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,

Pages 1 to 146 inclusive by

ROBERT CASSIDY, - BARRISTER-AT-LAW, REPORTER.

Pages 147 to end by

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VOLUME VI.

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1900.

JUDGES

OF THE

SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

AND IN ADMIRALTY

During the period of this Volume.

SUPREME COURT JUDGES.

CHIEF JUSTICE.

THE HON. ANGUS JOHN McCOLL.

PUISNE JUDGES.

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

LOCAL JUDGES IN ADMIRALTY.

THE HON. ANGUS JOHN McCOLL.
THE HON. ARCHER MARTIN.

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

ATTORNEYS-GENERAL.

THE HON. DAVID McEWEN EBERTS, Q.C.
THE HON. JOSEPH MARTIN, Q.C.
THE HON. ALEXANDER HENDERSON, Q.C.

NOTE.—The Hon. Angus John McColl was sworn in as Chief Justice of the Supreme Court of British Columbia on the 23rd day of August, 1898, as successor to the Hon. Theodore Davie, who died on the 7th day of March, 1898. Archer Martin was sworn in as a Judge of the Supreme Court of British Columbia on the 12th day of September, 1898, as successor to the Hon. Angus John McColl.

ERRATA.

PAGE.	LINE.	FOR.	READ.
10	6 from top.	Hall.	Hill
11	7 " top.	Fletcher v. Rylands.	Rylands v. Fletcher
28	17 " top.	Rink.	Fink
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32	9 " top.	Lancaster Canal Co. v. Parnaby.	Parnaby v. Lancaster Canal Co.
68	10 " bottom.	Moses.	Mosses
116	9 " top.		16 Ont.
141	16 " bottom.	Saileard.	Saillard
142	13 " bottom.	Fletcher v. Rylands.	Rylands v. Fletcher
239	2 " top.	36.	26

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

H.

M.

N.

O.

P.

S.

NOTE.—The following Order in Council, bringing in amendments to the Supreme Court Rules, appeared in the British Columbia Gazette of 13th April, 1899.

PROVINCIAL SECRETARY'S OFFICE,
7th April, 1899.

HIS HONOUR the Lieutenant-Governor, under the provisions of chapter 56 of the Revised Statutes of British Columbia, has directed that the amendments and additions set forth hereunder be made to the existing Rules of Court, intituled the "Supreme Court Rules, 1890."

And further, that the said amendments and additions shall be in force on and after the 1st day of May, 1899.

By Command.

C. A. SEMLIN,
Provincial Secretary.

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1. Rule 517 is hereby amended by striking out the words "section 3, sub-section 8," in the first line thereof, and by substituting therefor the words "section 14;" and by striking out the words "sub-section 8," in the fourth line thereof, and by substituting therefor the words "section 14." Amends Rule 517.

2. Rule 736 is hereby amended by striking out the words "The Long Vacation, which shall consist of the months of Amends Rule 736.

Long Vacation.

August and September," and by substituting therefor "The Long Vacation, which shall consist of the months of July and August."

Amends Rule 741.

3. Rule 741 is hereby amended by striking out the words "the Long Vacation," in the first line thereof, and by substituting therefor the word "vacations."

Solicitors' and Agents' Book to be kept in office of each District Registrar.

4. Every District Registrar shall keep in his office a book to be called "The Solicitors' and Agents' Book," in which each Solicitor residing elsewhere than in the town or city in which the Registry is situate, and not having an office there, may specify the name of an agent, being a Solicitor of the Supreme Court and having an office in such town or city, upon whom all writs, pleadings, notices, orders, appointments, warrants and other documents and written communications which do not require personal service upon the party to be affected thereby, shall be served.

Service of pleadings.

5. All writs, pleadings, notices, orders, appointments, warrants, and other documents and written communications which do not require personal service upon the party to be affected thereby, shall be served upon his Solicitor when residing in the town or city in which the Registry in which the proceedings are conducted is situate, or, if his Solicitor does not reside in such town or city and has not an office therein, then upon the agent, if any, named in "The Solicitors' and Agents' Book," unless the Court or a Judge before whom any such proceeding is had shall give any direction as to the Solicitor upon whom any such writ, pleading, notice, order, appointment, warrant, or other document or written communication, is to be served. Where any Solicitor has not caused such entry to be made in "The Solicitors' and Agents' Book," then the posting up of any such writ, pleading, notice, order, appointment, warrant, or other document or written communication for such Solicitor, in the office in which the proceedings are being conducted, is to be deemed sufficient

service, unless the Court or a Judge, as the case may be, directs otherwise.

Notice of change of agency.

6. Notice of any change of agency must be served upon the Solicitor for the other parties in the action, cause or proceeding, and in default thereof, service as in the last-mentioned Rule shall be valid.

Taking out Orders of Court.

7. Orders of 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.

Chamber Orders.

8. 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.

Entry, when deemed to be made.

9. An Order shall be deemed to be entered when it is initialled or signed by the Judge and handed to the Registrar for entry.

Certain Orders need not be written out at length in Court books.

10. The Orders mentioned in Schedule A hereto need not be written out at length in the books kept for that purpose by the Registrars of the Supreme Court, but a copy of any such Order may be inserted in the proper books. All final or interlocutory judgments, final Orders or Decrees, and all Orders for the payment of money, or for the appointment of Receivers, or injunctions, or the winding up of companies, are to be entered at length in the books kept for that purpose.

Dated 29th March, 1899.

JOSEPH MARTIN,
Attorney-General.

Approved this 29th day of March, 1899.

C. A. SEMLIN,
Presiding Member, Executive Council.

SCHEDULE A.

APPENDIX K TO SUPREME COURT RULES.

No. 5.—Order for time.
" 7.—Order under Order XIV., No. 2.
" 8.—Order under Order XIV., No. 3.
" 9.—Order under Order XIV., No. 4.
" 10.—Order to amend.
" 11.—Order for particulars (partnership).
" 12.—Order for particulars (general).
" 13.—Orders for particulars (accident case).
" 14.—Order to discharge or vary on application by third party.
" 16.—Order for delivery of interrogatories.
" 17.—Order for affidavit as to documents.
" 18.—Order to produce documents for inspection.
" 19.—Order for service out of jurisdiction.
" 20.—Order for substituted service.
" 21.—Order for renewal of writ.
" 22.—Order for issue of notice claiming contribution.
" 23.—Order of reference.
" 24.—Order for examination of witnesses before arbitrator.
" 25.—Order for examination of witnesses and production of documents.
" 26.—Order charging stock: nisi.
" 29.—Order to remove judgment from County Court.
" 30.—Order for arrest (capias) under Debtors' Act.
" 31.—Order of reference.
" 32.—Order for examination of witnesses before trial.
" 33.—Short Order for issue of Commission to examine witnesses.
" 34.—Long Order for Commission to examine witnesses.

REPORTS OF CASES

DECIDED IN THE

SUPREME and COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

NELSON AND FORT SHEPPARD RAILWAY COMPANY v. PARKER, *ET AL.*

FULL COURT

1897.

Nov. 1.

NELSON & FORT SHEPPARD RAILWAY CO. v. PARKER

Injunction—Presumed justice of the Crown—Crown lands—Trespass—Reservation from settlement—C.S.B.C. 1888, Cap. 66, Secs. 86 & 87.

A person in possession of waste lands of the Crown, with the consent of the Crown, can maintain trespass against persons having no title.

The Court should not, upon the ground that his claim appears to be invalid, restrain a party from applying to the proper department of the Government for a Crown grant of lands, for the Court cannot presume that the Crown will not do right.

Where Crown land is reserved from settlement by the Lieutenant-Governor-in-Council under section 86 of the Land Act, it does not again become open for settlement until cancellation of the reservation by the same authority, under section 87.

APPEAL by the defendants from part of the judgment of WALKEM, J., and motion by the plaintiffs by way of cross-appeal. The action was by the Railway Company for a declaration that they were entitled to the possession of a tract of land in West Kootenay District, and commonly known as the Townsite of Quartz Creek, being part of the

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land selected by the Company under the terms of their Subsidy Act (Stat. B.C., 1892, Cap. 38); for damages for trespass by the defendants, and for an injunction restraining the defendants from further trespassing on or from attempting to deal with the lands or interfering with the plaintiff Company in the possession thereof, or from doing any other act which would constitute an assertion of title to the lands on the part of the defendants, or create a cloud on the title of the plaintiff Company. The survey of the block of land in question was completed by the plaintiff Company on the 26th March, 1897, and the field notes were fyled on the 7th April, 1897. On the 9th April the defendants entered on the lands, and posted notices on stakes placed thereon that they had staked the land and forbidding trespassing. The facts more fully appear from the judgment of DRAKE, J.: McCOLL, J., granted the plaintiff's injunction *ex parte* and the defendants moved on notice before WALKEM, J., to dissolve the injunction, and for an order restraining the plaintiffs from proceeding with the sale of the lands, and from applying for or otherwise acquiring a Crown grant of any part of the lands in question, and asked that they be at liberty to add the Attorney-General as a party. WALKEM, J., refused to dissolve the injunction granted by McCOLL, J., or to restrain the plaintiff Company from selling, and also refused leave to add the Attorney-General, but restrained the Company from applying for the Crown grant. The defendants appealed from his refusal, and the plaintiffs gave a notice, by way of cross-appeal, that they would contend that the order should be varied by rescinding that part which restrained them from applying for a Crown grant, or taking such other steps as they might be advised to complete their title in accordance with their Subsidy Act.

The appeal and cross-motion were argued before DAVIE, C.J., McCREIGHT and DRAKE, JJ., on the 24th July, 1897.

E. V. Bodwell, for the plaintiff Company.

Frank Higgins, for the defendants other than the defendant J. N. Blake.

J. N. Blake, in person.

DAVIE, C.J.: As to the defendants' appeal, I see no reason for interfering with the order appealed from. This is an action of trespass, and it is of elementary principle that mere possession is sufficient to support such an action, as in *Harper* v. *Charlesworth*, 4 B. & C. 589, and *Johnson* v. *Barrett*, Aleyn 10, 11, where the plaintiff had no title to enable him to maintain an ejectment, because he had not a legal conveyance from the Crown, but still, according to the authority in Aleyn, he would be entitled by reason of his actual possession, to maintain trespass against a wrongdoer. There can be no doubt that the Railway Company were in possession here with the consent of the Crown; they were operating their railway through the land, and of course must have ingress and egress on either side. The language of BAYLEY, J., in *Harper* v. *Charlesworth*, *supra*, at p. 591, is precisely applicable: "It appears to me, then, that the plaintiff was in the actual possession of land and I am of opinion that actual possession of Crown land, with the consent of the Crown, is sufficient to entitle the party possessing it to maintain trespass against persons who have no title at all, and who are mere wrongdoers." Perhaps as this is only an interlocutory motion, indecisive of the merits of the case, it is better to say no more.

Judgment of DAVIE, C.J.

MCCREIGHT, J., concurred.

DRAKE, J.: The plaintiffs were incorporated in 1891, and by Stat. B.C. 1892, Cap. 38, the Crown granted a land subsidy not exceeding 10,240 acres for each mile of railway upon certain conditions, those conditions being that the Company should fyle a map shewing the course and direction

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of the proposed line, and deposit $25,000.00 as a guarantee for the construction of the line. The Company were to define, within twelve months, the located line, and mark the boundary lines of alternate blocks of land fronting on each side of the line, and having a frontage of six miles by sixteen miles in depth, so that each block selected and defined by the Company, should be opposite to a similar block not selected by the Company, on the other side of the railway, and such boundary lines should be traced to the cardinal points. Pausing here, it is, I think, clear that the line of railway should be the boundary of the blocks, however devious that line might be.

