, although the unsafe condition of the bridge was not occasioned by any act of the Corporation.

On appeal to the Full Court:

Per DAVIE, C.J., and McCREIGHT, J.: A Municipal Corporation is liable for damages caused by a dangerous nuisance created by it on a highway within the limits of its control, and the misconduct will be treated as misfeasance, and not mere nonfeasance, if the injury arises from a combination of acts and omissions on the part of the Corporation, here the boring of a beam rendering it more liable to rot, and its subsequent non-removal, though the acts without the omissions would not have caused the injury.

Per DRAKE, J., dissenting:

(1) That the Corporation were the governing body selected to execute only such duties and powers as were created by their Municipal charter. That they were not liable in damages for permitting the public works to fall into decay. That the boring of the floor beam in the bridge, complained of, and attributed as the cause of the disaster, was not negligent, and did not in itself affect the strength of the beam, and that the subsequent non-removal of the beam was mere non-feasance.

(2) The doctrine that an action lies for the non-exercise of statutory powers, which, if reasonably exercised, would have avoided the injury complained of, has no application to Municipal Corporations.

Per McCOLL, J. (at the trial): There cannot be a nonsuit, nor can leave to enter a nonsuit be reserved, without the consent of the plaintiff.

Statement. ACTION under Lord CAMPBELL'S Act, brought by the

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plaintiff to recover damages against the Corporation of the City of Victoria, for the death of her husband, which was caused by the collapse of a bridge over an arm of the sea, situated within the City limits. The bridge was crossed by a Provincial main highway from Victoria to Esquimalt, and was also crossed by a tramway line belonging to the Consolidated Railway Company. The bridge was built in 1885, by the Provincial Government, as a link in the highway referred to. By Stat. B.C. 1890, Cap. 52, Sec. 1, the Railway Company were authorized and empowered to construct, maintain and operate "a single or double line of tramway . . . for the passage of cars, carriages and other vehicles adapted thereto, upon and along the lands, highways and bridges lying between the City of Victoria and the town of Esquimalt." By section 2 the Company was authorized to "transport and carry passengers and freight upon and over the said lines of tramway, by electric or such other motive power as the said Company may deem expedient." By section 13, "the Company shall be entitled to and shall be accorded the right of way on all roads traversed by their tracks in such districts, provided the location of the said tracks, etc., shall be subject to the approval of the Chief Commissioner of Lands and Works." In 1891 the limits of the City of Victoria were extended by proclamation of the Lieutenant-Governor-in-Council, under powers conferred by the Municipal Act, 1889, Sec. 17, so as to include the bridge in question within its area. The bridge was constructed on the truss system, the floor being supported by transverse floor beams, supported at each end by iron hangers, which, depending from an overhead cord or arc, passed through holes bored in the ends of the beams, and were secured by nuts with plates and washers at their lower sides. The hangers were of square iron, while the holes in the beams were round, thus leaving interstices for the lodgment of water. In June, 1892, whilst a tramcar heavily laden with passengers was

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crossing the bridge, one of the floor beams broke at the hanger holes, but the car passed over the bridge without further injury to it. The City Engineer thereupon caused an examination of the floor beams to be made by the City carpenter. This was done by boring the beams. The boring was done with an inch-and-a-quarter augur, and penetrated about five or six inches into the beams, which were twelve by sixteen inches square timber. In answer to the question "What became of the hole that was left after the boring?" the City carpenter, who was the only witness examined on the point, said "the hole (referring to the hole in beam three, the breaking of which the jury found was the cause of the disaster in 1896) was caulked up with oakum for the present time only, with the understanding that the whole thing would be removed. I supposed it was to keep the water out for the present." After the examination of the floor beams, several of them were removed and

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new beams put in their places. The hangers which had supported the old beams were altered by welding additional pieces of iron to them and carrying them around the ends of the new beams, instead of through them in the form adopted by the original hangers, with a view to avoiding the rot which had previously taken place at the hanger holes. Beam 3 was not removed, and no alteration was made in its hangers. It was left as it was. The floor planking of the bridge was at the same time taken up, and diagonal substituted for the transverse planking. The tramway rails had been originally placed on the top of the floor planking, but the new diagonal planking was cut through along the line of the rails, and heavy longitudinal beams or stringers resting on the floor beams were introduced, and the new diagonal flooring and the rails were spiked down on top of the stringers. During these alterations the bridge was closed to traffic with the consent of the Tramway Company, and the City and the Tramway Company shared the expense of the repairs. By Stat. B.C.

1894, Cap. 63, the authorization to the Tramway Company to operate its line across the bridge in question, was continued, subject by section 12 "to the approval and supervision of the City Engineer or other officer appointed for that purpose, as to the location of all poles, tracks, and other works of the said Company," and by section 16 the Company was authorized "to carry passengers, freight, etc., over the said lines of railway, by electric or such other motive power as the said Company may deem expedient, subject to the approval and supervision of the City Engineer, or other officer appointed for that purpose by the said Corporation, as to the location of all poles, tracks and other works of the said Company."

In May, 1896, large crowds were proceeding along the road from Victoria to Esquimalt, to attend a review, and several heavily loaded cars had passed over the bridge in close succession, one a few yards in front of the car which was on the bridge at the time of the disaster. This last named car weighed ten tons, and was constructed to seat twenty passengers. It was crowded with over one hundred and twenty passengers, many standing on the platforms. When the car reached about the centre of one of the spans of the bridge, the span gave way, precipitating the car into the sea below, and over sixty persons were drowned.

Statement.

The statement of claim alleged:

(5) The defendants by the extension of their limits as aforesaid, acquired the possession of and assumed the duty of managing, and the control and management of the said highway, and of the said bridge forming part thereof.

(6) The said bridge was an artificial structure, and erected on said highway, and the defendants after the same became subject to its control and management as aforesaid, were bound and required in so far as the said bridge was concerned, and so long as the defendants continued to keep it as part of the said highway, to manage and keep the same in repair, and safe and fit for persons and vehicles lawfully passing over and along the same, but the defendants so managed and neglected to repair it, that the same became and was dangerous to persons and vehicles lawfully passing over and along it.

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(7) The defendants, from time to time, in attempting to repair and in doing work in connection with the repair of the said bridge, weakened the beams thereof by boring augur holes therein, and otherwise, which tended to hasten the decay of the said bridge, and increased its weakness.

(9) It was in consequence of the defendants negligently continuing the said bridge in the condition in which it was in, and of its negligent management thereof, and of their neglecting to repair it and negligently repairing it as aforesaid, that the said bridge gave way while the tramcar, on which the said James T. Patterson was being carried, was crossing it.

The statement of defence denied that the bridge was constructed upon a public highway; alleged that it was constructed over a public harbour by the Provincial Government, and that:

(5) The said Corporation of the City of Victoria never acquired, took over or assumed possession of the said bridge as alleged or otherwise, but the same always has been the property and subject to the sole control and management of the Province of British Columbia.

(6) If the Consolidated Railway Company had any right to use such bridges for the purpose of running cars and carrying passengers over same, such right was acquired from the Province of British Columbia, and not from these defendants.

Statement.

As to paragraphs 5, 6, 7 and 9, the defendants objected that no liability or duty is or was imposed upon them to keep, maintain or preserve the said bridge in a good state of repair, and in a fit and proper and safe condition for the purposes alleged, or any other purposes as alleged.

The City of Victoria was incorporated under a general Municipal Act, consolidated in 1892, (23rd April) Cap. 33, providing:

Sec. 2. "Municipality" shall include any City, Town, Township, or District, heretofore incorporated, or which may hereafter be incorporated and established under this Act.

The Act did not provide that any of such Municipalities should be a highway authority, or give them any initial ownership, power or control over roads, streets or bridges, within their respective territorial limits. The only power relating to the subject was given by section 104, providing:

"In every Municipality the Council may from time to time make, alter and repeal by-laws for any of the following purposes, or in

relation to matters coming within the classes of subjects next hereinafter mentioned (90) roads, streets and bridges, and for erecting gates on highways within half a mile of a railway crossing, and for the regulation of traffic at such gates (107) for opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, bridges, or other public communications within the boundaries of the Municipality or the jurisdiction of the Council (110). For regulating the plans, level, width, surface, inclination, and the material of the pavement, roadway and sidewalk of streets and roads, (114). The regulating or preventing the encumbering, injuring, or fouling by animals, vehicles, vessels, or other means, of any road, street, bridge, or other communication (120). The regulation of the traffic within the Municipality, and the prevention of immoderate riding or driving.

No by-law for repairing, improving or altering, or in any way relating to the highway or bridge in question, was passed by the Municipal Council of Victoria. On 20th of May, 1892, the "Estimates By-Law, 1892," was passed, reciting :

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"Whereas, the Council have caused an estimate of the expenditure required for the service of the year to be made. It shall be lawful to pay out of the corporate funds such sum of money as may be authorized from time to time by resolution of the Council or the Corporation . . . for streets, bridges and sidewalks, $25,000.00.

There was no resolution authorizing the alterations and repairs done to the bridge.

Expert bridge engineers were called as witnesses, both for plaintiff and defendants, and their evidence agreed that the bridge, which was constructed for ordinary vehicular and pedestrian traffic, was too slight to carry the tramway traffic which went over it, with any degree of safety.

The action was tried at Vancouver, before McColl, J., and a special jury.

The jury found answers to the questions put to them, as follows :

(1) Did the Corporation, after the extension of the City limits, control and manage the bridge, as if owner thereof? A. Yes.

(2) Was the bridge, as constructed, of sufficient strength for safe use by the Tramway Company in the way in which it was used up to the time of the accident? A. No.

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(3) Was such use by the Company by agreement with the Corporation? A. Yes.

(4) Had the Corporation knowledge of the insufficient strength of the bridge in time to have prevented such use by the Company before the accident? A. Yes.

(5) Would the Corporation, if exercising ordinary care, have become aware of the actual condition of the bridge in time to have prevented such use by the Company before the accident? A. Yes.

(6) Did the Corporation, before permitting tramcars to pass over the bridge, make any enquiry whether it was of sufficient strength for safe use for that purpose? A. No.

(7) Could such knowledge have been easily acquired by the Corporation? A. Yes.

(8) Had the Corporation at the time of the accident, suffered the bridge to fall into such disrepair, as by reason thereof to have become dangerous for such use by the Company? A. Yes.