Block 6 was defined, and according to the map this block is laid out as a parallelogram six miles by sixteen, but it crosses over the line and thus takes in land on both sides of the line, and it is in respect of a small piece of land on the west side of the line of the railway, opposite to the remainder of the land called block 6, that this dispute has arisen. By section 2 of the Subsidy Act, there is a general statutory reservation of land on both sides of the railway, and the reservation was gazetted by order-in-council of 18th August, 1892. This reservation prevents any dealing with the lands until it is removed, and it has not been removed. Not having been removed, the land included in it is not open to pre-emption under the Land Act, 1892, and it is not open to purchase under section 12 of the Act of 1896, Cap. 28. Whether or not the Crown intends to grant the land to the railway in accordance with the plans shewn, is not for us to discuss; it is to be presumed the executive will act in accordance with the law which authorizes the grant. The defendants, whatever may be the rights of the Railway Company, have not brought themselves within the terms of the Crown Lands Act.

Judgment of DRAKE, J.

The plaintiffs are in possession of this block by leave of the Crown, which is sufficient to enable them to maintain trespass. I think the order of Mr. Justice WALKEM, as far

as regards the injunction against the issue of the Crown grant, should be set aside. The Legislature having given to the plaintiffs certain lands in consideration of the construction of the line—and it is to be assumed that Crown grants will be issued by the Department for so much of those lands as fulfil the conditions of thestatute—it is not right to suppose that the executive will do otherwise than perform their duty.

We cannot consider whether the Subsidy Act is *ultra vires* the Provincial Legislature on the pleadings before us. This Court cannot interfere with the duties which the Legislature has imposed on the executive, and on this short point I think the plaintiffs' appeal should be allowed, but in so doing I must not be considered as in any way deciding that the plaintiffs have any greater rights than the statute gives them.

Defendants' appeal dismissed, and plaintiffs' cross-appeal allowed.

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C.P.R. v. PARKE, ET AL

C.P.R. v. PARKE, *ET AL.*

Crown Lands Act, Sections 39–52—Water—Diversion by recorded owner—Injury to adjacent proprietor—Damages—Injunction.

The defendants, as owners of recorded water privileges under sections 39–52 of the Crown Lands Act, were entitled to and did divert in and upon their land water from a neighbouring stream for irrigation purposes. The effect of this user of the water was to create a slide, carrying down masses of silt, etc., upon the plaintiff's railway line, which was constructed by the Dominion Government and conveyed to the plaintiffs after the defendants' rights to the pre-emption and user of the water accrued.

It appeared that, without the irrigation, the defendants' lands were worthless, and that the injury was an unavoidable incident of the exercise of the defendants' statutory rights. Negligence was not alleged.

Held, by DRAKE, J., at the trial dismissing the action (affirmed by the Full Court, McCreight, Walkem and McColl, JJ.), that there being no allegation or proof of a negligent user by the defendants of their statutory rights, it was a case of *damnum sine injuria*.

Quære, per MCCOLL, J., whether, if the plaintiffs had themselves constructed the part of the railway in question, the defendants would not have been entitled to compensation for injury to their lands by the plaintiffs.

Statement.

ACTION for an injunction to restrain the defendants from continuing to bring water upon their lands, and allowing it to escape in such a way as to cause damage to the plaintiff's railway. The facts fully appear from the head-note and judgment.

The action was tried before DRAKE, J., and a special jury, on the 16th November and following days

E. P. Davis, Q.C., for the plaintiff Company.

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

Judgment of DRAKE, J.

January 29th, 1897.

DRAKE, J.: The defendants are the present owners of

Lot 561, Group 1, Kamloops Division of Yale District, but no Crown grant has yet been issued. This land was taken up partly under the Land Act of 1865, and partly under the Land Act of 1870, by Wm. R. Puckett, and under both Acts a pre-emptor upon a grant of a Certificate of Improvements, could sell, mortgage, or lease his land. On 3rd September, 1872, a Certificate of Improvements was issued to Wm. R. Puckett.

By section 30 of the Act of 1870, and this section has been continued in all subsequent Land Acts down to the present time, every person lawfully entitled to hold a pre-emption, and occupying and *bona fide* cultivating the same, may divert unappropriated water, upon obtaining the authority of the Commissioner of the District, and a record is to be made thereof specifying certain particulars required by the Act, and the Act further declares that no one should have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record should be made. Section 33 gives a right of entry over the lands of others for carrying water, upon payment of compensation, and subsequent Acts have extended and defined the water rights.

On 21st November, 1868, W. R. Puckett recorded three hundred inches of water from McCallum's Creek. This is stated to be the first right. On 10th April, 1871, Puckett made a second record of three hundred inches of water from the same creek. On 3rd September, 1872, Puckett transferred to James Robinson his pre-emption claim, and Robinson was recorded as pre-emptor in the Land Office books. On 21st July, 1884, Robinson transferred to F. G. Kirkpatrick, and Kirkpatrick was registered as pre-emptor. Kirkpatrick subsequently assigned the same pre-emption to the present defendants.

By section 49 of C.S.B.C., 1888, Cap. 66, all assignments of any pre-emption rights, where the same are permitted by law, shall be deemed to have conveyed all recorded water

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privileges, in any manner attached to, or used, in working the land pre-empted or conveyed; and, by section 50, all water records honestly made prior to 6th April, 1886, shall be deemed valid and effectual, so far as the making and entry thereof is concerned.

The defendants have cultivated their pre-emption claim, and used the water so recorded, in irrigating their fields. The evidence is conclusive that, without irrigation, the farm of the defendants is worthless, owing to the arid character of the soil, and the height at which it is situated.

According to the Terms of Union between the Province and the Dominion, by section 11, the Provincial Government agreed to convey to the Dominion Government, certain public lands along the line of a proposed railway, connecting British Columbia with the existing railway system of Canada, twenty miles in extent on each side, and it was provided that the lands held under pre-emption or Crown grant, within the limits of the twenty-mile belt, should be made up to the Dominion Government out of contiguous public lands. In pursuance of this clause the Province, on 19th December, 1883, made the grant to the Dominion Government of twenty miles on each side of the railway where finally located. The railway was finally located in 1881, and runs along the east bank of the Thompson River, contiguous to the land of the defendants. The defendants' lands are on a bench, many hundred feet higher than that of the railway. The railway line itself is about sixty feet above the water of the Thompson River. The defendants irrigate about thirty-four acres of land on the high bench above the railway, with water brought by a ditch capable of carrying one hundred and sixty inches of water. An inch of water means 12,960 gallons in twenty-four hours, or 1,728 cubic feet. The soil which the defendants irrigated was proved to be of a very porous quality, consisting of many feet of gravel underlying a slight deposit of sandy loam, and below the gravel was a large bed of what is called silt, which

Judgment of DRAKE, J.

absorbs water rapidly, and, and when its saturation reaches seventy-eight degrees, is converted into liquid mud. At a point on the banks of the Thompson, above and below the plaintiff's line, a large slide has been formed by water percolating through the soil and causing the earth to slip. This slide is continually moving towards the river, forcing the rails out of position, and, frequently, large masses of more or less liquid silt, carrying away the road bed, drop from under the line. This slide is now sixty-six acres in extent, and continually increasing.

The jury found, after a trial extending over many days, that the substantial cause of the injury done to the plaintiff's railway, was the water brought on to the lands by the defendants for irrigation purposes; and, on that finding, the plaintiffs move for judgment, asking that the defendants be restrained from further damaging the plaintiff's line by irrigating the lands in question. The effect of such an order will be to prevent the defendants carrying on farming operations on the lands in question.

Judgment of DRAKE, J.

The rights of the defendants to divert, and use, recorded water for agricultural purposes, is a statutory right, in derogation of the common law right of riparian ownership; but the statute gives no greater rights to the owners of water privileges than if, as riparian owners, they used the water running through their own lands for the same purpose. They must not, by a negligent user of their rights, prejudice their neighbours. There are no direct English authorities on the subject of irrigation waters. As Lord WENSLEYDALE remarked, in *Chasemore* v. *Richards*, 7 H. of L. 349, at p. 362: "The English cases have not yet allowed water for irrigation."

Powers granted by a statute are to be exercised reasonably and with due care, so as not, by negligence, to cause damage to others: *Manley* v. *St. Helen's Canal*, 27 L.J. Ex. 159, at p. 164.

The right given by the statute is to bring foreign water

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upon the land for agricultural purposes. The effect of its addition to the natural rainfall must be to increase the infiltration and percolation over the area where the water is used; and the amount of this extra percolation depends largely on the character of the soil where it is used.

Mr. *Davis* relied on *Metropolitan Asylums* v. *Hall*, 6 App. Cas. 193, where the distinction was made between statutory powers which are imperative, and those which are permissive. Lord BLACKBURN says that where the Legislature directs that a thing shall be done, which, if not authorized by the Legislature, would entitle anyone to a cause of action, the right of action is taken away; and Lord WATSON, in the same case says: "Where the terms of a statute are not imperative, but permissive, the fair inference is, that the Legislature intended that the discretion as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights." This case was discussed in *The London and Brighton Railway Company* v. *Trumen*, 11 App. Cas. 45, and in *The National Telephone Company* v. *Baker* (1893), 2 Ch. 186, and the principle to be deduced is that if the statute to be construed indicates an intention to interfere with private rights, or contains an element of compulsion in it, it is no longer a mere permissive Act, but an Act which, if a nuisance is caused by its adoption, gives no right of action.

Judgment of DRAKE, J.

The statute in question imposes on the owners of land over or through which a person seeks to bring water, the obligation to permit a ditch or flume to be constructed, on payment of compensation; and, by section 47, Cap. 66, C.S.B.C. 1888, allows waste water to be carried over the lands of others on payment of compensation. The Act is therefore a compulsory Act, as affecting the rights of others. The plaintiffs do not allege negligence in the defendants. What they really complain of is, that by irrigating their lands in a lawful way, owing to the peculiar nature of the sub-soil, the plaintiffs are seriously injured. Does this give

a right of action? Is it not a case of *damnum sine injuria*. In the case of *Baird* v. *Williamson*, 15 C.B.N.S. 376, it was held that the owner of a mine at a higher level than an adjacent mine, has a right to work his mine in a usual and proper manner, and he is not liable for any water which flows by gravitation into such adjacent mine, from works so conducted. And in *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, it is laid down that where the owner of land without wilfulness or negligence, uses his land in the ordinary manner, then, though mischief should thereby be occasioned to his neighbour, he will not be liable for damages; but if he brings on his land anything which would not naturally come upon it, and which is in itself dangerous if not kept under proper control, though in so doing he may act without negligence, he will be liable in damages. The latter proposition is the one on which the plaintiffs rely, but the defendants, although in one sense they have brought on to their land foreign water which they are unable to control, yet in so bringing it they are exercising a statutory right. The statute sanctions their use of the water in the way they have used it.

In *Pixley* v. *Clark*, 35 N.Y. 520, the principle is laid down that if in the exercise of the right to dam a stream, the water by infiltration or percolation finds its way to the land of an adjacent proprietor and causes damage, the owners of such dam are not, in the absence of negligence, liable to such adjacent proprietor for any damages he may sustain. The difference in the present case is, that there is no direction that irrigation waters should be used, but only a permission to use them; but the permission to use implies a legal right of user, which will bar an action for damages when the user has been non-negligent. In the case of *Hurdman* v. *Northeastern Railway Company*, 3 C.P.D. 168, which was cited, there was negligence found.

The Legislature in authorizing the bringing of water on to lands for agricultural purposes, must be taken to have

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contemplated the mischief which might arise from a reasonable use of such power, and to have condoned it. See the judgment in *National Telephone Company* v. *Baker* (1893), 2 Ch. 186.