(9) Did the changes made in the bridge by the Corporation, and under an arrangement with it by the Company, materially reduce the strength of the bridge to support a tramcar passing over it? A. The strength was reduced.

(10) Was the hole bored by Cox, the City carpenter, in beam number 3, as described by him? A. Yes.

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(11) Did the boring of such hole cause the beam to become rotten? A. The hole undoubtedly added largely to the rottenness of the beam.

(12) What was the immediate cause of the accident? A. The breaking of beam number 3.

Upon these findings both the plaintiff and the defendants moved for judgment.

E. P. Davis, Q. C., and *D. G. Macdonell*, for the plaintiff.

W. J. Taylor, Robert Cassidy and *C. D. Mason*, for the defendants.

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Judgment of McCOLL, J.

McCOLL, J.: I understand from counsel that it is of great importance because of the large number of similar actions now pending, to have judgment given at once, so that an appeal may be brought on for hearing before the vacation and that a stay of proceedings in the other actions may perhaps be arranged until after the determination of the appeal. I shall therefore merely state, as shortly as I can, why I think the plaintiff entitled to judgment.

It was contended for the defendants that they are not in law liable (1) because no by-law assuming the ownership of the bridge was ever passed by them, and (2) because of the doctrine of non-feasance.

It seems to me that if such a by-law was necessary, the by-law providing for the extension of the boundaries of the City was sufficient, but I do not consider this question of any importance in view of the control admittedly exercised by the defendants over the bridge, in consequence of this extension, after it took place.

I do not feel called upon to determine on this occasion, whether the doctrine of non-feasance as laid down by the Judicial Committee applies to a Municipal Corporation in this Province to the full extent to which the doctrine was applied in the cases before the Committee.

As I understand the rule has been frequently discussed in cases before this Court, the liability of such a Corporation here depends upon our own legislation, which of course cannot be construed without full consideration of the exact nature of our own municipal system, the precise provisions of this legislation, its history, and the decisions of our own Courts upon it, as well as those of the Courts of Ontario, from the municipal system of which Province it has been largely derived.

The facts as they appear to me are that after the extension referred to, the defendants assumed and exercised complete control over the bridge in question, which formed part of a main highway passing through the City; that subsequently, and before the accident occurred, the defendants became aware that the condition of the bridge was such as to make its use by the Tramway Company highly dangerous; that the defendants thereupon asserted as against the Company and the Company conceded to them the right to stop such use by the Company until the bridge should have been made safe therefor; that the defendants accordingly did close the bridge against traffic of all kinds and instructed

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the City Engineer to examine the bridge and report upon its condition; that he did so; that upon receiving his report the defendants renewed portions of the bridge, the work of renewal being done partly by themselves and partly by the Company under an arrangement between them, certain changes being made for the purposes of the Company; and that afterwards the defendants threw open the bridge for traffic and allowed the Company again to use it as before.

It is admitted that, notwithstanding what was done, the use of the bridge by the Company continued to be attended with great danger because of its being entirely unsuited in design and strength for any such use, it having been built for passenger and vehicular traffic only, and the evidence clearly shows in accordance with the findings of the jury that the defendants knew, or but for the grossest negligence on their part would have learned, and therefore ought to have known, the actual condition of the bridge.

Judgment of McColl, J.

Indeed, when the defendants' counsel put their case in his address to the jury, the fact that it was inevitable that the bridge would sooner or later collapse under the cars of the Company, whether it was kept in repair or not, was strenuously urged as the best possible defence to the plaintiff's claim, and a conclusive answer to it.

I am of opinion that the defendants, having authorized the use by the Company of the bridge in a manner necessarily entailing its destruction, are liable for the destruction so brought about by them, and that they cannot escape liability by setting up that the actual destruction was done by the Company.

I cannot find the slightest suggestion in any of the numerous cases cited for the defendants of any principle of law affording them any defence, but, on the contrary, those cases do, I think, clearly shew that the defendants are liable. In the view which I have taken of the law, I do not think it would be useful to refer to the specific findings of the

jury, with one exception. I think that the boring done by the defendants is relevant upon the material question of what they themselves understood to be their duty with reference to the bridge, and as throwing light upon their means of knowledge as to its condition at the time; but I do not see how the defendants, if not otherwise liable, can be held to be so merely because of an act done in the way of making repairs, and not, as I think, shewn to be in itself improper or even unusual for the purpose for which it was done, though possibly not necessary for that purpose.

The defendants' counsel having moved for a nonsuit, counsel for the plaintiff insisted upon the right to refuse to be nonsuited, and counsel for the defendants asked me to reserve leave to move before the Full Court. As there seemed to be some difference of opinion upon the question of nonsuit, I think it right to state what I consider to be the practice. As I understand, a plaintiff cannot be nonsuited against his will, that is if he persists in objecting, whatever view the Judge may take upon the question, and if the plaintiff does so object there can be no use in either reserving leave to move at the end of the whole case or before the Full Court. If the plaintiff does not so object, and right to move before the Full Court is at the end of the case desired, the notice having been reserved until then, it is, I think, then too late to object. The defendants' evidence must, of course, be considered on any motion made or renewed after such evidence has been given. I understand that leave is necessary before a nonsuit can be moved before the Full Court.

Judgment of McColl, J.

Judgment for plaintiff for $13,500.00.

From this judgment the defendant Corporation appealed to the Full Court, and the appeal was argued before Davie,

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C.J., McCreight and Drake, JJ., on the 29th, 30th, and 31st of July, and 4th, 5th, and 6th of August, 1897.

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W. J. Taylor and *Robert Cassidy* for the appeal: The findings of the jury are inconclusive, and no inferences can be drawn from the evidence, which, added to them, will support the judgment for the plaintiff. Judgment should, therefore, be entered for the defendants: *Hamilton* v. *Johnson*, 5 Q.B.D. 263. The Corporation is not responsible for the acts complained of. The streets, roads and bridges are not vested in the City nor does the Municipal Act give it initially any control over them. It has power to assume from time to time by by-laws such degree of control as may by such by-laws be provided, and the degree of assumption must of course be co-extensive with the language of the by-laws. The clauses of the Municipal Act, 1892, particularly relating to the subject are section 104, sub-section 90, giving it power to pass by-laws "in relation to roads, streets and bridges," and sub-section 107, "for opening, repairing or stopping up roads, streets, bridges," etc. The only by-law passed was "The General Estimates By-Law, 1892," which contained an estimate of $25,000.00 as a fund for possible use on roads, streets and bridges. This by-law was purely tentative. There was no by-law authorizing the repairing of the structure of the bridge in question, or even of the highway over it, and the corporate discretion of entering upon the enterprise must be shewn to have been exercised by a deliberate and unequivocal corporate act and cannot be presumed, particularly as the bridge belonged to the Provincial Government, was a link in the Provincial main highway, and its only profitable user was the Tramway Company. The Corporation, as such, cannot, therefore, be said to have entered upon the exercise of the power in question, and any servant of the Corporation doing anything to the bridge was not its servant or agent *pro hac vice*: *Holliday* v. *St. Leonard's*, 11 C.B.N.S.

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192; *Halifax* v. *Lordly*, 20 S.C.R. 505; *Cain* v. *Syracuse*, 5 A. & E. Corp. Cas. 371; *Clinton* v. *Stewart*, 7 A. & E. Corp. Cas. 511; *St. John* v. *Christie*, 21 S.C.R. 1; *Ogston* v. *Aberdeen* (1897), A.C. 111; *Lemon* v. *Newton*, 2 A. & E. Corp Cas. 480; *McCarthy* v. *Boston*, 4 A. & E. Corp. Cas. 639, per FIELD, J.; *Condict* v. *Jersey*, *Ibid.* 645; *Atcheson* v. *Portage la Prairie*, 10 Man. 39. But, even assuming that the act of Cox in boring the hole in the floor beam was the act of the Corporation and that it caused the disaster, was it a negligent act? Could it, looked at from the point of view of an intelligent and careful man at the time he did it, and putting out of view the accident four years afterwards, be said to be negligent in any way? It was done for a good purpose, to ascertain the condition of the beam. It was not in itself, and without more, injurious to the beam. Cox says that when he did it, it was understood that the beam was shortly to be removed, and he had therefore no reason to take extraordinary precautions in the expectation of its remaining for many years, and he plugged it up. There cannot, therefore, be said to be any negligence in the boring or plugging, and therefore no misfeasance—on this point the judgment of McCOLL, J., is relied on—and the only possible negligence was in not removing the beam, whereby it gave way four and a half years afterwards by natural decay, the rot being largely added to by the hole which had been bored. The beam had then been in the bridge eleven years, or longer than the extreme average life of wooden beams. The jury did not find that the boring or plugging was negligent. A distinct finding of negligence is essential, and an evasive finding is insufficient: *Earl of Shaftesbury* v. *L. & S. W. Ry. Co.*, 11 T.L.R. 126, affirmed on appeal, *Ibid.* p. 269. The jury distinctly refused to find that the boring was the cause of the disaster; they evade the question, and say, "it added largely to the rottenness of the beam," which may well be true without fixing the cause, as other possible moving causes existed, many,

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if anything, more probable. It is not open to the Court to make an essential finding, which the jury have declined to make. Its power of drawing inferences is limited to omissions from oversight, and to such inferences as are consistent with the evidence and not inconsistent with other findings: *Earl of Shaftesbury* v. *L. & S. W. Ry. Co., supra.* There must not only be a finding of negligence (and, here of misfeasance), but of negligence "whereby" the injury was caused: *Wright* v. *Midland Ry. Co.*, 51 L.T.N.S. 539; *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 183; Jones on Negligence of Municipal Corporations, 466; *Davis* v. *The Chicago M. & St. Paul Ry.*, 67 N.W. Rep. 16, at p. 19. It is noticeable that, in every case in which public authorities, whether incorporated or not, have been held answerable for injuries resulting either from misfeasance or nonfeasance in regard to public highways—except where there was a statutory liability to answer in damages—

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the liability has, on the theory of *Russell* v. *Men of Devon*, 2 T.R. 667; *M'Kinnon v. Penson*, 9. Ex. 609, been attributed to the defendants in some other capacity than *qua* public highway authority, *i.e.*, as constructors of sewers or water pipes under the highway, or of some artificial work thereon, as to which the maxim, *sic utere*, etc., would apply, or as owning or controlling works the apparatus of which was involved in the cause of injury, such as docks, gas works, walls, etc. In cases in which the defendants were both highway authority and also owner or controller of such works, their non-liability in the former and their liability in the latter capacity are carefully discriminated: *Blackmore* v. *Mile End Old Town*, 46 L.T.N.S. 869; *White* v. *Hindley Local Board*, 32 L.T.N.S. 460; *Goldsmid* v. *Tunbridge Wells*, 13 L.T.N.S. 352; *Bathurst* v. *Macpherson*, 4 A.C. 256. *Blackmore* v. *Mile End* and *White* v. *Hindley* were not overruled, but approved in the *Bathurst* case, and the decision in the latter case must have been for the defendants if the injury had arisen

from some negligence, whether of misfeasance or nonfeasance, as highway authority, and in regard to the highway merely. In *Foreman* v. *Canterbury*, L.R. 6 Q.B. 214, the defendants occupied a dual capacity. It was held that they were liable as local Board, and were not exempt merely because they were also the highway authority. The argument of counsel for plaintiff in *Gibbs* v. *Trustees of Liverpool Docks*, as reported in 3 H. & N. 164, collects the cases up to that date shewing liability, and it will be found that they involve either ownership or control of some work with or without profit, or the construction or operation of some artificial work as distinguishable from acts as mere highway authority. In *Kent* v. *Worthing*, *&c.*, 10 Q.B.D. 118, the negligence proved was in permitting the highway to wear away, but the defendants were both highway and water works authority, and a water pipe, which protruded owing to the wearing of the highway, was the direct cause of the accident. The defendants were held liable because of their dual capacity, but this was expressly overruled in *Oliver* v. *Horsham*, *&c.*, 1894, 1 Q.B. 343. The principle of that decision discriminates *Bathurst* v. *Macpherson* from this case.

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That a Municipal Corporation is not liable for permitting a dangerous nuisance, for which it is not originally responsible, to continue on the highway, appears from *Cowley* v. *Newmarket Local Board* (1892), A.C. 345, at pp. 349, 351, 352, 353 ; *Sydney* v. *Bourke* (1895), A.C. 433, at p. 442 ; *Glossop v. Heston*, 12 Ch. D. 102, at p. 109 ; *Oliver* v. *Horsham*, *supra*. The power of the City in regard to roads streets and bridges, is regulated by the Municipal Act, 1892, Sec. 104, Sub-Secs. 90, 107. The judgment appealed from decides that the Corporation is liable because, having agreed with the Tramway Company to close the bridge and make repairs, it was thrown open again, with the knowledge express or implied that it was unsafe. In the first place, the Tramway Company had a statutory right uncontrollable by the City to keep the bridge open and use it for their traffic; see

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Stat. B.C. 1890, Cap. 52, Sec. 1 (1894, Cap. 63, Sec. 12), and the closing of it could not be said to have been done by the City *in invitum*, or that the re-opening had any significance in altering the relation of the City to the bridge. To be liable as holding out an invitation, the inviting party must have power to exclude: *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93. Even if the City had, without passing a by-law, the power of stopping passengers from using the bridge, it would be a police power, exercisable for the public safety, and there is no liability at law for wrongful acts, either of omission or of commission, in regard to the exercise of such functions. The authorities are collected in *Wishart* v. *Brandon*, 4 Man. 453; see also *Wallis* v. *Assiniboia*, *Ibid.* 89; *Gibraltar* v. *Orfila*, 15 App. Cas. 400, at pp. 411 to 413. But the only power the City had to open and stop up roads, bridges, etc., was by by-law, given by section 104, sub-section 107, and it was exercisable only in

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that way; so that the complaint is reduced to the non-passing of a by-law, for which no action lies. The Tramway Company had a distinct statutory right to carry the deceased as a passenger, and he had a corresponding right to be carried by them over the bridge. In this respect, his relationship to the City was different to that of an ordinary pedestrian. As there was no duty to repair the structure, the fact that the City knew, or ought to have known, that it was unsafe, is immaterial.

E. P. Davis, Q.C., and *D. G. Macdonell, contra:* The Court can supplement the findings of the jury by any inferences deducible from the evidence not contrary to the findings: *Millar* v. *Toulmin*, 17 Q.B.D. 603. The boring of the hole alone is not complained of, for that was not necessarily negligent; the negligence consisted in the boring without taking proper precautions to plug the hole up, whereby, in the course of time, the injury was caused. The by-law proved sufficiently shews an assumption by the City of the power of repairing the roads, streets and bridges. At all events

it shews that expenditure of City funds on the particular work on the bridge complained of was authorized by by-law. Even if there was no by-law, none was necessary : *Bernardin* v. *Dufferin*, 19 S.C.R. 581 ; *Brighouse* v. *New Westminster*, 20 S.C.R. 520, at pp. 533, 537 ; *Nevill* v. *Ross*, 22 U.C.C.P. 487 ; *Lewis* v. *Toronto*, 39 U.C.Q.B. 343 ; *Hubert* v. *Yarmouth*, 18 Ont. 458 ; *Hislop* v. *McGillivray*, 15 O. A. R. 687. Cox's act was, therefore the act of the Corporation done in the exercise of its power to appropriate for and make repairs on the bridge. If a Corporation enters upon the exercise of a power it must take care not to cause injury. The omission to do what it was its province to do is a misfeasance : *McDonald* v. *Dickenson*, 24 O.A.R. 31, at p. 42, per OSLER, J.; *Foreman* v. *Canterbury*, *supra*, where the wrong was putting and leaving a pile of rock in the street ; *Glossop* v. *Heston*, *supra*, making a hole and not lighting it ; namely, a combination of misfeasance, and nonfeasance which caused the misfeasance to operate injuriously. As to governmental agency : *Wallis* v. *Assiniboia*, *supra*, does not apply to municipalities called into existence by special Municipal Acts. In *Gilbert* v. *Trinity House*, 17 Q.B.D. 795, the defendants had powers for management of harbours, etc., for public safety in the nature of a governmental agency to which no emolument was attached, yet they were held liable in damages for negligently removing a beacon : See also *Whitehouse* v. *Fellowes*, 10 C.B.N.S. 765 ; *Gibraltar* v. *Orfila*, *supra* ; *Jolliffe* v. *Wallasey*, L.R. 9 C.P. 62. The defendants bored a hole and failed to take steps to prevent it rotting the beams. The case is not distinguishable from *Sydney* v. *Bourke* (1895), A.C. 433, at p. 441. As to *causa causans*, *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 193, at p. 203, shews that it is only necessary that the act complained of should have " materially contributed " to the injury. The reopening of the bridge after it was closed for repairs with knowledge of its insecurity was a

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breach of duty to the deceased for which the City is liable. If the City nad built too weak a bridge or an unsafe one, they would be liable under *Bathurst* v. *Macpherson*, *supra*, and *St. John* v. *Campbell*, *supra*. If the City had itself run the cars there is no doubt it would be liable. How is its responsibility different, seeing that the jury found that the City managed the bridge as if owner, and that the use of it by the Tramway was by agreement with the City.

Cassidy, in reply.

Cur. adv. vult.

Judgment of DAVIE, C.J.

DAVIE, C.J.: The jury have found that the Corporation had knowledge of the insufficient strength of the bridge in time to have prevented its use by the Company before the accident, and had suffered the bridge to fall into such disrepair, as by reason thereof to become dangerous for tramcar use by the Company. It appears that Cox, the City carpenter, in the discharge of his duty and by the order of the City Engineer, had bored an auger hole part way through beam No. 3 for the purpose of testing it, and had then plugged up the hole with oakum. The beam was permitted to remain in this condition until the accident; the primary cause of which the jury find was the breaking of this beam, which was thoroughly rotten at the place where it broke; and the jury also find that the hole bored by Cox undoubtedly added largely to the rottenness of the beam. As there is no question that the findings are abundantly supported by the evidence, the question of course is whether the facts which they establish give the plaintiff a cause of action against the Corporation. It is clear that such right of action does not arise if the only fault of the Corporation is its mere failure to repair the bridge, or any mere omission to do that which it might or perhaps ought to have done; for, as held in *Pictou* v.

Geldert (1893), A.C. 524: "Public Corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere nonfeasance, unless the Legislature has shewn an intention to impose such liability upon them. Therefore, in an action for damages for injuries caused by the neglect of the appellant municipality to repair a bridge; held, that by the County Incorporation Act, under which it was incorporated, there was no indication of an intention to impose the liability sought to be enforced." If such be the construction of a statute imposing upon the Corporation the obligation of repair, *a fortiori*, would it seem to be so under the general Municipal Act of this Province, which is simply permissive in its terms, and imposes no obligation to repair whatever. As remarked in *Atkins* v. *Banwell*, 3 East. 92, "a nonfeasance is not within clauses of this kind."

Judgment of DAVIE. C.J.

But whilst exempt in the fullest way from the consequences of mere nonfeasance, "the statutes," as remarked by Lord WATSON, in *Ogston* v. *Aberdeen* (1897), A.C. 111, at p. 115, "give the Corporation no right to create a nuisance, and they have no such right at common law." If a public Corporation, by any act which it does, impedes or endangers the highway, it is said to be guilty of misfeasance; in other words, it causes a nuisance, for which it is just as responsible as any other wrongdoer who is not a public Corporation. It is not at all necessary to complete the responsibility of the Corporation that the nuisance should be attributable to any one act of the defendants in particular, without which, apart from other circumstances, the nuisance would not have been occasioned, nor that it should be an act in the nature of a trespass, nor, indeed, any act of commission at all. On the contrary, many of the cases in which the Corporations have been held liable for misfeasance are in respect of acts of omission only, which would have amounted to mere nonfeasance, had it not been for

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antecedent acts performed or sanctioned by the Corporation, but which in the public safety required to be guarded against. Thus, in *Davis* v. *Curling*, 8 Q.B. 286, the declaration charged that the defendant was under the Highway Act (5 & 6 Wm. IV., Cap. 50), surveyor of the Parish of T.; that gravel had been placed in a highway in T., by means of which gravel the highway was obstructed, and the gravel was a nuisance to the public; that defendant had notice and was requested to remove the same, but he well knowing, etc., did not, nor would in a reasonable time remove, or cause it to be removed, but, on the contrary, conducted himself with gross negligence, and knowingly, wilfully and wrongfully . . . permitted, caused and suffered the gravel to continue and be upon the highway, obstructing the same, remaining and being a nuisance to the public for a long and unreasonable time, without taking any care or precaution to guard against danger or damage to persons passing, contrary to his duty, etc., whereby the plaintiff's carriage was overturned and he was injured. It was proved that the defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident. It was held that the defendant was charged with a thing done in pursuance of the act. Lord DENMAN, C.J., in giving judgment, says, at p. 292 : "It is clear that the defendant is charged with a *tort* committed in the course of his official duty; he is charged as surveyor with the positive act of leaving the gravel in the road, where it had been improperly placed, for an unreasonable time." And PATTERSON, J., says, at p. 293 : "The charge is not one of mere omission, but of actually continuing the nuisance. * * * The continuation therefore, was a thing done in pursuance of the statute."