If the damage done to the plaintiff's line had been caused by turning the surplus water on to the line, that would be negligence. But the water has been used in lawful manner and no negligence has been shewn.

I must therefore refuse the injunction and dismiss the plaintiffs' action with costs.

Action dismissed.

Statement.

From this judgment the plaintiff Company appealed, and the appeal was argued on the 4th and 5th May, 1897, before McCREIGHT, WALKEM and McCOLL, JJ.

E. P. Davis, *Q.C.*, for the appellant Company.

L. G. McPhillips, *Q.C.*, and *Chas. Wilson*, *Q.C.*, for the respondents.

Cur. adv. vult.

November 4th, 1897.

Judgment of McCREIGHT, J.

McCREIGHT, J.: The defendants are ranchers residing on their ranch, situate about four miles from Ashcroft, B.C., such ranch consisting of lot number 561, group 1, in the Kamloops Division of the Yale District, and are and have been for some time in occupation of the said land. The plaintiff's line of railway runs along by, and about half a mile distant from, the ranch, but at a much lower level than the ranch. On the 21st November, 1868, W. R. Puckett, the earliest predecessor in title of the defendants, duly recorded three hundred inches of water, from a creek called McCallum's Creek, to be used for the purposes of irrigating

the said land, and again, on the 10th April, 1871, the said Puckett duly recorded another three hundred inches of water for the same purposes, and under these records the defendants and their predecessors in title, that is, Puckett and one Robinson, and one Kirkpatrick, their immediate predecessor, have diverted water from the said creek to irrigate the lands in question at proper seasons as required. The manner in which plaintiffs acquired land for the purpose of making a railway, and as a subsidy, are well known and referred to by the learned Trial Judge in his judgment. The learned Trial Judge refused to grant an injunction and dismissed the action with costs, and before considering his decision it will be convenient to consider the statutory rights of the defendants with respect to the water rights referred to. The subject is dealt with in sections 39 to 50 inclusive of Cap. 66 of C.S.B.C. 1888. These sections shew that the rights of the party recording are much more extensive than those of a merely riparian owner at common law. From sections 39, 43 and 47 (especially the last section), it is plain he may irrigate his land, a right which it is by no means clear that the riparian owner enjoys, to the detriment at least of another proprietor on the stream, at common law. See the judgment of the Court of Exchequer delivered by PARKE, B., in *Embrey* v. *Owen*, 20 L.J. Ex. 212, at p. 217; also at 6 Exch. 353. He, the party recording, may carry the water by a ditch over the lands of others, on making compensation for the damage done, and he is, or may be, relieved from the burden of providing that the surplus or waste water should be returned to it's original stream—see section 47—and this regardless of the common law rights of riparian owners further down the stream. By section 49 all conveyances, etc., etc., of lands including pre-emption rights, are to be deemed to have passed all recorded water rights and privileges attached, etc., etc., to the land, so that the owner of the recorded water privileges, in addition to the above great

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advantages, has those of a riparian owner at common law, with reference to the land to which the water privilege is annexed, and if this is the case he would apparently be entitled to compensation, and at least to the same extent as a riparian owner would be entitled to receive, who suffered by severance in consequence, say, of the railroad separating him from the stream, with reference to which he previously enjoyed riparian rights. I mention this as shewing that it is by no means clear that if the plaintiffs deprived the defendants of their water rights in some way independent of actual legal proceedings, they would not be compelled to make compensation ; see sections 90 and 92 of the Railway Act of 1888 (Can.) ; and so in a case like the present, where an injunction is asked for without any offer of compensation or suggestion in that respect, I feel greater difficulty even than the learned Trial Judge seems to have felt in granting the injunction. From the judgment of the Judicial Committee in *Jones* v. *The Stanstead Railway Company*, L.R. 4 P.C. 98, at p. 120, I gather proceedings might be taken to obtain compensation for lands injuriously affected subsequently to the building of the railway. See further on this subject the judgment of the Judicial Committee in the *Northshore Railway Company* v. *Pion*, 14 App. Cas. 612, at p. 628, and without giving an opinion on a point which was not argued, I can only say that I see no reason for disagreeing with the learned Trial Judge. It is perhaps well to point out that while the Judicial Committee seem to think in the case last cited, at p. 128 of the report, that the doctrine of the *Hammersmith Railway Company* v. *Brand*, L.R. 4, H.L. 171, prevented compensation being claimed in respect of lands injuriously affected after the completion of the railway, that sections 90 and 92 of the Railway Act of 1888 (Can.) contemplate distinct injuries subsequent to completion of the railway and compensation therefor. I agree with the learned Trial Judge that this is a case of *damnum sine injuria*, for it is admitted that the defendants

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have acted negligently, and I think the case to which he refers, of the *National Telephone Company* v. *Baker* (1893), 2 Ch. 186 applies ; and I will only add the remark made by Lord BLACKBURN in the *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. at p. 208, that "it is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an implication appears." The Railway Act of 1888 (Can.), evidently contemplates, as we should expect, compensation for injury. I understand no irrigation takes place between the month of September and the following May. The plaintiffs will therefore be in as good a position during that period without, as with, an injunction, and the risk will be no greater to the travelling public ; and it is to be hoped that meanwhile the Company may be relieved in some way from a heavy burden and expense without doing injustice to the defendants. I think the appeal must be dismissed with costs, but without prejudice to further proceedings as new circumstances may require.

Judgment of McCREIGHT, J.

WALKEM, J., concurred.

McCOLL, J.: Because of the rule which is thus formulated by Mr. Justice KING, in *The City of Vancouver* v. *The C.P.R. Company*, 23 S.C.R. at p. 23 : "When the Legislature clearly and distinctly authorizes the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right ;" I consider that the only questions to be determined are, whether under the legislation applicable to the plaintiff Company, and which not merely authorized but required the construction of the Canadian Pacific Railway, the defendants are entitled to compensation from the Company for the damages sustained by them, owing to the loss of the use for agricultural purposes of their land, which, as appears from the evidence,

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can no longer be cultivated by means of irrigation—the only way in which it can be cultivated—without destroying the railway, and, if so, whether the plaintiff Company, not having offered to make to the defendants compensation for this loss, should now be granted relief upon proper terms.

If the plaintiff Company had constructed the part of their line of railway affected by the irrigation complained of, the cases of *Jones* v. *The Stanstead Railway Company*, L.R. 4 P.C. 98, and *The Northshore Railway Company* v. *Pion*, 14 App. Cas. 612, shew, I think, that the defendants might perhaps have been entitled to have the first question answered in their favour; but this portion of the railway having been made by the Government of Canada, and assured to the plaintiff Company in circumstances too well known to need to be stated here, it may be that the defendants' right (if any) to compensation, is not enforceable against the Company.

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I say no more, since these questions were not raised upon the argument, and I understand that my learned brethren have been able to come to the conclusion that the judgment should be affirmed.

Appeal dismissed with costs.

NOTE—On the 17th November, 1897, the Full Court (McCreight, Drake and McColl, JJ.) granted leave to appeal to the Privy Council.

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Municipal Corporation—Highway Authority—Negligence—Respondeat superior—Contractor or servant—Misfeasance or nonfeasance—Trial - Cross-examining questions to jury—Right of jury to find general verdict.

A Municipal Corporation which had statutory power to enter lands and take, without payment, gravel for its roads, let a contract for grading and gravelling a road within its limits, which contained no provision as to where the gravel was to be obtained. The contractor entered adjacent private property and took gravel from a pit thereon in such manner as to undermine a large tree standing close to the road allowance, which, by reason thereof, afterwards fell upon and killed plaintiff's husband who was driving on the road. To be assured of its quality, the taking of the gravel was superintended by the Municipal Road Inspector. The jury found that the excavation was done by the order or permission of the Corporation, and that, irrespective of who caused the excavation, the subsequent condition of the tree was a dangerous nuisance to the highway, of which the Corporation had notice.

Held, per DAVIE, C.J., on motion for judgment that, upon the findings of the jury, the Corporation was liable:

1. For negligent misfeasance in regard to the excavation, and that a contention that the act was that of an independent contractor, was untenable.
2. For knowingly maintaining a dangerous nuisance causing the injury.

Upon appeal to the Full Court, *per* MCCREIGHT, J., WALKEM, J., concurring:

1. The Corporation was responsible for the act of the contractor in undermining the tree, to the same extent as if he was a labourer acting under the orders of the Road Inspector or the Board of Works.
2. If one employs a contractor to do a work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, and the employer accepts the work in that condition, he becomes at once responsible for the nuisance.

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3. He who knowingly maintains a nuisance is as liable for its consequences as he who created it.
4. The jury may believe part and reject part of a witness' evidence.
5. Cross-examining questions to a jury are not to be encouraged, as they are calculated to induce the jury to stand on their undoubted right to return a general verdict.

Per MCCOLL, J.: The Corporation was under an obligation to the public so to exercise its powers of repairing the highway as not to render its use dangerous to the lives of passengers thereon by the absence of reasonable precautions against obvious risks from falling trees, and the circumstance that the Corporation exercised its powers through the instrumentality of their contractor, did not absolve it.

Per DRAKE. J. (dissenting):

1. That the contractor was, on the facts, an independent contractor, and was not a servant of the Corporation. That the work to be done for the Corporation, as provided by the contract, was not necessarily attended with risk in regard to the tree, and in that the negligence was therefore casual and collateral to the performance of the contract, and the Corporation was not liable for it.
2. That the statutory authority to the Corporation to enter lands and take gravel for roads, did not extend to their contractor, and he was not therefore its agent *quoad hoc.*
3. That the negligence alleged and proved consisted in leaving a tree standing which ought to have been removed, and was therefore mere nonfeasance and not actionable.

Statement.

ACTION under Lord CAMPBELL'S Act to recover damages for the death of plaintiff's husband, owing to the negligence of the defendant Corporation. The statement of claim alleged that:

4. The maintenance or repair of the roads within the boundaries of the defendant Municipality were under the control of the defendant, and in repairing one of such roads the defendants, by their servants, agents or contractors, negligently took away or permitted to be taken away gravel from around and under a large tree which stood near the said road, and so excavated beneath the said tree that the same was left without proper and natural support and liable to fall across the said road, and in such condition as to render the same dangerous to persons lawfully driving upon the said road, as the defendants well knew.

5. The defendants negligently permitted the said tree to remain standing for a long time after the same had become liable to fall, and dangerous to persons using the said road.

6. The said W. Steves was lawfully driving along the said road, when the said tree, by reason of the said negligence of the defendants, fell across the said road and struck and killed him.

The statement of defence took issue on all the allegations in the claim, and also objected that it disclosed no cause of action in point of law. The point of law was not argued before the trial. The Corporation had let a contract to one Thomas for "the gravelling of the centre of Granville street for a certain distance, at $1.89 per cubic yard." The contract contained the following clauses:

"5. The (City) Engineer shall be at liberty, any time, either before the commencement or during the construction of the works or any portion thereof, to order any work to be done and to make any changes which he may deem expedient in the grades, widths of cuttings and fillings, dimensions, character, nature, location or position of the works, or any part or parts thereof, or in any other thing connected with the works, whether or not such changes diminish the work being done or the cost of doing the same, and the contractor shall immediately comply with all written requisitions of the Engineer in that behalf, but the contractor shall not make any change in, or addition to, or omission or deviation from the works, unless directed by the Engineer, and shall not be entitled o any payment for any change, etc., unless such change shall have been first directed in writing by the Engineer.