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In *Pendlebury* v. *Greenhalgh*, 1 Q.B.D. 36, defendant was surveyor of highways of a parish, the vestry of which had ordered 150 yards of road to be raised, and defendant was to carry out the order. He contracted with his brother to

do the labour, the vestry finding the stones and material. The defendant had nothing to do with the labour except superintending on behalf of the vestry. After commencing the work and heaping up stones, etc., it was left at night, without fencing or light, in consequence of which plaintiff's carriage was upset. Whilst it was admitted that the defendant would not be responsible if the work had been simply let to the contractor, who, by his negligence, had caused the injury, yet it was held that the defendant was responsible, for the injury proceeded from a combination of circumstances, *i.e.*, the placing of the stones and leaving the place unlighted, and for the latter the defendant was held responsible, as his brother had only contracted for labour; whereas the work consisted of material, labour, superintending, lighting and fencing, for which other than labour defendant was liable, as for misfeasance, although his fault was only an omission. Similarly, in *Foreman* v. *Canterbury*, *supra*, the defendant as the local Board of Health, had left a heap of stones on the road, without light or fencing, whereby plaintiff on a dark night upset his cart and was injured. The defendants were held liable for their omission to fence and light. In all these cases the defendants were held liable, because by their omission they had produced a nuisance in the highway. To the same effect and upholding the same principle is the case of *Bathurst* v. *Macpherson*, 4, App. Cas. 256. There the Municipality constructed a barrel drain, the brickwork of which having broken away, and not having been repaired, a hole was caused into which the plaintiff's horse fell, carrying plaintiff with him, and causing a compound fracture of plaintiff's leg. The Chief Justice, who tried the case, directed the jury that the defendants were not liable for any mere nonfeasance; that if the accident was caused by the negligent way the sewer was constructed, they were liable, but if the sewer was properly constructed in the first

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instance, and it became defective afterwards, they were not bound to repair it, and further that if the defective state in which the drain was, arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable. It was held on appeal to the Judicial Committee of the Privy Council that this was a misdirection, their Lordships pointing out that the barrel drain was not only made by the defendants, but the sole control and management of it were by statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby as an indirect but natural consequence the dangerous hole was formed which was left open and unfenced, the defendants caused a nuisance in the highway, for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff, who had sustained direct and particular injury from their breach of duty, and, says Sir BARNES PEACOCK, p. 265: "It is clear that the hole was caused by an artificial work, viz., the barrel drain, which was constructed by the Council, and that the accident would not have happened if that drain had not been made, or if it had been kept in repair, so as to prevent the soil adjacent from washing into it, and forming the hole in question, etc. This being the state of facts, their Lordships do not think it necessary to decide whether it was the intention of the Legislature to throw upon the Municipality the obligation of keeping in general good repair the roads and streets placed under its management." After giving reasons for holding that the duty was cast upon the Corporation of repairing the artificial work which they had constructed, the judgment continues: "Their Lordships are therefore of opinion that the appellants, by reason of the construction of the drain and their neglect to repair it, whereby the dangerous hole was formed which was left open and unfenced, caused a nuisance in the highway for which they were liable to indictment. This being so, their

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Lordships are of opinion that the Corporation are also liable to an action at the suit of any person who sustained a direct damage from their breach of duty," citing *Henley* v. *Mayor of Lyme Regis*, 5 Bing. 91, 3 B. & A. 77, and in H.L. 8, Bli., N.S. 690, and also per POLLOCK, C.B., in *McKinnon* v. *Penson*, 8 Ex. 327.

It is true that some of the other observations of the learned Lords in the case just quoted are considered in subsequent cases before the same tribunal to have gone beyond the point for decision, and perhaps to be erroneous, but the principles which I have quoted from that case and the particular decision therein are distinctly affirmed in the subsequent cases of *Pictou* v. *Geldert* (1893), A.C. 524, and in *Sydney* v. *Bourke* (1895), A.C. 433.

In the *Pictou* case Lord HOBHOUSE says, at p. 531: "Whatever general views are stated in that (the *Bathurst*) case, must, as in all cases, be taken with reference to the facts, and it is clear to their Lordships that the governing fact in the *Bathurst* case is that the conduct complained of was not, in the view of the committee, nonfeasance, but misfeasance. In delivering the judgment of the committee, Sir BARNES PEACOCK expressly says that they do not decide whether the Legislature threw upon the Municipality the obligation of keeping in good repair the works it took over. The ground of the decision was that the Municipality having, under the powers conferred upon them, constructed a drain, which, unless kept in proper condition, would cause a nuisance to the highway, were bound to keep this artificial work in such a condition that no nuisance should be caused, and that, if, owing to their failure to do this, the highway subsided and a nuisance was created, they were as much liable for a misfeasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway." And in the *Bourke* case, whilst upholding the principle that public corporations are not, in the absence of legislative enactment, liable in damages for mere

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non-repair of a highway, the *Bathurst* case was explained as enforcing liability in respect of misfeasance in causing a nuisance in a highway, and the LORD CHANCELLOR, after elaborately defining the facts and principles of the *Bathurst* case, says at p. 441: "The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair and whether any person injured by the breach of such duty could maintain an action. The case was not treated as one of mere nonfeasance, and, indeed, it was not so. The defendants had created a nuisance. Having made the drain and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. . . .

Judgment of DAVIE, C.J.

The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the Municipality be less liable than any other person in respect of the same acts, merely because the road is vested in them, and certain powers or duties in relation to its repair are committed to them?" and at page 443: "There can be no doubt then that some of the dicta in *Bathurst* v. *Macpherson* can scarcely be supported. . . . But they do not affect the authority of that case, for the decision rests on grounds independent of them. The conclusion being arrived at that the defendants had caused a nuisance to the highway for which they could be indicted, it cannot be doubted that it was properly decided that the action lay."

It is impossible to my mind to apply the principles of these decisions to the present case, and not to hold the defendants liable. The question is not the narrow one, as urged on behalf of the Corporation, "Did the hole bored by Cox cause the accident?" but is the more comprehensive

one, "Did the defendants produce a nuisance in the highway, and so cause the accident?" and such nuisance may arise, as I have already shewn, not merely from some one act of commission, but from a combination of acts and omissions, and then the question is, "Does this combination, or any of its incidents, give a cause of action?" in determining which question we must bear in mind the definition of a cause of action, as given in *Jackson* v. *Spittall*, L.R. 5 C.P. 542 and incidentally applied by Lord HOBHOUSE in the *Pictou* case at page 531, where he speaks of "the conduct complained of" as "that act on the part of the defendant which gives the plaintiff his cause of complaint." Now, what is the cause of complaint here? Not simply that the Corporation bored the hole, any more than the raising the highway in the *Greenhalgh* case, or the making of the barrel drain in the *Bathurst* case. These were proper and laudable undertakings no doubt, just as the boring of the hole by Cox may have been a wise measure of precaution against the rotting of wooden beams, the life of which was becoming exhausted. But, as in *Davis* v. *Curling*, *Pendlebury* v. *Greenhalgh*, *Foreman* v. *Canterbury*, and *Bathurst* v. *Macpherson*, *supra*, the cause of complaint was the failure to take proper steps to prevent the artificial work becoming a nuisance in the highway, so here the plaintiff's complaint is that, after having bored the hole, the Corporation did not take precautions against the increased rotting of a hole which must become saturated with water in wet weather. When the jury find that the boring of the hole added largely to the rottenness of the beam they mean, also, I think, or, if not, we are bound to infer, that the beam would not have rotted so quickly, that is to say, would have lasted longer had it not been for the boring; in other words, that the *causa causans* of the accident was the failure to take timely precautions against the increased rotting produced by the hole, thus tracing the immediate cause of the accident to the neglected hole made by the Corporation.

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The breaking of the beam was the accident, the rottenness of the beam caused the breaking, and the act of the Corporation in boring the hole produced the rottenness.

The evidence also shews that in the summer of 1892 the Corporation were warned of the dangerous condition of the bridge, and that they then closed it to tramway traffic, as it was their undoubted right and duty to do. They were recommended by their engineer to put in iron beams throughout, and, had they done so, the accident, in human probability would not have occurred, as it is shewn by the evidence that the iron work of the bridge on which the iron beams would have depended had a factor of safety of eleven, which, even with the heavy traffic of the cars, had never been reached or nearly reached. The Corporation, however, discarded the advice of their engineer, and, having simply put in a few new wooden stringers, after a short delay themselves opened the bridge to traffic, thus lulling the public into security and inviting them into a dangerous trap.

Judgment of DAVIE, C.J.

The learned Judge whose decision is under appeal is of opinion that these undisputed facts of themselves, irrespective of the particular findings of the jury, entitle the plaintiff to recover, and it may become necessary in another action, or in another Court, to decide whether his view is not the correct one.

In this case, however, I am satisfied that upon the findings of the jury, and the facts necessarily to be inferred therefrom, the plaintiff is entitled to judgment, unless there be anything in the defendants' point that the defendants in repairing the bridge, closing it, and then throwing it open, acted *ultra vires* for want of a by-law, but this objection is, I think, met by the case of *Bernardin* v. *North Dufferin*, 19 S.C.R. 581. Moreover, I think there was a by-law, if one was wanted, in No. 162, authorizing the expenditure of $25,000.00 on the repair of roads and bridges.