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"9. A competent foreman to be kept on the ground by the contractor, during all working hours, to receive the orders of the Engineer, and should the person so appointed be deemed by the Engineer incompetent, or conduct himself improperly, he may be discharged by the Engineer and another shall at once be appointed in his stead. Such foreman shall be considered as the lawful representative of the contractor, and shall have full power to carry out all requisitions and instructions of the said Engineer.

"10. In case any material or other things in the opinion of the Engineer are not in accordance with the several parts of this contract, or not sufficiently sound or otherwise unsuitable for the respective works to be used for or brought to the intended works or any part thereof, or in case any work be improperly executed, the Engineer may require the contractor to remove the same, and to provide proper materials and other things, or properly re-execute the work as the case may be, and thereupon the contractor shall and will immediately comply with the said requisitions, and if twenty-four hours shall elapse and such requisition shall not have been complied with, the Engineer may cause such material or other things, or such work to be removed, and in any such case the contractor shall pay to the Corporation all such

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damages and expenses as shall be incurred in the removal of such material or of other things, or of such work, or the Corporation may in its discretion retain and deduct such damages and expenses from any amounts payable to the contractor.

"13. In case the contractor shall make default, or delay in diligently continuing to execute the work for six days after notice in writing by the Engineer requiring the contractor to put on a sufficient force to put an end to such delay, or in case the contractor should become insolvent, or neglect properly to superintend the works, then the Corporation may take the work out of the contractor's hands, etc.

"14. The contractor shall be at the risk of, and shall bear all loss or damage whatsoever, from whatsoever cause arising, which may occur to the works, or any of them, until the same be fully and finally completed and delivered up to and accepted by the Corporation.

"15. The contractor shall be responsible for all damages claimable by any person or persons, or Corporation, whatever, in respect of any injury to persons or to lands, buildings, ships, or other property, or in respect of any infringement of any road whatsoever, occasioned by the performance of the said works, or by any neglect or misfeasance or nonfeasance on his part, and shall and will, at his own expense, make such temporary provision as may be necessary for the protection of persons or of lands, buildings, ships, or other property, or for the uninterrupted enjoyment of all roads by all persons or Corporations in and during the performance of the said works."

Statement.

No provision was made in the contract or otherwise as to where the contractor was to get the gravel to employ in the work. The other essential facts fully appear from the judgments.

The action was tried at Vancouver, before DAVIE, C.J., and a special jury, on 16th and 17th March, 1897. The following questions were put to and answered by the jury:

Was the disaster caused to the plaintiff's husband by a falling tree whilst he was lawfully travelling on a public highway within the limits and under the control of the Municipality? A. Yes.

Did the tree stand within the limits of the Municipality? A. Yes.

Previously to the accident had the ground around the tree been excavated away by the order or permission of the defendants, to such an extent as to remove the support of the roots? A. Yes.

Was the falling of the tree due to or precipitated by the excavation? A. It was.

Had the defendants notice or knowledge of the existence of the danger reasonably long enough to remove the nuisance or otherwise protect travellers on the highway against the danger? A. They had.

Who owned the gravel which was used by the contractors in gravelling the roadway? A. The Municipality owned the gravel used for road purposes.

Upon these findings both the plaintiff and the defendant Corporation moved for judgment on the 22nd March, 1897.

Gordon Hunter and *H. C. Shaw* for the plaintiff.
E. P. Davis, Q.C. and *C. B. Macneill* for the defendants.

Cur. adv. vult.

March 29th, 1897.

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DAVIE, C.J.: This is an action by the widow of Walter Herbert Steves, on behalf of herself and two children, to recover damages from the Corporation on account of the death of her husband, which occurred on 23rd December, 1895. The jury, in answer to questions put to them by the Court, have specifically found that the deceased was killed by a falling tree, whilst lawfully travelling upon a public highway, within the limits and under the control of the Municipality; that previously to the accident the ground around the tree had been excavated away by order or permission of the defendants, to such an extent as to remove the support of the roots, and that the falling of the tree was due to, or precipitated by, the excavating. The jury have also found that the tree stood within the limits of the Municipality; that its presence in its standing condition was a dangerous nuisance, and a visible menace to the public safety, and moreover that the defendants had notice

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or knowledge of the existence of the danger reasonably long enough to remove the nuisance, or otherwise to protect travellers on the highway against the danger, and they have awarded the plaintiff $10,000.00 damages, $2,000.00 of which amount is to go to the infant children.

Upon motion for judgment the defendant's counsel has renewed the application for non-suit which was made and reserved at the trial, principally on the ground that the road work, in course of which the excavation took place, was conducted under contract, which limited the contractor in taking gravel to a point some fifteen feet away from the tree, and that the Corporation is not liable for the way in which the contractor carried out his contract, but upon the facts I think there was abundant evidence that the Corporation actively directed the work through their superintendent and Board of Works. At all events the jury have found that the Corporation ordered or permitted the excavation, and that concludes the question. In *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335, a District Council being about to construct a sewer under their statutory powers empowered a contractor to construct it for them. In consequence of his negligence in doing the work, a gas main was broken and did damage to the plaintiff. It was held that the District Council owed a duty to the public, so to construct the sewer as not to injure the gas main; that they had been guilty of a breach of this duty, and that notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiff. In view of the direct finding of the jury that the Corporation ordered or permitted the excavation which precipitated the fall of the tree, it is, I think, unnecessary for me to consider the learned argument addressed to me on behalf of the plaintiff, that upon the true construction of the contract, the contractor was the mere servant of the Corporation: Dillon on Corporations, Sec. 1027; or that the Corporation are, under section 108 *f* of the Municipal

Act, 1892, as amended by section 22, Cap. 30, 1893, responsible for his negligence, a view which seems to be upheld by the judgment of HAGGARTY, C.J., in *Sombra* v. *Township of Moore*, 19 O.A.R. 144. It is unnecessary moreover to consider the cases of *St. John* v. *Campbell*, 26 S.C. R. 1; *Pictou* v. *Geldert* (1893), App. Cas. 524; *Sydney* v. *Bourke* (1895), App. Cas. 433; *Gibraltar* v. *Orfila*, 15 App. Cas. 411, shewing that a Corporation is not liable for mere acts of nonfeasance, nor how far this rule may be affected by section 15 of the Municipal Act, 1892, enacting that the Municipality shall be subject to all the liabilities of a corporation. It is unnecessary, I say, to consider the bearing of these questions in view of the distinct finding of misfeasance against the Council, even if the finding of responsibility for excavating round the tree and precipitating its fall were insufficient to support the verdict, as the additional finding that the tree was a dangerous nuisance, and the Corporation had notice of its dangerous condition sufficiently long to have removed the nuisance, compels me to give judgment against them. They have no right to create a nuisance, *Sydney* v. *Bourke*, *supra*, and he who knowingly maintains a nuisance is as guilty as he who creates it. There was in this case a continuing nuisance from day to day, for which, according to the principles laid down in *Sibbald* v. *Grand Trunk*, 18 O.A.R. 184, 20 S.C.R. 259; *Vogel* v. *Mayor of New York*, 2 A. & E. Corp. Cas. 537, 544, the defendant Municipality is fully responsible.

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Let judgment be entered in favour of the plaintiff for $10,000.00 and costs.

Judgment for the plaintiff.

Statement.

From this judgment the defendant Corporation appealed to the Full Court, and the appeal was argued before MCCREIGHT, WALKEM, DRAKE and MCCOLL, JJ.

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Argument.

E. P. Davis, Q.C., for the appellants: To render a Municipal Corporation liable under these circumstances, the plaintiff must shew: (*a*) A statutory obligation on the part of the Municipality to repair. (*b*) That a liability for non-repair has been imposed by the Legislature: See *Pictou* v. *Geldert* (1893), A.C. 524, at pp. 527, 529 and 531. See also *Sydney* v. *Bourke* (1895), A.C. at pp. 433, 435, 437, 439, 441, 443 and 444. The defendant Corporation is not by the Municipal Act charged with the maintenance of roads within its limits, and they are not vested in it. No duty whatever in regard to the repair of such roads is imposed upon it. The only power it has in regard to them is, if it pleases, to make by-laws relating to roads, etc., the assumption of power being of course in each case co-extensive with the by-law: Municipal Act 1892, Sec. 104, Sub-Sec. 90 and 107, Sec. 266, Sub-Sec. 11; Sec. 267 and Sec. 282. In *Cowley* v. *Newmarket Local Board* (1892), A.C. 345, at pp. 349, 351, 352 and 353, approved in *Sydney* v. *Bourke* (1895), A.C. at 442, it was held that although a statutory obligation to repair was imposed, the resulting duty is only to the public, and not to any private individual, because it is the public who have to repair. Section 7 of Cap. 55 of 1875 (Imp.), makes all these local boards corporations. In regard to the highways, ordinary municipal corporations are only governmental agents, and are *quasi* corporations merely. See *Wallace* v. *Assiniboia*, 4 Man. 89; *The Mersey Docks case*, L.R. 1 H.L. 110, is distinguished in this respect, both in *Wallace* v. *Assiniboia*, and also in *Orfila* v. *Gibraltar*, 15 App. Cas. pp. 411, 412, 413.

The Municipal Act does not, either in terms or by implication, create a liability to answer in damages. Plaintiff relies upon section 15, Municipal Act, 1892; the effect of this, however, is only to give municipalities ordinary corporate rights and liabilities, such as to sue and be sued, etc., and does not create any new cause of action against them. See Interpretation Act, C.S.B.C. Sec. 8, Sub-Sec. 33. Plaintiff

also relies on section 108 *f*, Municipal Act 1892, as amended by section 22 of Cap. 30 of 1893, and on the Ontario case of *Sombra* v. *Moore*, 19 O.A.R. 144, claiming that parent legislation can be looked at for the purpose of construing statutes. The section in question is taken from subsection 4 of section 531 of the Ontario Municipal Act. In that section the Ontario municipalities are expressly made civilly liable for non-repair. This provision has been deliberately left out of the British Columbia Statute, and the inference is therefore plain that the language of section 108 *f* (which is an amendment passed in 1893 to the general Act, as it stood before) does not purport to make any change whatever in the law as to the liability of municipalities as it stood prior to that time. The most that can be urged on the strength of 108 *f*, is that the Legislature thought that the law under the Municipal Act as it stood was such that a municipality would be liable for non-repair. If so, it was mistaken, and the mistake of the Legislature in this respect should not alter the existing law: *Mollwo, March & Co.* v. *Court of Wards*, L.R. 4 P.C. 419; *Earl of Shrewsbury* v. *Scott*, 29 L.J.C.P. 53; Hardcastle on Statute Law, pp. 455–6; Wilberforce on Statutes, pp. 13 and 14; Maxwell on Statutes (2nd Edition), pp. 379 and 390.

Argument.

The cases cited in support of the plaintiff's contention that the defendants are as liable for permitting a nuisance to continue as if they had originally created it: *Sibbald* v. *Grand Trunk*, 18 O.A.R. 184, at pp. 191–2, and 20 S.C.R. 259; *Vogel* v. *New York*, 2 A. & E. Corporation Cases, pp. 537 to 544; *Hurst* v. *Taylor*, 14 Q.B.D. 918 at p. 920 and other cases (with the exception of *Vogel* v. *New York*, which when closely examined does not seem to be an authority for the proposition as broadly as stated) are not authorities for the proposition laid down generally, as they do not apply to the case of municipal corporations, with reference to which a special rule of law is applicable. To say that a municipality has permitted a nuisance to continue

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is only another way of stating that it has neglected to repair, and the authorities above cited clearly shew that the Municipality is not liable for non-repair. The point is, however, covered by a straight authority: See *Cowley* v. *Newmarket Local Board* (1892), A.C. p. 345, at 350, 351, 352 and 353, where it is expressly laid down that the defendants were not liable for allowing a nuisance to continue in the highway, which had been caused by a stranger, and this proposition of law is expressly approved in *Sydney* v. *Bourke* (1895), A.C. at p. 442; see also to same effect, *Glossop* v. *Heston*, 12 Ch. D. 102 at 109; *Oliver* v. *Horsham* (1894), 1 Q.B. at 343. This last case overrules *Kent* v. *Worthing*, 10 Q.B.D. 118, and at p. 341 comments on and explains *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430; see also *Bathurst* v. *McPherson*, 4 App. Cas. 256, where it is expressly laid down that the Municipal Corporation can only be liable if they actually caused the nuisance in the highway.

Argument.

The defendant Corporation did not commit the acts complained of as being misfeasance. The relation between the Municipality and Thomas was that of employer and contractor, not master and servant. Compare sections 5, 9, 10 and 13 of Thomas' contract, with sections 7, 8, 11, 45 and 46 of the contract proved in *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335. The sections in the latter contract are far stronger than those in the present one, inasmuch as (*inter alia*) the very work from which the damage arose was under the complete control of the defendant's Engineer; yet in that case a majority of the Court—LINDLEY and A. L. SMITH, L.JJ.—held that the relationship between the defendants and their contractor was not that of master and servant. The citation from Dillon on Corporations, Sec. 1,027, at p. 1,303 (4th Edition), and the case of *Storrs* v. *Utica*, 17 N.Y. 104 (1858) there cited, only refer to cases where the Municipality were bound by statute to repair, and were also liable for non-repair. If the relationship was that of employer and contractor, then the law on

the subject is fully laid down in *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335, at pp. 340, 342–350, and see especially pp. 346–9. This case is, when closely analyzed, the strongest authority for the defendants, whether we adopt the principle laid down by Lord Justice LINDLEY in his judgment, that the employer is not liable for the "collateral negligence" of his contractor, or accept as its *ratio decidendi* the principle upon which Lord Justice A. L. SMITH bases his judgment, that the Idle District Council were doing what was necessarily a dangerous act in tearing up the street, and that they were therefore bound to see that no injury was done in the course of that work, and equally bound to see to this whether they entrusted the work to a contractor or did it themselves. In the present case, in the natural course of things, no injurious consequences could possibly follow from the performance of the work entrusted to the contractor, namely, the grading of the street. The only duty which was cast upon the defendants in grading the street was that the street itself should be properly graded, that is, that no nuisance or obstruction should be caused by the grading done by the defendants. The employer, according to Lord Justice LINDLEY, in the *Hardaker case*, following the prior authorities, is not liable for the "collateral negligence" of the contractor, and "collateral negligence" is defined at page 352 as being "negligence other than the imperfect or improper performance of the work which the contractor is employed to do." Here the contractor was employed to grade the street. That work was perfectly and properly performed. Any negligence in connection with supplying the gravel would be "collateral negligence." In the *Hardaker case* the contractor was employed not only to build the sewer, but also expressly to protect the gas and water pipes in the course of building that sewer, and the injury arose from the latter work having been improperly and imperfectly performed by the contractor. The following authorities indicate the cases in which the employer is

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liable for acts of his contractor: *Overton* v. *Freeman*, 11 C.B. 867; *Hughes* v. *Percival*, 8 App. Cas. 443, at pp. 444, 446 and 449; *Pickard* v. *Smith*, 10 C.B.N.S. 470; *Hole* v. *Sittingbourne*, 6 H. & N. 488. See especially language of WILDE, J., at p. 497. *Reedie* v. *London & N.W. Ry. Co.*, 4 Ex. 244; this case over-rules *Bush* v. *Steinman*, 1 B. & P. 404; *Steel* v. *South Eastern Ry. Co.*, 16 C.B. 550; *Peachey* v. *Rowland*, 13 C.B. 181; *Allen* v. *Hayward*, 7 Q.B. 960; *Gray* v. *Pullen*, 5 B. & S. 970; *Woodhill* v. *Great Western Ry. Co.*, 4 U.C.C.P. 449; *Carroll* v. *Plympton*, 9 U.C.C.P. 345; *Gillson* v. *North Grey*, 33 U.C.Q.B. p. 128, and on appeal in 35 U.C.Q.B. 475, a very important case, going into the law on the subject exhaustively, and on appeal it is a decision by a strong Court. *Daniel* v. *Metropolitan Ry. Co.*, L.R. 5 H.L 45, at p. 60, *et seq.*; *Murphy* v. *Ottawa*, 13 Ont. 334; Shearman & Redfield on Negligence, (4th Ed.) p. 168 *et seq.*; *Rink* v. *Missouri Furnace Co.* 82 Mo. 276, cited at p. 168 of Shearman & Redfield; *Halifax* v. *Lordly*, 20 S.C.R. 508; *Whatman* v. *Pearson*, L.R. 3 C.P. 422, shewing that acts such as those in question here would constitute collateral negligence, and are not acts done or intended to be done under the contract.

Argument.

The Municipality could not prevent Thomas, under the terms of the contract, taking the gravel from any place he wished, as long as such gravel was suitable for grading the road. The Road Inspector was only the agent of the Corporation in seeing that proper gravel was used, and that the grading of the road was properly performed by the contractor, in accordance with the contract, and he had no power to bind the Corporation by any assent to the act of the contractor in regard to the tree: *Bolingbroke* v. *Swindon Local Board*, L.R. 9 C.P. 575. In any case the plaintiff must shew a corporate assent by the Municipality to the undermining of the tree, and it cannot be inferred merely from knowledge: *Howarth* v. *McGugan*, 23 Ont. 396, at p. 402; *Hardaker* v. *Idle*, *etc.* (1896), 1 Q.B. 335, at p. 345. If the

Inspector was guilty of any negligent omission, that was a breach of duty which he owed to his employer and not to the plaintiff. It is not shewn that there was any by-law of the Municipality providing for the abatement of nuisances, either on or adjoining the highway, and there was furthermore, no power in the Municipality to pass a by-law with reference to trees on adjoining private lands, in which case the Municipality could only resort to indictment, and no power is given to the Municipality or their Engineer in the contract, under which they could refuse to take the gravel under such circumstances, so long as it was proper for grading.

Gordon Hunter, contra : Anyone who exercises a statutory power or performs a statutory duty, is bound in the absence of impunity conferred by the Legislature to do so without negligence : *Cowley* v. *Mayor of Sunderland*, 6 H. & N. 565; *Gray* v. *Pullen*, 5 B. & S. 970 ; *Geddis* v. *Bann Reservoir*, 3 App. Cas. 430, at 465, per Lord BLACKBURN ; *Hurst* v. *Taylor*, 14 Q.B.D. 918. The law is plain that whosoever undertakes the performance of or is bound to perform duties, whether they are duties imposed by reason of the possession of property or by the assumption of an office, or however they may arise, is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging duties, or whether it be a Corporation or an individual who has undertaken to discharge them : *Gilbert* v. *Trinity House*, 17 Q.B.D. 795, per DAY, J., at p. 799 : *Gibraltar* v. *Orfila*, 15 App. Cas. 410, at p. 411.

Argument.

The duty to take care cannot be evaded by deputing a contractor or employee to exercise the power or perform the duty : *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335, per LINDLEY, L.J., at pp. 340, 345, RIGBY, L.J., at 351. The Municipality was fully clothed with power over the streets. See Municipal Act, 1892, Sec. 104, Sub-Secs. 32, 80, 82, 90, 107, 108–114, 120, 121, 133, 137, 108 *e*, Secs. 266, 266(1),

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267. The general enactment contained in section 92 of the Land Act, that, unless otherwise provided for, the soil and freehold of every public highway shall be vested in Her Majesty, is overborne by sub-section 133 *supra*, giving power to the Municipality to dispose of the highway, and execute deeds thereof, etc. See per HERSCHEL, L.C., in *Sydney* v. *Bourke* (1895), A.C. 433, at p. 441: "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 a 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, "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."

Argument.

See also DAVEY, L.J., in *Oliver* v. *Horsham* (1894), 1 Q.B. 332, at 343. 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.

By the terms of the contract between the Municipality and the contractors, the Municipality having control and direction of the contractors as to the mode of doing the work, the contractors were, to all intents and purposes, the servants of the Municipality, so far as the public and the deceased were concerned: Dillon on Corporations, Vol. II., p. 1,303 and note. As to the effect of such powers of supervision, *Burgess* v. *Grey*, 1 C.B. 578. For criteria as to whether the relationship is one of master and servant, or of independent contractor, see *Sadler* v. *Henlock*, 4 E. & B. 570, per CAMPBELL, C.J.

The plaintiff also contends that the defendants authorized or permitted the creation of a dangerous nuisance to the highway, and they therefore owed a duty to the deceased to

protect him against the danger, and that for breach of this duty they are liable in the action. The jury found that the tree was a dangerous nuisance to the highway, caused by the authority or permission of the defendants. That it was a nuisance as a matter of law, see Garrett on Nuisances, pp. 32, 33; *Castor* v. *Uxbridge*, 39 U.C.R. 113, at p. 119; *Roberts* v. *Mitchell*, 21 O.A.R. 433; *Badams* v. *Toronto*, 24 O.A.R. 8; *Tarry* v. *Ashton*, 1 Q.B.D. 314. And a municipality may not create or authorize a nuisance any more than any other person: Garrett on Nuisances, p. 30; *Cline* v. *Cornwall*, 21 Grant 129; *Sydney* v. *Bourke* (1895), A.C. 433; *Pictou* v. *Geldert* (1893), A.C. 524; *Bathurst* v. *McPherson*, 4 App. Cas. 256; *Mayor of Preston* v. *Fullwood Local Board*, 53 L.T. 718. Neither is the commission of a nuisance under colour of the exercise of a statutory power justifiable, except under express statutory authority: *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193, at p. 213, per Lord WATSON; *Rex* v. *Bradford Navigation Co.*, 6 B. & S. 631.

Argument.

Even if the defendants did not authorize or permit the creation of the nuisance, if they were aware of it for a time reasonably long enough to protect the public against it, they owed a duty to the public to do so, even if they had a discretion: *Gibbs* v. *Liverpool Docks*, 3 H. & N. 163, per COLERIDGE, J., at p. 176, delivering the judgment of the Exchequer Chamber. "But at all events we think that if they had a discretion under the circumstances to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public, and that they had no right, with the knowledge of its dangerous condition, to keep it open, and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship on payment of the tolls to them, might enter and navigate the dock." See also *Badams* v. *Toronto*, *supra*; *Hurst* v. *Taylor*, 14 Q.B.D. 918; *Sibbald* v. *G. T. R.* 18 O.A.R. 190, 20 S.C.R. 259; *Evans* v.

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Rhymney Board, 4 T.L.R. 72; *Foreman* v. *Canterbury*, 6 L.R.Q.B. 214; 40 L.J.Q.B. 138.

As to what evidence is sufficient to bring home knowledge of the existence of a nuisance to a municipality, see *Duck* v. *Toronto*, 5 Ont. 295; Harrison's Municipal Manual (5th Ed.), p. 493.