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

McCreight, J.: In this case the learned Judge at the trial left certain questions to the jury at the end of his charge, who returned their answers to them accordingly. The respective questions and answers are as follows, (quoting):

I think the answers to questions 10, 11 and 12 having regard to the respective questions and the evidence, are findings that the hole bored in floor beam number three by Cox, the City carpenter, on the northern side of the bridge, added largely to the rottenness of that beam, the breaking of which (of course through its rottenness) was the immediate cause of the accident. I cannot say that the findings are such as a "jury viewing the whole of the evidence reasonably, could not properly find." On the contrary, I think the evidence of the witnesses Warner, Lockwood, Murray and Balfour, and that of Gore as to the jib plate having been "torn through" the rotten beam, fully warrant the finding as to the immediate cause of the accident.

Judgment of McCreight, J.

I think these findings bring the case within the decision in the case of *Bathurst* v. *Macpherson*, 4 App. Cas. 256, 265 and 266. See especially this case explained in *Sydney* v. *Bourke* (1895), A.C. 433, at p. 441. There it is said in the judgment of the L.C., "that the *ratio decidendi* of the *Bathurst* case was that the defendants had caused a nuisance in the highway, etc., etc. The case was not treated as non-feasance, and indeed it was not so. The defendants had created a nuisance—having made the drain and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had subsequently subsided and become founderous."

I quote this passage because it seems to me that the action of the Council by Cox, their carpenter, in boring the auger

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hole and leaving it for four years in such a state as largely to add to the rottenness of the beam, is more directly a nuisance than what was done by the Corporation in the *Bathurst* case, and constituted more directly a misfeasance. The connection of the non-repair of the barrel drain with the hole which caused the accident, was not so obvious or so direct as that of the deep auger hole in the present case, with the rottenness of beam number three increasing during the four years from 1892 to 1896, and which a little care should have foreseen and prevented by removal of the beam. Cox, the carpenter, says: "The hole was caulked up with oakum for the present time only, with the understanding that the whole thing would be moved. I suppose it was to keep the water out for the present."

Q. "How did you put the oakum in?" A. "Just put it in with sticks."

Judgment of McCreight, J.

This witness was not cross-examined. It is argued that the conduct of the defendants was that of nonfeasance rather than misfeasance, but I think the answer is that there is more misfeasance in the present than in the *Bathurst* case. The real inquiry is, what is the cause of action? and the answer is that it is the act on the part of the defendant which gives the plaintiff his cause of complaint. See the judgment of the Common Pleas in *Jackson* v. *Spittall*, L.R. 5 C.P. 531, at p. 552. I think no one would say that the making of the auger hole, coupled with the subsequent neglect, was the cause of action, or that it was not one of the material facts on which the plaintiff relies.

But I think the plaintiff's case may also be rested safely on the ground put by the learned Trial Judge; that the Corporation are responsible for the state of the bridge, as they would be for the state of the streets, regard, of course, being had to the doctrine of nonfeasance and misfeasance; that the defendants, while so responsible, became aware in June, 1892, that the bridge was in a dangerous state, especially having regard to its use by the Tramcar Company;

that eight of the beams were found in June, 1892, to be unsound, in addition to that which broke and had to be removed; that the City Engineer recommended iron beams in lieu of the wooden beams, many of which appear to have got into a bad state between the years 1885 and 1892, when the first beam was broken under the weight of a tramcar which, as Warner, the civil engineer, says, passed over barely "by the skin of the teeth," and the second time that the application of that heavy load was made it failed. He further seems to have thought it the "most criminal piece of maintenance he had ever heard of," and I gather the structure was altogether too light for tramcars, and that even the substitution of iron for wooden beams might not have averted the disaster. I shall not further deal with the judgment of the learned Trial Judge, except to say that I think it is correct, and that the closing of the bridge against traffic of all kinds, with the consent of the Company and the renewal of portions, partly by the defendants, and partly by the Company under arrangements with the defendants, shew the defendants felt the state of the bridge was their responsibility. Had they kept it closed against tramway traffic, at all events, they would have done well, or at least they should have taken great precautions such as its dangerous case required, but the throwing open of the bridge again for all traffic, including tramcar traffic, seems to have been an unmistakeable act of misfeasance which renders any discussion as to the doctrine of non-feasance as distinguished from misfeasance in this case irrelevant.

Judgment of McCreight, J.

I think this case discloses distinct acts of misfeasance such as make the defendants liable for the ensuing disaster, and the appeal must be dismissed with costs.

Judgment of Drake, J.

Drake, J.: The question of this case is whether or not the boring of an auger hole in an old beam of the bridge

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in 1892 is sufficient evidence of misfeasance to render the Municipality of Victoria liable for the loss of the plaintiff's husband owing to a most disastrous accident which happened by the collapse of the bridge in question on the 26th of May, 1896. The causes which led to the accident were many, and to no one single cause can it be truly said that it, and it alone, was the primary cause of the disaster.

The bridge was built by the Provincial Government in 1885, and it never was a structure intended to bear very heavy loads. Apparently it had been calculated to carry a weight of ten tons with a factor of safety of four and one-half, which means that it could bear forty-five tons. It was a wooden structure raised on concrete piles, and had two spans of 150 feet each, which were supported by an overhead truss. The iron rods connecting the floor of the bridge to the compression arc of the truss were estimated to have a factor of safety of eleven, and were described as the hanger irons, and two holes were bored through the floor beams on each side, in which a piece of iron like a gigantic staple was inserted, and the hanger irons were fastened by pins to this staple, and it would therefore require a great deal larger weight to be placed on the bridge than the evidence shews was actually done before the iron work would be affected beyond the limit of safety, which is roughly spoken of as the breaking strain.

Judgment of DRAKE, J.

It is not suggested that it was the fracture of the iron work which was the cause of the accident, but the breaking of a wooden floor beam. The bridge was handed over to the Municipality in 1891. At the time of such handing over the Electric Tramway had been granted the right to use the bridge, and they had laid down their rails along the northern side of the bridge, and not in the middle. The central span, which gave way, had seven floor beams, which were supported by iron hangers to the upper floor of the truss.

In 1892 the Municipality had the bridge examined, and replaced five of the floor beams of the span which collapsed, with new timber, and other repairs were made; a new flooring was laid over, and longtitudinal wooden sleepers for the rails of the tram line. The mode in which the examination of the timbers was made was by boring a hole in the timber with an inch and a quarter auger to a depth of seven inches, and stopping up the resulting cavity with oakum, driven in with sticks. This is said to be a very improper mode of examination, as the caulking is liable after a time to absorb water and induce decay. The floor beams extended on each side of the bridge some five feet beyond the place where the hanger irons and lateral rods were inserted, and this five feet was planked and used as a footway for passengers outside of the bridge proper.

The holes bored for the staples went entirely through the beam. The staples were made of square iron, and were fastened underneath the beam by nuts screwed to an iron plate, and two other holes were bored at the side into which lateral iron rods were inserted. All these four holes were within twelve inches of each other, and the test hole was made within a few inches of the vertical holes. It was pointed out that the life of wood, placed in a similar position and subject to the same weather, was not more than eight to ten years. The holes, under any circumstances, would induce decay from the presence of damp and rain, and decay is present in the other old beams of the bridge where there are no holes bored. The beam which is called number three, and one called number seven, were two beams which had never been renewed, and had been eleven years in the bridge. Why they were not renewed when the others were, is not explained.

The evidence discloses the fact that beam number three broke through the hanger holes on the side of the bridge where the rails were laid. The wood was so rotten that the iron plate to which the hanger irons were screwed was

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pulled completely through the beam, the very strongest evidence that there was no sound wood left in that part of the beam. On the day in question a heavily loaded car was passing over the span, and the estimated load was eighteen to twenty tons on the span which collapsed. As before remarked, it was not any one cause that led to the accident, but a variety of causes all operating together; general decay and overloading. The resulting accident must have happened with the ordinary traffic at no distant date, unless the rotten timbers were taken out and replaced by sound. The boring of the floor beam was found by the jury to have increased the decay, but it did not initiate it. The neglect of the Corporation in not removing this beam, or in testing its soundness in a rough and ready manner, are not such acts of misfeasance as will render the Corporation liable.

Judgment of DRAKE, J.

Mr. *Taylor* strongly argued that the whole bridge was originally too slight in its construction, and that the specifications were not complied with, owing to neglect by the contractors. He especially referred to the evidence relating to weldless iron, which was called for by the specifications, and for which welded iron was used. This difference would render the calculations as to the factor of safety uncertain; but it was not shewn that the bridge fell owing to defects in the iron, but owing to the floor beam. It therefore is not of importance to discuss how far the factor of safety was reduced as regards the iron work by the neglect of the contractors. One thing is clear, that the elastic limit of the iron was never reached by any load placed on the bridge of which we have evidence.

But, after all, the defendants occupy a position very different from a railway company or other corporation formed for private objects. They are the governing body, selected out of the whole body of corporators to execute such duties as are imposed on them by their charter of incorporation, and to expend the rates and taxes levied on the corporators in the repair of the public property as far

as the funds permit. If they permit the public works to fall into decay from any cause, they are not legally responsible, but if loss or damage ensues, owing to this neglect, they are greatly to be blamed. They might have closed the bridge to traffic, or taken other steps which would have rendered the casualty impossible.

The Corporation may have adopted a method of ascertaining the condition of the beams which was unusual, but that alone did not affect the strength of the beam, as it lasted for four and one half years. It doubtless increased the decay, as the jury found, but that falls into the category of want of repair. It is a curious fact that in another action for the same accident, tried shortly before this one, the jury found the cause of the accident was the breaking of a stirrup iron—that is, an iron which was fastened round the floor beam, and to which the hangers were attached. These stirrups were placed in position by the Corporation round the new beams they put in, instead of boring the beams and inserting the iron hangers, as was done by the original builders.

The chief evidence in support of the plaintiff's case was furnished by the engineer of the original contractors for the construction of the bridge, and it was not unreasonable for him to endeavor to combat the theory that the original design and construction were faulty, and to place the fault elsewhere. The testing of the beams was a proper thing to do, and no injury resulted from that, but the subsequent breaking of the beam was found to be the cause of the accident. The beam doubtless broke owing to the weight placed on it, but this comes back to the same result—want of repair.