There is a distinction between permitting highways to fall into disrepair and permitting the continuance of a dangerous nuisance after notice express or implied: *Lancaster Canal Co.* v. *Parnaby*, 11 A. & E. 223, at pp. 242–3; *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93. And the fact that the operations were carried on for profit was afterwards shewn to be immaterial in the case of *Gibbs* v. *Liverpool Docks*, 3 H. & N. 163, at 176, 177. Anyone in possession of, or who has effective control of the *locus in quo*, who sanctions or maintains a nuisance, is equally responsible with him who creates it: *Sibbald* v. *G. T. R.* 18 O.A.R. 184 (affirmed 20 S.C.R. 264), at p. 193; *Vogel* v. *New York*, 2 A. & E. Corp. Cas. 537; *Vespra* v. *Cook*, 26 U.C.C.P. 182, at p. 188; *Fisher* v. *Prouse*, 2 B. & S. 770; Dillon, 1274, *et seq.* Where there is negligent ignorance merely, see *Queen* v. *Williams*, 9 App. Cas. 413, *Gibraltar* v. *Orfila*, 15 App. Cas. 413; *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93.

Argument.

As to the contention that no by-law was passed by the Municipality providing for an assumption by the Corporation of the work which was done, the defence is not pleaded, and the point was not raised at the trial. It is also submitted that no by-law was necessary: *Pratt* v. *Stratford*, 14 Ont. 260, affirmed 16 O.A.R. 5. At all events the defendants must be assumed to have been lawfully exercising their powers when, as a Corporation, they entered into the contract for doing the work which resulted in the injury.

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McCREIGHT, J.: I think the most convenient course will

be, first, to consider whether there was sufficient evidence to leave to the jury, to warrant them in their findings; next, whether there was misdirection by the learned Chief Justice, who tried the case, and such as may have misled the jury; and, lastly, supposing the findings of the jury to be free from objections on either ground, whether the learned Trial Judge was warranted thereupon in arriving at the judgment now appealed from.

As regards the first point, as to whether there was sufficient evidence: As there was contradictory evidence, and the testimony of one or two of the witnesses was by no means uniform, or consistent with itself throughout, we must attend to the remarks of Lord BLACKBURN, in *Dublin, Wicklow & Wexford R.R. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1201: "The jurors are not bound to believe the evidence of any witness, and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness' evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission, etc., etc."

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On the first point I shall deal with the objections which Mr. *Davis* has taken in his careful argument. He says, as to the third question, and answer, which were as follows: "Previously to the accident, had the ground around the tree been excavated away by the order or permission of the defendants, to such an extent as to remove the support of the roots?" A. "Yes," that there is no evidence to support that finding of the jury. But I think Thomas' evidence goes far to warrant the finding of the jury, bearing in mind Lord BLACKBURN'S remarks, which I have quoted, as to believing only part of a witness' statement. [The learned Judge then reviewed the evidence in question, and proceeded.]

This evidence seems to warrant a jury in giving their answer to question three.

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Mr. *Hunter's* analysis of the evidence seems to be directed, and perhaps properly, to the position that the evidence was such as to require the jury to find as they did, but we must not lose sight of the fact that the finding of the jury of question three should not be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find : *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 154, per Lord HERSCHELL ; *Phillips* v. *Martin*, 15 App. Cas. 194 ; and, of course, the remarks which I have quoted of Lord BLACKBURN, must be attended to in applying this rule. See, also, *Webster* v. *Friedeberg*, 17 Q.B.D. 736, that the opinion of the Trial Judge should be taken into serious consideration.

The alleged misdirection, as I have already said, should be separately dealt with in regard to this and other findings which are complained of.

Judgment of McCREIGHT, J.

Mr. *Davis* next says that there is no evidence to support the finding of the jury in answer to the seventh question left to them ; that is, the finding " that the Municipality owned the gravel which was used for road purposes." Mr. *Davis* says the evidence is clear that the gravel pit from which this gravel was taken was owned by the C.P.R. Co., and there is not the slightest evidence anywhere that such gravel was taken by the Municipality under the powers given to them by section 267 of the Municipal Act, 1892, so that it could not even be argued that it belonged to them in this way. But it seems plain that the gravel belonged to them under section 267 of the Act, which authorized them to take the gravel. The Act provides, under section 269, for compensation, and the Municipality would in effect be obliged to pay for gravel, stone, timber, etc., used in the construction of the road, if the C.P.R., as owners, required them to do so, and obtained no benefit by the road. When the Legislature gave the power to take gravel, they necessarily gave the property that the Council required Their power under section 267 is plain.

Ford's evidence shews that he, as Inspector, in presence of the Engineer, selected the place the gravel was to be taken from. The defendants, by their officers, were acting as if dealing with their own property. An act is presumed to be lawful rather than tortious; see, per Lord HERSCHELL in *Mara* v. *Brown* (1896), 1 Ch. 199, at p. 207: "It is surely more reasonable to refer his acts as trustee to this appointment, than to treat them as tortious;" and see what is said by the late Master of the Rolls in *In re Hallet's Estate*, 13 Ch. D. 696, at p. 727 (C.A.): "Nothing can be better settled, etc., than this, that where a man does an act that may be rightfully performed, he cannot say that that act was intentionally and in fact wrongly done, etc." The Municipality would, of course, be disposed to exercise the power in case of their contractor, and the power was a statutory right. I do not think the jury can possibly be considered to have acted unreasonably in finding on the evidence that the Council owned the gravel used for road purposes, and I think that the law clearly leads to the same conclusion. Could the contractor have sold the gravel to some one else? If he even used a pick or shovel otherwise than in accordance with the wish of the officers of the Council, he was a trespasser.

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I now pass to the question whether there was misdirection, and Mr. *Davis'* objections on this point mainly seem to be with reference to question three of the questions left to the jury I think I have shewn that there was evidence upon which a jury could find as they have done in answer to this question, and I have but little further to add; but he says that permission is not sufficient, and he complains that the jury were not instructed as to what, if any, meaning is to be attached to the word "permission." Before I deal with the question whether "permission" is sufficient, it will be well to ascertain the meaning of that word as settled by decided cases, and, moreover, as used throughout the trial, in which sense the jury would probably take it.

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In *Toleman* v. *Portbury*, L.R. 5 Q.B. 288, a case where it was contended there was a forfeiture of a lease by a lessee for "permitting" a sale by auction to take place on the premises without the consent of the lessor in writing, contrary to a covenant in that behalf in the lease: KELLY, C.B., at page 293, says: "The question then arises is there any evidence that he (the lessee) permitted this sale; that it was by his permission, or under his authority, etc., etc. It is quite consistent with the evidence that not only did he not permit the sale, but that he actually opposed it, and endeavoured to prevent it, etc., etc. It is quite enough for us to say that there is not a particle of evidence in the case that he either directly or indirectly authorized the sale; and when we look to the words of the covenant, we find that the lessee covenanted that he would not permit any sale." The judgment of the Chief Baron was agreed to by Barons MARTIN and PIGOTT, and it shews that "permission" and "authority" are substantially equivalent expressions. This judgment was not dissented from by the other four Judges in the Exchequer Chamber, at least two of whom were eminent as pleaders.

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Mr. *Hunter* has shewn the way in which "permit" and "permission" were used throughout the trial, and substantially in the above sense—that is, as importing knowledge and consent. If Ford was there every day whilst the contract was going on, no gravel could have been taken out or removed without his consent. Ford says he was Road Inspector, and we find in the specifications: "In this specification Engineer is understood to mean any Inspector appointed by the Council. The decision of said Engineer in all matters pertaining to this contract and specification, is to be final and binding on all parties concerned."

I do not think *Re Throckmorton*, 37 L.T.N.S. 447, and 7 Ch. D. 145, affects this construction. There the expression in the will was "do or permit" any act whereby the annuity might be aliened; and the act a failure to comply with a

debtor's summons, there the word "permit" was plainly used in contradistinction to the word "do," *i.e.* in a passive sense; here the word "permission" in contradistinction to "order," may have many meanings besides a merely passive signification. In the Encyclopædic Dictionary "permit" is defined: "To allow by silent consent or by not offering opposition or hindrance; to suffer or allow without prohibition or interference; to look on at and allow a person to act or a thing to be done; to tolerate. 2. To allow by express consent given; to give permission, leave, liberty or authority to another; to authorize. 3. To resign; to give over; to refer; to leave."

It is well to consider more minutely the actual position of Thomas with respect to the getting out of this gravel from the pit. The case has been put, on behalf of the defendants, as if he were an independent contractor, getting out gravel, perhaps his own, or from his own land, or as a duly licensed person, the Inspector, Ford, having no duty or power to interfere except to see that the gravel was of proper quality, and placed as required in specifications and contract; but this seems to be a fallacy so far as relates to the procuring and taking out of the gravel, and the circumstances which led up to the occurrence of the accident. In effect, paragraph 3 of the contract requiring the contractor to provide all the materials, etc., gravel of course included, seems to have been suspended by agreement, as to which see *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, and the power of the Council under section 267 invoked for the benefit of the Council, but it does not seem that whilst he, Thomas, was getting out the gravel under this new arrangement, his position as an independent contractor must have been materially changed. He could no longer act in any respect regardless of Inspector Ford, for he had no choice but either to obey him implicitly, or become a trespasser with respect to the C.P.R. Co., the owners of the gravel pit. If the new relation did not *quoad hoc* become altogether that

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of master and servant, with the usual consequences of responsibility on the part of the employers, it would, at all events, warrant a jury in concluding that Thomas was obliged to act in getting out the gravel in all respects with the full authority or "permission" of Ford, as the officer appointed in that behalf by the Council. I have already shewn that "permission" may well be used as equivalent to "authority," and that that is the usual meaning of the word.

Ford's conduct was in accordance with this view, for he was at the pit every day during the carrying out of the contract, for two months, and his duty was to see, not merely that the gravel was suitable, but that it was so obtained as not to increase unnecessarily the amount to be paid by way of compensation for lands injuriously affected under section 269 of the Act of 1892. I think there was quite enough to warrant the learned Chief Justice in leaving the question in the shape he did, and the jury in finding "order" or "permission," or both, and that either is sufficient. The charge, which must be read along with the question, I think places this beyond doubt.

Judgment of McCREIGHT, J.

In his charge the learned Judge says: "The Corporation in this matter will be deemed to have either permitted, or be responsible for the actions, if it knew of them and permitted them, either through its Superintendent, or through the Board of Works. Here knowledge and permission are put to the jury in the conjunctive, not in the disjunctive; in other words, they are distinctly told that there must be knowledge coupled with permission, which must here mean consent or authority; the direction or question three would have been defective without the word "permission."

Again, in his charge, he asks, "as to who caused this excavation, whether it was the Municipality or not." But Mr. *Davis* complains that two other proposed questions were not left to the jury: 1st. "Did the Municipality

authorize gravel being taken within fifteen feet of the centre of the tree, and, if so, through whom? and, 2nd. Had the Municipality any knowledge of gravel being taken within fifteen feet of the centre of the tree, and, if so, how did they acquire any knowledge?" But question three by the Chief Justice, seems to cover that ground: If that question: 3rd. "Previously to the accident had the ground around the tree been excavated away by the order or permission of the defendants, to such an extent as to remove the support of the roots?" had been answered in the negative, the defendants would have been satisfied, and that I think, shews its sufficiency, and fifteen feet might or might not be enough, according to circumstances.

The same observations apply to the second of the proposed questions. I think there is a fallacy in separating authority and knowledge, as contended for in urging the proposed additional questions. If the Council authorized the removal of the gravel so as to endanger the tree, they surely are liable, and if they knew it was being done and consented to it as involved in the word "permission," and explained as I have already shewn in the Judge's charge, they surely are liable as having knowingly consented to a dangerous act.

But there seem to be further objections to the proposed questions. Lord ABINGER is reported to have said that it is sometimes of much importance, with a view to understanding a transaction, to observe what men do rather than what they say. Now the finding of the jury as regards question three, having regard to the evidence, seems to imply that the Council, by Ford, their Road Inspector, or really their Engineer, knew all that was being done in reference to the removal of gravel from about the tree, and consented to it, and this removal of the gravel from the pit, I gather from the evidence, lasted for a period of about two months, they being there every day, *i.e.*, every working day, six days in the week. In view of this a verbal direction which

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he gave, or which it is said he gave, is not very important, and the jury, I infer, did not attach much weight to it. Thomas, in getting out the gravel, as I have shewn, must have been completely under his control, and nothing could have been done in reference to it without the consent of Ford, as representing the Council or Board of Works.

I will only add that cross-examining questions to be left to a jury, like these two proposed by the defence, are not to be encouraged, for they are calculated to induce a jury to stand on their undoubted right to return a general verdict, where answers to proper questions may be very useful in avoiding the expense of a new trial.

Judgment of McCREIGHT, J.

The last point to be dealt with is, supposing there was sufficient evidence to warrant the findings of the jury and no misdirection, having regard to what is said in *Clark* v. *Molyneux*, 3 Q.B.D. 237, at p. 243, by Lord BRAMWELL, whether the judgment of the learned Trial Judge is correct according to the findings. Mr. *Davis* asks: "If the defendants were guilty of misfeasance—in other words were they responsible for the act of the contractor in removing the gravel from around the tree, although they did not authorize the same and were not cognizant of it at the time it was done?" I think the finding of the jury in answer to question three, shews they thought the defendant did not authorize the removal of the gravel from around the tree, and were by their officers cognizant of it at the time it was done, and I think I have shewn that such findings cannot be considered unreasonable. Mr. *Davis* says "the relation between the Municipality and Thomas was that of employer and contractor, and not master and servant." I think I have shewn that in getting the gravel from about the tree Thomas was certainly not acting as an independent contractor, and the jury by their answer to question three have negatived the independent contractorship in this respect. The Council seem to me to be responsible for Thomas' act in undermining the tree, as if he was a labourer

acting under the orders of Ford or the Board of Works, whom he could not disobey in this respect. The independent contractorship had little or no application to the taking of the gravel from the C.P.R. gravel pit.

Reliance was placed upon the terms of Thomas' contract, and it was argued that the sections in *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335-338, were far stronger than those in the contract between Thomas and the Council, inasmuch as *inter alia* the very work from which the damage arose was under the complete control of the defendant's Engineer; yet in that case a majority of the Court, Lord Justices LINDLEY and A. L. SMITH, held the relationship between the defendants and their contractor was not that of master and servant.

I will not further dwell on the fallacy of comparing Thomas taking the gravel from under or about the tree with the knowledge and permission of the Board of Works or Ford, and independently of the agreement of June, 1893, with the position of the contractor in the *Hardaker case*. The only sections of the contract which are set out in that case are sections 7, 8, 11, 14, 45 and 46, and I do not think the arbitrary provisions to be found in clauses 10, 12 and 13 of the Thomas contract, could possibly have been inserted in the other. In England the solvency of the contractor and his sureties is generally reliable, and the employer relies on the penalties contained in the contract to prevent delays or misconduct on the part of the contractor. There is no provision as to the penalties in the Thomas contract, and the Council seem to have relied on a power to take the works at any time out of the hands of the contractor, when their Engineer or Inspector thought it right to do so. The clauses as to the contractor furnishing to the Council a pay list is certainly not what we should expect to find in an English contract. However, it is unnecessary for the plaintiff to rely solely on such points, for I think doctrines are laid down in the *Hardaker case* (1896), 1 Q.B. p. 344,

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by A. L. SMITH, L.J., who, as an experienced common law lawyer, must be familiar with actions for negligence, which doctrines entirely support the case for the plaintiff, and the judgment of the learned Trial Judge. At page 344 of the report, after saying that he thought the relation of master and servant did not exist between the Council and Thornton (the contractor) and observing that the circumstance that the District Council had the right of fully superintending and supervising by their Inspector, the execution of the works, and giving directions in relation thereto, did not render the principal liable for the negligent act of the contractor, (referring to *Steel* v. *S. E. R. Co.*, 16 C.B. 550, and *Reedie* v. *London & N. W. R. Co*, 4 Ex. 244) he adds the important remark, "unless it was brought about by the order of the Inspector." He then proceeds: "If the fracture of the gas pipe in the present case had been caused by reason of the orders of the District Council's Inspector, that would have rendered the District Council liable, because, as between the District Council and the Inspector, the relation of master and servant existed, and for his acts within the scope of his employment, the Council would be liable; (see definition of "Engineer" in the specifications) but no proof was given that the fracture was occasioned by anything which the Inspector said or did. If the Inspector was guilty of any negligent omission, that was a breach of duty "which he owed to his employers, not to the plaintiffs." The Lord Justice then proceeds: "The plaintiffs have not shewn that the District Council authorized the act complained of."

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I must pause here to observe that the finding of the jury in answer to question three concludes that point in favour of the plaintiff. They find that the ground around the tree had been excavated away by the order or permission of the defendants, to such an extent, etc.—see their finding.

I will not, of course, repeat what I have said as to the meaning of the word "permission," further than to say

that I think that the jury must be taken to have found, in the words of the Lord Justice, that the defendants authorized the act of negligence complained of, and of course, as the Lord Justice suggests, that might come from the Council's Inspector. It may be well to add that the act of misfeasance in excavating around and under the tree, in itself, perhaps, and for say a very short time, was not a dangerous act, but injurious by reason of the subsequent omission to cut down the tree, or otherwise prevent it from doing mischief, but these are not to be considered as separate acts, such that the defendant may contend that the first is in itself not dangerous, and the subsequent omission not actionable within the doctrines of *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433. But the whole transaction must be taken as one cause of action (as to the meaning of "cause of action" see *Jackson* v. *Spitall*, L.R. 5, C.P. 542), and that one of misfeasance, and I think this appears from *Newton* v. *Ellis*, 24 L.J.Q.B. 337; *Pendlebury* v. *Greenhalgh*, 33 L.T.N.S. 373; *Davis* v. *Curling*, 8 Q.B. 287; and *Wilson* v. *Halifax*, 37 L.J. Ex. 44. But the judgment of A. L. SMITH, L.J., in the *Hardaker case*, at p. 345, brings me to another ground upon which the plaintiff may maintain the judgment in his favour. He says "the important question still remains, whether the plaintiffs have not shewn that the District Council owed such a duty towards them that the Council could not, by delegating that duty to a contractor, escape liability thereunder should the contractor be guilty of negligence in the performance of the work which he had contracted to execute." But I wish to refer especially to what the Lord Justice says at the foot of page 345: "In each of those cases (referred to in that page) it was held that the defendant was liable to the plaintiff for breach of the duty thus imposed upon him (page 346), although the act of default which caused the injury was the act or default of the defendant's contractor, and not of the defendant himself.

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The *ratio decidendi* of these cases is, that, as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the necessary precautions to ensure that the duty should be performed." He then refers to invasion of the right of transit, which is the present case, and refers to what Lord WATSON says in *Dalton* v. *Angus*, 6 App. Cas. at p. 831: "But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions," (see specifications, title "responsibility.") Now, further on, perusal of the specifications of work to be done, we find "slashings;" "all standing timber and undergrowth on allowance for a road sixty-six feet wide, is to be cut within four feet of the ground; also any leaning trees outside of the allowance which may be dangerous to the travelling public, in case of their falling on the road, are to be felled." Now the witness Wescott thought (I gather in the year 1893) that the tree would necessarily fall on the road because that is the only place where it "was excavated from." This tree, I think, was within the purview of the above specifications; at all events, under clause four of the contract, it could readily have been brought within the specification.

In answer to a question Ford says: "I would not have had any trouble, for if the tree had been dangerous there were men with saws, and I would have had authority to saw and cut it down; but there was nothing to shew that it was dangerous. I would have had authority to order them to cut it down if I thought it was dangerous." This also shews his duty was not so limited as contended for, and I think in view of the above doctrines so laid down by the Lord Justice, and the risk attendant on the felling or omitting to fell dangerous trees, that even if we could suppose Thomas to have been an independent contractor in respect

to getting out the gravel, that would not exempt the defendants from liability.

The passages which I have referred to in the specifications displace any argument of the subject of collateral negligence for the cutting down of the trees was as much a part of the contract as any other part of it, adopting the definition given by RIGBY, L.J., of "collateral negligence," meaning thereby "negligence other than the imperfect or improper performance of the work which the contractor is employed to do." SMITH, L.J., points out at page 350 in the *Hardaker case*, "it is obvious from the clauses 14, 45 and 46 of the contract, that the risk was apprehended" (from the possible fracture of the gas pipe) "for those specific provisions were inserted to obviate the danger." The passages which I have referred to, as in the specifications in this case, seem to go quite as far as and further than the above clauses in the *Hardaker* contract. The chance of a gas pipe sunk in the street breaking, so that the gas should escape and get into an adjoining house, and there cause a serious explosion and disaster, seems more remote than that likely to arise from a dangerous and leaning tree falling upon a frequented thoroughfare. SMITH, L.J., refers also to *Black* v. *Christchurch Finance Co.* (1894), A. C. 48, where the plaintiff sued the defendants for damages by reason of having had his crops burnt by a fire lighted upon the defendants' land by their contractor, which spread on to the plaintiff's land, and says it is pertinent to the *Hardaker case*.

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I agree with the opinion expressed by Mr. Justice McCOLL, in *Patterson* v. *The City of Victoria*, 5 B.C. 628, as to the practice upon a question of non-suit.

I cannot say the damages were such as no twelve reasonable men could have properly given: *Praed* v. *Grahame*, 24 Q.B.D. 53. As to the ruling that Thomas was a hostile witness, *Rice* v. *Howard*, 16 Q.B.D. 681, may be referred to as shewing that such ruling is not reviewable, and, judging

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from the evidence, I think he was a hostile witness. I think also, the Council are clearly liable on the grounds stated by Lord HERSCHELL in *Sidney* v. *Bourke* (1895), A. C. 433, 11 R. at p. 489, and per DAVEY, L.J., in *Oliver* v. *L. B. of Horsham* (1894), 1 Q.B. 344, where he 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."

The case of *Vogel* v. *Mayor, etc., of New York*, 2 A. & E. Corp. Cas. 537, furnishes an additional ground for supporting the judgment—the marginal note is, "one who employs a contractor to do a work not in its nature a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, if he accepts the work in that condition, becomes at once responsible for the nuisance." And in the judgment, at pages 544 and 545, it is said that "this is upon the principle very similar to that which makes a principal responsible for unauthorized wrongs committed by his agents, by ratifying them," and at the end of the report, at page 545, there is a note as follows: "Where an employer accepts a defective piece of work done for him by a contractor, he is generally liable for a subsequent injury resulting therefrom, although the employment of the contractor has been an independent one," and several cases are referred to on the subject. And this is in accordance with what is said in Garrett on Nuisances: "He who knowingly maintains a nuisance is just as responsible as he who created it." I think the appeal should be dismissed with costs.

Judgment of McCREIGHT, J.

DRAKE, J.: The question in this action is, whether the defendants, a Municipal Corporation, are liable for misfeasance in that they did not remove a tree, standing on private property within the Municipality, which was a source of danger to travellers on the public high road.

Judgment of DRAKE, J.

The distinction between misfeasance and nonfeasance is

in many cases but faintly marked; to permit a road to become dangerous for want of repair by a municipality is not actionable by one injured thereby, but to repair a road, and thereby to make that which was a source of danger before, a lesser danger, may become actionable if an accident can be attributed to the negligence of the Corporation in making the repairs.