If there was no duty cast upon the Corporation to keep the bridge in repair, the testing of the condition of the bridge, or the repair of it, cannot of themselves be held to be improper acts which will create a liability that did not exist before. The principle which Lord BLACKBURN laid down

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in *Geddis* v. *Proprietors of the Bann Reservoir*, 3 App. Cas. 430, that an action lies for doing that which the Legislature has authorized, in a negligent manner; and that if by reasonable exercise of the powers given by statute the damage could be prevented, it is negligence within the rule not to make such a reasonable exercise of these powers—does not apply to municipal corporations, as it would render them liable for every act of negligence or omission, which they might have prevented by a reasonable exercise of their powers.

The *Bathurst* case, 4 App. Cas. 256, is cited as the governing case of misfeasance. The ground of that decision is that in constructing a drain, which the Municipality had power to do, they were bound to keep this artificial work in such a condition that no nuisance should be caused. It might be contended that a bridge was an artificial work which the Municipality were bound to keep in repair, but *The Municipality of Pictou* v. *Geldert* (1893), A.C. 524, seems to be in conflict with the *Bathurst* case, as there is but a small distinction between the approaches to the bridge and the bridge itself, and if in the former case the Corporation are not liable, I fail to see how they can be made liable in the latter.

Judgment of DRAKE, J.

The whole matter comes back to the same point: Unless the act of examining the bridge with the auger was an act of misfeasance, which I do not think it was, the acts of the Corporation in not removing the beam were nonfeasance only, and such being the case the defendants are entitled to judgment, but, under the circumstances, without costs.

Appeal dismissed.

IN RE ATLAS CANNING COMPANY.

DAVIE, C.J.

1897.

May 1.

FULL COURT.

Oct. 9.

RE ATLAS CANNING CO

Winding Up Act—Petition—Affidavit verifying—Necessity for—Creditor—Debt not payable—Estoppel.

Upon the petition for a winding up order it appeared that the application was made by a creditor who had given the Company an extension of time, not yet expired, for payment of the debt.

The affidavit in support of the petition was made by a person who deposed upon information and belief, and upon cross examination thereon it appeared that he had no personal knowledge of the matters deposed to.

Held, per DAVIE, C.J.:

1. That the affidavit must be treated as a nullity.
2. That all that the Winding Up Act requires, as essential to a winding up order, is a petition setting forth sufficient facts, and that, although the rules require a verifying affidavit, the rules are not to be treated as imperative, but directory only.
3. That declarations of insolvency made by the officers of a company do not operate as an acknowledgment of insolvency by the Company sufficient to satisfy section 5 of the Act, but that such acknowledgment must be a corporate one.
4. That the debt, though not yet payable, was sufficient to support the petition.

Upon appeal to the Full Court, *per* DRAKE, J., MCCREIGHT and MCCOLL JJ., concurring:

1. There must be evidence to enable the Court to act, and, as the affidavit was insufficient, there was no support for the order.
2. The distinction between the language of section 6 of the Act, which refers to a creditor whose debt is "then due," and that of section 8, in which the term is "creditor" only, is not unmeaning, and a creditor whose debt is not yet due, is a good petitioning creditor for winding up under section 8.

The Company had called its creditors together, and a deed was executed whereby the Company assigned certain property to trustees to answer the creditor's claims, and the creditors agreed to extend the time for payment.

Held, that the creditors who had executed the deed, of whom the petitioner was one, were estopped from presenting a winding up petition until the period of extension had expired.

Statement.

PETITION for a winding up order presented by a creditor

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of the Company; the facts and objections to the petition sufficiently appear from the head note and judgments.

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

L. G. McPhillips, Q.C., and *F. R. McD. Russell, contra.*

May 1st, 1897.

DAVIE, C.J.: As I have already said, if the petition must fail for want of a sufficient affidavit to support it, this petition, I think, could not stand. The deponent in the affidavit of verification swears only to information and belief, and, upon cross examination, had to admit that he had no information or belief regarding most of the salient points of the petition. As remarked by BRAMWELL, B., in *Roe* v. *Bradshaw*, L. R., 1 Ex., at p. 109, "A man who swears to the best of his belief, swears that he has a belief," and applying that test here, the affidavit which has been made is inaccurate. The affidavit should be a true affidavit; an untrue one fails for the reason pointed out in *Re Marquette Election*, 11 Man. 381. But if this petition had no affidavit at all, it would be a sufficient compliance with the Act if standing alone. All that the Act requires is a petition, (section 8). The rules under the Act require the affidavit, and the question is whether a non-compliance with those rules is necessarily fatal. I think not. In *Woodward* v. *Sarsons*, L.R. 10 C.P. 733, it was held that the rules and form of the Ballot Act were directory only, although the body of the Act was imperative, and our own rules under the Judicature Act provide that non-compliance shall not necessarily render a proceeding void. In this case, therefore, notwithstanding the defective affidavit, I permitted the petitioner to adduce evidence of his petition, by which it appeared that the total secured indebtedness of the Company is $31,000.00, and unsecured $6,000.00. Affidavits made by the defendant's officers were read, practically acknowledging insolvency, but it would appear that the mere declaration of the officers are insufficient to constitute an acknowledg-

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ment of insolvency within sub-section (*d*) of section 5 of the Winding Up Act, such an acknowledgment should be a corporate act: *Re Lake Winnipeg Co.*, 7 Man. 255, which has not happened here. The debt due to Robertson & Hackett was sworn to positively by Mr. Robertson, who has made the affidavit annexed to the petition, and was about the only matter he was in a position to state affirmatively. The petitioner's debt is secured by a promissory note upon which he has already sued, but been nonsuited on the ground of having granted an extension of time which has not yet expired. The present petition is founded on the original debt or consideration of the promissory note which upon its face is overdue, owing to the extension of time—the demand is *debitum in præsenti solvendum in futuro*, and it has been urged that such a demand cannot found a petition. It is reported in *In re W. Powell & Sons* W.N. (92) 94, to have been so held in England, but that report is very unsatisfactory. The case was unargued and reasons are not given. The Weekly Notes are not binding on us: *Pooley* v. *Whetham*, 33 Ch. D., at p. 77, and especially should not be when in such unsatisfactory shape as the present report. I think for the reason given in Palmer's Company Precedents, 7th Ed., Part II. p. 39, that a *debitum in præsenti*, etc., can be the foundation of a petitioning creditor's debt. And it has been held that the holder of a bill of exchange not yet payable, cannot petition: *In re W. Powell & Sons*, W.N. (92) 94, but the matter was not fully discussed, and it has yet to be settled whether "creditors" in section 82 of "The Companies' Act, (Imp.) 1862," means exclusively a creditor whose debt is presently due. It may be that this is the meaning, but the word is ambiguous and may be held to mean a creditor, whether his debt is presently due or not. It is to be observed that in section 80 of that Act, the Legislature shews clearly that it understood that the word "creditor" alone might extend to creditor for money not yet due, for it refers to a "creditor" to whom the Company

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is indebted in a sum exceeding £50: "then due." Why, it may be said, were not these words repeated in section 82 if "creditor" there was intended to refer exclusively to a creditor whose debt is presently due? If that section had said a creditor or creditors in respect of a debt then due, the meaning would have been clear. *Prima facie*, the change of language imports change of intention, and goes to shew that the Legislature did not intend to qualify the word "creditor" in section 82 as it has in section 80. But it may be said that to hold that a debt not actually due is a good foundation for a petition, would work injustice and be absurd, for why should a creditor for such a debt be entitled to claim payment before his contract matures? The answer is, that if the Company is unable to pay its debts, and is therefore commercially insolvent, or insolvent in the sense that its assets, if realized, would not suffice to satisfy its debts and liabilities or if its substratum is gone, there is nothing absurd in holding that a creditor whose debt is not presently due, may petition for a winding up and thus bring about a *pari passu* distribution of the limited fund to which alone the creditors must look. Is it just that such a creditor should, in a case of insolvency, be obliged to stand by whilst the other creditors whose debts are presently due, scramble for and exhaust the assets? And if the substratum of the Company is gone, is it just that such a creditor should be unable to stop the concern? In either of these cases a member of the Company can petition although he may have but little interest. Can it be that the creditors are in a worse position? Surely the Court, in construing the section should, of the two alternatives, adopt that which would enable creditors whose debts are not presently due to step in where there is an insolvency, or where the substratum is gone, and secure a *pari passu* distribution of the limited fund.

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It has been shewn in evidence that all of the Company's assets are mortgaged, and it has been boldly asserted in argument that there is nothing for the petitioner to get in

any case, and therefore it has been urged the petition should be dismissed, as was done in *In re Chapel House Colliery Co.*, 24 Ch. D. 259, affirming the principle that when it is shewn that the petitioning creditor cannot gain anything by a winding up order, it will not be made, although the debt is admitted. I cannot say that I am moved by this argument; neither does the case cited affirm any such general proposition. On the contrary that case upholds the general rule that an unpaid creditor of the Company is entitled to a winding up order *ex debito justitiæ*, subject however to an exception that where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding up order, that then it will be refused. It is only necessary to remark that in this case no one except the Company objects to the Company being wound up. There is abundant evidence of insolvency under section 5 of the Act. It has exhibited a statement shewing its inability to meet its liabilities. It has, I think, notwithstanding that it not only actually offered them something less than fifty cents on the dollar, called a meeting of creditors for the purpose of compounding with them, but it now comes into Court and deliberately tells us that although it owes $6,000.00 to unsecured creditors, there is not a dollar for one of them.

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I order the Company to be wound up. The question of liquidator and other questions can be brought before the local Judge, or Judge on the *rota*. In case the parties wish to appeal, I give leave to give notice and set the case down for this Court, and I abridge the time accordingly.

Order accordingly.

Statement.

From this judgment the Company appealed to the Full Court, and the appeal was argued before McCREIGHT, DRAKE and McCOLL, JJ., on the 26th July, 1897.

Argument.

L. G. McPhillips, Q.C., for the appeal: There is no

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affidavit of verification, and the rules require such an affidavit. The rules being made by the Judges in pursuance of statutory power, bind the Court: *Re Anglo Greek Steam &c. Co.* 2 Eq. Cas. at pp. 13 and 14; *Re Marquette Election*, 11 Man. 381, at pp. 387, 390, 391, 393 and 395; *Re St. David's Gold Mining Co.*, 14 W.R. 755; *In re New Callao Co.*, 30 W.R. 647. The petitioner is not a creditor, as his debt is not yet proved: see page 804 of Manson on Trading Co's; *In re W. Powell & Sons*, W.N. (92) 94; *Re European Banking Co.*, 2 Eq. 521. To entitle a person to present a petition, there must be a debt which can be enforced against a Company: Emden on Winding Up, p. 45; and see *Ex parte Matthew*, 12 Q.B.D. 506; *Law Courts Chambers Co.*, 61 Law Times 669. The petitioner concealed material facts: *Ex parte Barnett, re Ipswich Ry. Co.* 1 DeG. & Sm., p. 749. The petition merely states conclusions of facts, and not facts: *In re Wear Engine Works Co.* L.R. 10 Ch. 188. A Company cannot be wound up unless the facts bring it within Cap. 129 of Stat. Can. 1886. Cap. 31 of 1889 does not apply to a creditor's petition: *Re Ontario Forge & Bolt Co.* 25 Ont., 407, at p. 409. The statutory demand was not made upon the petitioner's debts: *Re Catholic, etc., Co.*, 2 DeG. J. and S. 116; *Re Rapid City Farmer's Company*, 9 Man. 574. The petition must strictly prove the existence of one or more circumstances set forth in sections 5 or 6, or it will be dismissed.

Argument.

L. P. Duff, contra, cited as to sufficiency of debt: *In re Raatz*, (1897) 2 Q.B. 80; *Re Regent Stores Co.* 8 Ch. 82; *Rendell* v. *Grundy*, (1895) 1 Q.B. 16; *In re Scott*, (1896) 1 Q.B. 619; *In re Chapel House Colliery Co.*, 24 Ch. D. 259; *In re Krasna Polsky etc. Co.* (1892), 3 Ch.; Chadwick Healey on Joint Stock Companies, p. 550.

Cur. adv. vult.

October 9th, 1897.

Judgment of DRAKE, J.

DRAKE, J.: A Company is, by the Winding Up Act

deemed insolvent whenever amongst other things it becomes unable to pay its debts as they become due, if it calls a meeting of creditors for the purpose of compounding, if it exhibits a statement showing its inability to meet its liabilities. The Act then defines the meaning of the term "inability to pay its debts as they become due;" and that is when a creditor to whom at least two hundred dollars is due serves a notice requiring payment, which notice has been neglected for sixty days. Whenever the Company becomes insolvent within the meaning of the Act, a creditor may, after four days' notice, petition for a winding up order. A notice was given on the 20th of February, 1897, of a winding up petition to be heard on the 27th February. The petitioners, David Robertson and James Wm. Hackett, as partners, claimed to be creditors to the amount of $1,472.78; and alleged that on the 14th of January a meeting of creditors was called by the Company for the purpose of compounding with them; and, further, that on the 2nd February they assigned all their personal property to Charles Nelson; and on the 3rd February a similar deed was executed to Hackett and Moon as trustees for the general body of creditors. These are the three acts of insolvency on which the petitioners rely to establish their right to seek the intervention of the court. The petition is supported by an affidavit. The Act does not require an affidavit; but the rules do; because a petition is not evidence, and there must be evidence to enable the court to act; and it is clear, from the examination of the petitioner on his petition and affidavit, that the facts he stated in his petition were founded on hearsay only. The other evidence which was put in were certain affidavits which had been filed in an action brought by the petitioning creditors against the Company. A winding up petition should clearly set out the acts on which the petitioner relies in order to enable the Court to judge of their sufficiency; the petitioners did not set out the fact that they had agreed to

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give the Company an extension of time for payment of their debt, and this becomes important as it is necessary to place a meaning on the term creditor used in section 8 of the Act. Creditor, in its primary meaning, imports one to whom a debt is due, in a secondary meaning, one to whom money is owing but the period of payment has not arrived, *debitum in præsenti solvendum in futuro*." Section 6 of the Act refers to a creditor whose debt is "then due;" in section 8 the term is "creditor" only. The distinction is not unmeaning. In the one case the debt must be due, in the other it need not be due. In the latter case, when a company has become insolvent, such a creditor can be a petitioner.

It is clear that the Company were in financial difficulties, and they called their creditors together, and the creditors agreed to an extension of time. That was an act of insolvency which made them liable to a winding up petition; and such a petition could be presented by any creditor who had not assented to the extension. Hackett, one of the petitioners and a partner of the other, had assented to the deed giving the extension, and was one of the trustees himself. The deed was dated February 3, 1897, and by the recitals it appears that the Company was indebted to the petitioners in two sums—one for $652 on an open account, and the other for $690 on an overdue note—and the Company covenanted, *inter alia*, to pay the several recited amounts, and that the Company should apply all its net profits from the fishing seasons of 1896, 1897 and 1898 in payment *pro rata* among the several creditors; the mortgagees and creditors thereby agreeing that the Company should have the time mentioned for making payment of its indebtedness, and the Company assigned real and personal estate to the trustees to secure the covenant.

Judgment of DRAKE, J.

The whole body of creditors assented to this deed in writing except the petitioner, James Wm. Hackett, who, however, has had the deed registered and thereby accepted the trusts. There is nothing illegal in accepting such a

deed or in permitting the Company to continue their business, and I do not think, as the deed is operative and the conditions of it are fulfilled by the Company that any assenting creditor can make use for it for the purpose of founding a winding up petition. For these reasons, I think the winding up order should be discharged without costs. Costs of Court below to be born by petitioners.

McCREIGHT and McCOLL, J.J., concurred.

Winding up order discharged.

FULL COURT.

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Nov. 1.

MADDEN v. THE NELSON & FORT SHEPPARD RAILWAY COMPANY.

Practice--Privy Council Appeal—P.C. Rules of 1887 R. 1—Leave.

MADDEN v. NELSON AND FORT SHEPPARD RY. CO

Judgment was given for the defendant Company in an action for damages for the death of plaintiff's horses, caused, as alleged, by the non-fencing of the defendant's railway line, and an appeal by the plaintiff to the Full Court was dismissed. The value of the horses was proved at $110. The action was based on the 54 Vic. (B.C.), Cap. 1, providing that Dominion railways should be liable in damages to the owner of any cattle killed by their engines or trains unless their line was fenced as provided by the Provincial Fence Act, 1888. The judgment held the Act to be unconstitutional.

The plaintiff applied for leave to appeal to the Privy Council under the P.C. Rules, 1887, Rule 1 (a), on the ground that the judgment indirectly involved a claim respecting a civil right of the value of £300.

Held by the Full Court (*per* MCCREIGHT, J., DRAKE and MCCOLL, JJ., concurring) that the expression "civil right," required to found an appeal, as being indirectly involved, contemplates such rights as easements and franchises, and other rights of a similar nature.

(2) That the plaintiff's only interest in the matter was the $110 damages.

Statement.

MOTION by plaintiff to the Full Court to appeal to the Privy Council. The facts sufficiently appear from the head-note.

Argument.

Gordon Hunter for the application. The civil right directly involved is under £300, but indirectly there is involved in the question of the constitutionality or otherwise of the Act a much greater amount than £300, both to the Railway Company and to the public, who are indirectly

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NOTE (a)—See p. 305 ante.

interested in the result, as the point is now finally determined in this Court not only against the plaintiff, but all other persons.

L. P. Duff, contra.

McCREIGHT, J.: I think that we have no jurisdiction under the rules issued by Her Majesty-in-Council on July 12th, 1887. (See B.C. Gazette, 1888, p. 150). It was argued that the case fell within section 1 of those Rules as indirectly involving a civil right above the amount or value of £300. Even if the Railway Company had been unsuccessful, and was appealing, I do not think the case would fall within the purview of that provision, inasmuch as I think the expression "civil right" contemplates such rights as easements and franchises and other rights of a similar nature, where we know the judgment is often only for trivial damages, but at the same time the value of the right may be very great. If the Railway Company could not in any event have appealed, it is even plainer that we cannot give leave to the plaintiff, whose only interest in the matter seems to be the sum of $110.00.

DRAKE and McCOLL, JJ., concurred.

Leave refused.

DRAKE, J.

1897.

Oct. 19.

IN RE ASH ESTATE

IN RE ASH ESTATE.

Practice—Settled Estates Act, 1877—Sale of infants' estate under—Guardian.

Where a guardian to an infant has already been appointed by the Court, it is not necessary to appoint a guardian for the special purpose of presenting a petition for sale of the Infant's estate under Settled Estates Act, 1877, Sec. 49 (*a*).

Statement. APPLICATION for the appointment of a guardian under section 49 Settled Estates Act, 1877, for the purpose of presenting a petition for sale of the infant's estate.

Argument. *Lindley Crease* for the applicant: The special appointment of a guardian for the purposes of the Act has been usually required. Although a guardian *ad litem* has been appointed in this case, it has been held that neither a testamentary guardian, *Re James*, L.R., 5 Eq. 344, nor the father of an infant, *Re Caddick*, 7 W. R. 344, is a guardian within the meaning of section 49, see Daniel's Chancery Practice, 6th Ed. 2306; Middleton's Settled Estates Acts, pp. 5, 91-94. The English Settled Estates Act Orders, 1878, have not been introduced into this Province.

Judgment. DRAKE, J.: A guardian of the infant having already been appointed in this Court it is unnecessary that he should be specially appointed for the purposes of this Act. The petition may be made by him in his present capacity as guardian.

Order accordingly.

NOTE (*a*).—Sec. 49. "All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be made or given by, and all notices under this Act may be given to guardians on behalf of infants."

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5. ——*C.S.B.C. 1888, Cap. 82, Secs. 114, 126—Foreman—Estoppel—Partnership*-] M. was a member of and held a controlling interest in a mining partnership. He was not formally appointed foreman, but appeared to have been permitted to manage its affairs in the matters in question, and appointed one G. superintendent, who ordered certain goods from M. for the partnership. He also supplied other goods to the partnership, accounts for which were passed at a meeting of the partnership. *Held, per* Drake, J., affirming the Registrar's certificate made upon taking the accounts under the decree allowing the items to M. that section 126 of the Act does not preclude a mining partnership from contracting liabilities otherwise than upon the order of a duly appointed foreman. That as to the items passed at meetings of the partnership, it was estopped from disputing its liability. Upon appeal to the Full Court, McCreight, J. (Walkem and McColl, JJ. concurring), affirmed Drake, J. GRAY v. MCCALLUM. - - - 462

6. ——*Contract for sale of mineral claims—Accord and satisfaction.*
See CONTRACT. 3.

7. ——*Mineral Acts, 1888, Secs. 37 and 50; 1891, Secs. 10 and 18, 50 and 51; 1892, Sec. 9—Location—Record—Priorities—Whether record notice to subsequent purchasers—Appeal—Right to withdraw—Practice.*] Two miners having located the same ground on different days, and respectively recorded their locations within the fifteen days thereafter required by section 19 of the Mineral Act, 1891, the record of the subsequent locator being made on a day prior to the record of the first locator; in a dispute between their respective successors in title as to priority: *Held*, by the Full Court, McCreight, Walkem and Drake, JJ., over-ruling Spinks, Co. J., that a valid location is a pre-requisite to a valid record of a mineral claim: that section 9 of the Mineral Act (1891) Amendment Act 1892, must be read in the light of section 10 of Mineral Act 1891: that the subsequent location was void as made upon ground already occupied and not upon waste lands of the Crown, and did not acquire any validity by being recorded, and the priority of its record was therefore immaterial as against the claim of the prior locator who had perfected his title by recording within

the statutory time. Under Sections 50 and 51 of the Mineral Act, 1891, a prior unregistered must be postponed to a subsequent but registered conveyance. *Quære* (*per* McCreight, J.) Whether the record of a document of title under sections 50 and 51 constitutes notice of it to subsequent purchasers. The "Cariboo" and "Rambler" mineral claims in part covered the same ground. *Quære*, whether the owner of the "Rambler" was affected with notice of a bill of sale affecting the title of the common ground registered only upon the "Cariboo" record of title. ATKINS v. COY. - - - - 6

8. ——*Mineral Act, 1896, Sec. 16 (d)—"Discoverer"—Staking—Bona fide attempt to comply with Act.*] As to location, the Mineral Act, 1896, by section 15, provides; "Any free miner, desiring to locate a mineral claim, shall enter upon the same and locate a plot of ground measuring, when possible, but not exceeding, 1,500 feet in length by 1,500 feet in breadth, in as nearly as possible a rectangular form; all angles shall be right angles, except in cases where a boundary line of a previously surveyed claim is adopted as common to both claims, but the lines need not necessarily be meridianal." As to staking, by section 16: "A mineral claim shall be marked by two legal posts, *et cetera*," with provisions as to notices upon and delimitation of the claim by reference thereto. By sub-section (d) of section 16, it is provided "that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section, shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bona fide* attempt to comply with the provisions of the Act, and that the non-observance of the formalities hereinbefore referred to, is not of a character calculated to mislead other persons desiring to locate claims in the vicinity." *Held*, 1. That a locator of mineral in place is within the sub-section, though he may not have been the first discoverer. 2. That the *bona fide* attempt to comply with the provisions of the Act does not merely mean an attempt to locate a claim of size and form as provided in section 15, but means an attempt to comply with the formalities provided by section 16 as to staking and that a locator

PRACTICE—Continued.

pose of defeating a judgment of the defendant against him. That the defendant had issued a certificate of *lis pendens* in that action and registered it against the lands in question, whereby the plaintiff was prevented from making an advantageous sale thereof. That "the defendant, although he was made aware of the circumstances surrounding the transaction in question, and of the loss of profit which he would thereby entail upon the plaintiff wrongfully and maliciously refused to remove the said *lis pendens*," and that the defendant afterwards discontinued his action. Upon application by defendant to dismiss the present action as frivolous and vexatious, and an abuse of the process of the Court, and, under Rule 235, as disclosing no reasonable cause of action. *Held*, by Walkem, J., and affirmed by the Full Court (Davie, C.J., McCreight and Drake, JJ.) that the statement of claim disclosed no reasonable cause of action, and, upon all the facts (which appeared by affidavits fyled for the purpose of defendant's contention that the action was an abuse of the process of the Court) that no truthful amendment could be made to the statement of claim which would disclose a good cause of action. *Held* (by the Full Court): That the omission to set down the appeal two days before the day for hearing, as prescribed by S.C. Rule 678, is an irregularity only, and should be relieved against under section 12, Sub-Sec. 1, and Sec. 7, Sub-Sec. 5 of the Supreme Court Amendment Act, 1897, *Reg.* v. *Aldous*, 5 B.C. 220; *Tollemache* v. *Hobson*, *Ibid.* 223, and *Kinney* v. *Harris*, *Ibid.* 229, discussed. COWAN v. MACAULAY. - - - - 495

29. ——*Judgment debtor—Right of to counsel.*] The examination of a judgment debtor is a personal examination, but he can have counsel to privately advise him. BANK OF MONTREAL v. MAJOR. - 156

30. ——*Judgment under Order XIV—Service of Exhibit to affidavit.*] Supreme Court Rule 84, providing that the summons for leave to enter final judgment under Order XIV. R. 1, must be accompanied by a copy of the affidavit and exhibits referred to therein, is imperative. HUGHES v. HUME. - - - 278

31. ——*Jury— Rules 331-81 — Mineral Act, 1896, Sec. 144 to 150.*] *Held*, by McCreight, J., (the Full Court not dissenting), that sections 144 to 150 of the Mineral Act, 1896, refer only to procedure in the County Courts. In an action to enforce an adverse claim and for a declaration that the plaintiff was entitled to the right of possession to that portion of the "Paul Boy" mineral claim in conflict with the "Lookout" mineral claim, and that the "Lookout" be declared invalid, the defendants asked for a jury. *Held*, by the Full Court, Davie, C.J., and Drake, J., (McColl, J., concurring), affirming McCreight, J.: (1) That as the relief prayed was such as could not have been obtained in a common law action prior to the Judicature Acts, the issues were not proper for trial by a jury. (2) That the character of the action will be determined from the issues raised on the pleadings. CORBIN v. LOOKOUT MINING CO. - - - - 281

32. ——*Jury — An action for an injunction held proper for trial by a jury.*] C. P. R. v. PARKE. - - - 507

33. ——*Libel—Pleading—Particulars—Discovery.*] In an action of libel a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff. BULLEN v. TEMPLEMAN. - - - - - 43

34. ——*Mortgage — Foreclosure — Affidavit of non-payment.* CANADA SETTLERS' LOAN CO. v. RENOUF. - - 243

35. ——*Non-suit.*] There cannot be a non-suit, nor can leave to enter a non-suit be reserved, without the consent of the plaintiff: *Per* McColl, J., in PATTERSON v. VICTORIA. - - 628

36. ——*Officer of Corporation—Examination of—Service of summons for—Service.*] A summons under Rule 703, for the examination for discovery of past and present officers of a body corporate, must be served personally on all past officers. Order made as to present officers, and application adjourned to enable the past officers to be served. HOBBS v. E. & N. RY. CO. - - - - 461

43 ——*Rule 74—Taking final judgment against one partner—Afterwards proceeding against others.*] A plaintiff who has obtained final judgment against one of two defendants sued upon a joint liability, may afterwards, under Rule 74, proceed to judgment against the other defendants. ZWEIG v. MORRISSEY. - 484

44. ——*Second commission to same place—Costs.*] A second commission to New York granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action. GILL v. ELLIS. - - - - 137

45. ——*Settled Estates Act, 1877—Sale of infant's estate under — Guardian.*] Where a guardian to an infant has already been appointed by the Court, it is not necessary to appoint a guardian for the special purpose of presenting a petition for sale of the infant's estate under Settled Estates Act, 1877, Sec. 49. *In re* ASH ESTATE. - - - 672

46. ——*Special jury — Right to — Whether as of course.*] The granting of a special jury is not as of right, but is a discretion to be invoked upon special circumstances. CRANSTOUN v. BIRD. - 210

47. ——*Summons under Order XIV.—Service of exhibit to affidavit—Rule 84.*] Supreme Court Rule 84, providing that the summons for leave to enter final judgment under Order XIV., R.1, must be accompanied by a copy of the affidavit and exhibits referred to therein, is imperative. Adjournment to enable the plaintiff to furnish a copy of exhibit refused. BARKER & CO. v. LAWRENCE. [460

48. —— *Time — Extending — Mining Law—Adverse—Claim — Estoppel — Mineral Act, 1891, Secs. 21, 126—Mineral Act Amendment Acts, 1892, Sec. 14; 1893, Sec. 9, Sub-sec. (h), and Sec. 10; 1894, Sec. 6.*] The Mineral Act, 1891, Secs. 21 and 126 provides that adverse claims should be fyled in the office of the Mining Recorder, while the Act of 1894, Section 6, gives a form of notice of application for certificate of improvements which sets forth that adverse claims must be sent to the

Gold Commissioner. The proposed defendants made an application for a certificate of improvements for the mining ground in question, and published the notice prescribed by section 6 *supra*, whereupon the proposed plaintiffs, in accordance with the terms of the notice, fyled their adverse claim with the Gold Commissioner. Within the prescribed time they gave instructions to their agent to commence action, but he by mistake omitted to do so, the omission not being discovered until some time afterwards, when negotiations for settlement were pending. Prior to and during these negotiations the proposed defendants knew that no action had been instituted. Finally, one of the proposed defendants refused his assent to a settlement which had been agreed to by all the other parties. The proposed plaintiffs moved to extend the time to commence action. *Held, per* Drake, J.: By the Mineral Act Amendment Act, 1892, Sec. 14, the fyling of an adverse claim in the office of the Mining Recorder is a condition precedent to the right of action, and that there is no jurisdiction to extend the time. *Quære*: Whether, if there were such a jurisdiction, the grounds shewn were sufficient. Upon appeal to the Full Court: *Held, per* McCreight, Walkem and McColl, JJ., affirming Drake, J.: (1) That the adverse claim was not properly fyled. (2) That, owing to the nature of the subject matter, the Court requires stronger ground for extending time in mining cases than in other matters. The notice of appeal was served on the agent of the solicitor for the proposed defendants. *Held*, sufficient. KILBOURNE v. MCGUIGAN. - - - - - 233

49. ——*Time—Jury—Application for before issue joined—Rule 333.*] An application to try a case before a jury made before joinder of issue or the expiration of the time for fyling of same is premature. BANK OF MONTREAL v. MAJOR. 155

50. ——*Winding-up Act — Creditors discontinuing—Whether other creditors entitled to be substituted.*

See WINDING-UP ACT. 2.

51. ——*Writ not served within year—Action out of Court—Setting aside adverse claim—Form of application.*] Plaintiff having commenced an action to enforce