Without going minutely into the evidence adduced in this case, the following facts are sufficiently established: The Corporation in May, 1893, let to one Thomas, a contract to repair a road and gravel the same. Thomas finding some gravel near the road, in a place where gravel had been dug before, without troubling himself to inquire on whose land it was, took it out, and in so doing dug near a large cedar tree, thus, as no doubt was the case, taking away some of its natural support. In December, 1895, two years and one-half after removal of gravel, during a rather violent gale the tree fell and killed the husband of the plaintiff, who was carrying the mail on the road in question.

The Municipality of South Vancouver was established under Stat. B.C., 1891, Cap. 21, which Act was repealed and a fresh Act enacted by Stat. B.C., 1892, Cap. 23. Under that Act, by section 104, sub-section 107, the Corporation have power to make by-laws for the repair and improvement of roads, with power to enter and take land for that purpose.

There is no statutory liability for non-repair to be found in the Act, but by section 22, sub-section 108 of Stat. B.C., 1893, Cap. 30, which is an amending Act, it is enacted that in case any action is brought against the Corporation to recover damages sustained by reason of an obstruction or excavation under, or in or adjoining any public highway placed, made, or left by any person other than a servant or agent of the Municipality, the Municipality shall have a remedy over against any such person, provided they make such person as a third party defendant in an action brought

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against the Corporation. This section does not create a liability in a municipality for the nuisances enumerated, but merely gives a remedy over in case an action is brought, and there are many cases in which nuisances may be created by persons, for which the Municipality might be liable. It is to such cases that a remedy over is granted, but in my opinion it does not establish the liability of the Municipality for all actionable negligence in relation to matters arising under the section. If there is no legal liability existing, the section in question does not create it. The plaintiff contends that Thomas, the contractor, was the servant of the Corporation, or rather that the Corporation are liable for his acts. In *Steel* v. *South Eastern Railway Company*, 16 C.B. 550, there was a contract to excavate a road and make an embankment. The work was done under a surveyor of the Company, but executed by the contractor. It was held that the Company was not liable, the contractor not being the servant of the Company.

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In *Daniel* v. *Metropolitan Railway Company*, L.R. 3 C.P. 594, BLACKBURN, J., says the persons whose duty it was to take precautions, were the persons by whom the work was being carried on. In *Pickard* v. *Smith*, 10 C.B.N.S. 480, it is laid down that if an independent contractor is employed to do a lawful act, and he or his servant commit some casual negligence, the employer is not answerable. In order to make the Municipality responsible for the acts or omission of Thomas, the plaintiff argues that he was a servant of the Corporation, both in removing the gravel and leaving the tree in a dangerous position. The evidence does not, in my opinion, establish any such proposition.

The Corporation, by section 269, have power to enter lands and take gravel, stone or timber without compensation, for roads or bridges. This is a necessary power in a new country, but it is not a power that should be extended. To say that any contractor who has to make a road, and who is bound to furnish the material, can go on any land he

pleases without leave of the owner, is an extension of the rights given to the Corporation, to make such an entry, and in my opinion cannot be supported. The contractor in this case had no authority from the land owner to take the gravel where he did. The Corporation surveyor refused to accept certain gravel he was using, and pointed out in the pit a class of gravel which would be satisfactory, and members of the Council saw the work going on. This, it is contended, is sufficient evidence of authority from the Municipal Council to enter on the land in question and remove the gravel. I don't view it in the same light. The contractor admits he had authority from no one to take the gravel, and no authority from the Corporation is shewn. The mere fact that the Municipal Engineer had control, to see that the work was properly performed, and pointing out the class of gravel which he would accept, is not such an authority as would bind the Corporation, and make them liable for damages in case of a *tort* committed by the contractor.

Mr. *Hunter*, for the plaintiff, argued that the case of *Hardaker* v. *The Idle District Council* (1896), 1 Q.B. 340, was a clear authority in his favour. The facts in that case were very different. A contractor had to make a sewer, and in doing so he broke a gas pipe which caused damage. The District Council were held responsible, but the distinction is there pointed out between the neglect of the contractor in the performance of his contract, and his negligence in other respects, which is called collateral negligence, which RIGBY, L.J., defines as negligence other than the imperfect or improper performance of the work which the contractor is employed to do—that is, the negligence which is charged here. The tree which was left is some distance from the highway, and leaving it in a dangerous position was an act of carelessness on the contractor's part. If the Municipality had directed the contractor to enter on this land for the purpose of obtaining the gravel, then the declaration of

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Lord WATSON, in *Dalton* v. *Angus*, 6 App. Cas. 740, would be applicable. He says, when an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbour's house which he is under an obligation to support, he is not liable for the negligence of the contractor; but in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions; and in *Bower* v. *Peate*, 1 Q.B.D. 321, it is held that a man who orders work to be executed, from which in the natural course of things injurious consequences to his neighbour must be expected, is bound to take steps to prevent the mischief, and cannot relieve himself from his responsibility by employing some one else to do what is necessary to prevent injury. No necessarily injurious consequences could arise in the present case to make the Municipality liable for the act of Thomas.

Judgment of DRAKE, J.

On the other branch of the case, with regard to the distinction between acts of misfeasance and nonfeasance, this question has been greatly considered in the cases of *Sydney* v. *Bourke* (1895), A.C. 433, and in *Cowley* v. *The Newmarket Local Board* (1892), A.C. 345, and it now must be treated as settled law that Municipal Corporations are not liable for non-repair of a highway, even if the duty to repair was unquestionable. The misfeasance alleged is leaving a tree adjoining a highway standing which ought to have been removed by the contractor; this was an act of omission on his part, as I have already shewn. And the collateral negligence of the contractors cannot impose a liability on the Municipality.

For these reasons I think the appeal should be allowed, but without costs.

Judgment of McCOLL, J.

McCOLL, J.: I think the jury reasonably could upon the evidence find, and in effect did find the gravel to have been taken by the defendants in the exercise of their statutory

power, and I agree that there is no sufficient ground for granting a new trial. It seems to me clear, from the nature and object of this power, that as regards its exercise the defendants plainly owed a two-fold duty.

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Their duty to the owner of the land was to take the gravel in a reasonable way, not the less that their power was to take it without any compensation to him, and no mode of taking the gravel having been provided for, they would not be acting reasonably if they did not take it in such manner as to do as little damage to his land and the timber upon it, as the condition of the gravel permitted.

The defendants' duty to the public, in whose interest alone the power was conferred, was, especially in view of the control vested in them over highways, and the very purpose to which the gravel was to be applied, to exercise their power so as not to injuriously affect the public, and particularly in their use of the highway. It would be strange, indeed, if in making repairs for the purpose of enabling the travelling public to use the highway more advantageously, the defendants were under no obligation in the circumstances disclosed by the evidence, not to render its use dangerous to the lives of such persons, by the absence of reasonable precaution against obvious risk from falling trees. If the removal from the tree in question of part of its support, already frail, was unnecessary, this was a wrongful act, and whether necessary or not, the removal without felling the tree in the usual way, so as to preserve to its owner whatever value it might retain, and also to avoid endangering the use of the highway, was, I consider, entirely to fail to perform the duty required of the defendants.

Judgment of McColl, J.

I do not understand upon what principle the defendants can be held to have got rid of their responsibility by the course adopted, whatever view may be taken of it.

The only defence suggested, applicable to the question now under discussion is, that Thomas was a contractor

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employed by the defendants, and that the negligence was his alone, and was collateral. The negligence of Thomas in removing the gravel was no doubt collateral to the performance by him of his contract to repair the road, and would be so whether he took the gravel solely of his own motion, or under a contract with the defendants, or merely by their authority, and of course would equally be so, whether the contract, if any, was part of his contract to repair, or separate from it.

The circumstance that the defendants exercised their power by the instrumentality of Thomas, could not absolve them from their duty. Their authority to him did not, either in substance or in the form in which it was given, create and, as I think, could not in any circumstances of the exercise of this power have created, any such relationship as that of an independent contractor in the sense contended for, and even assuming that Thomas removed the gravel under a contract to remove it, the negligence complained of would not be collateral with reference to such contract. Without citing cases which are fully discussed in the opinions of the other members of the Court, which I have had the great advantage of reading, I think the judgment should be affirmed.

Judgment of McCOLL, J.

Appeal dismissed.

ALDRICH v. NEST EGG COMPANY.

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ALDRICH v. NEST EGG CO. LTD

Practice—Law Stamp Act, C.S.B.C. 1888, Cap. 70, Secs. 9, 10, 12, 15 and 16 (a)—Unstamped summons—Power of Court to affix stamp after judgment—"Knowingly and wilfully" violating Act.

No law stamps being obtainable, a County Court summons was issued and served without being stamped, and judgment was signed in default. FORIN, Co. J., on the *ex parte* application of the judgment creditor after judgment, ordered the stamp to be affixed under section 15 of the Law Stamp Act, C.S.B.C. 1888, Cap. 70, and afterwards refused an application by the defendant Company to set aside the judgment.

Upon appeal to the Full Court from the refusal to set aside the judgment.

Held, per DAVIE, C.J., DRAKE and MCCOLL, JJ., concurring, dismissing the appeal, that the omission to affix the law stamps did not, under the circumstances, constitute a knowing and wilful violation of the Act, and the order for the due stamping of the process was therefore properly made.

APPEAL from a judgment of FORIN, Co. J., refusing to set aside a County Court judgment obtained against the Statement.

NOTE (*a*)—"9. No matter or proceeding whatever, upon which any fee is due or payable to the Crown as aforesaid, shall be issued or shall be received or acted upon by any Court, or by any officer of any Court, until a stamp or stamps under this Act for the sum corresponding in amount with the amount of the fees so due or payable to the Crown as aforesaid, for, upon, or in respect of such matter or proceeding and in lieu of such sum so due or payable to the Crown, has or have been attached to or impressed upon the same."

"10. Every matter and proceeding whatever, upon which any such fee is due and payable to the Crown as aforesaid, and which is not so duly stamped, shall, if not afterwards stamped under the provisions of this Act, be absolutely void for all purposes whatsoever."

"12. No Sheriff, or other officer or person, shall serve or execute any writ, rule, order or proceeding, or the copy of any writ, rule, order or proceeding upon which any such fee or charge is due or payable,

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defendant Company by default on a summons which, owing to stamps not being obtainable at the time of its issue, was not stamped in accordance with the provisions of the Law Stamp Act, *supra*. After judgment an order was made, on the *ex parte* application of the judgment creditor, for the due stamping of the writ of summons under section 15 of the Act.

The appeal was argued before DAVIE, C.J., DRAKE and MCCOLL, JJ., on 5th November, 1897

Argument.

Gordon Hunter, for the appeal: Section 12 expressly enacts that if the Sheriff serves process unstamped, such service shall be void; the judgment, therefore, being based on a void service, is also invalid, and no effect could be given to it by the subsequent affixing of the stamps, under section 15; see the absence, in section 12, of the words "if not afterwards stamped under the provisions of this Act," in section 10: *Smith* v. *Logan*, 17 P.R. 219. In any event it is admitted that the plaintiff knew of the omission to stamp, but he attemps to excuse it by saying that no stamps could be obtained; by the omission therefore the Act was "knowingly and wilfully violated," and the Judge had no

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and which is not stamped under this Act; and every such service and execution contrary to this Act shall be void, and no recompense shall be allowed therefor."

"15. Any party to any matter or proceeding in any Court which ought to be, but is not, so duly stamped, may apply to the Court in which such matter or proceeding is pending, or to any Judge having jurisdiction in the case, for leave to have the same duly stamped; and in case this Act has not been knowingly and wilfully violated, the application shall, on payment of costs, be granted for the duly stamping of such matter or proceeding, with stamps of such amount beyond the fee due thereon as may be thought reasonable, not exceeding ten times the amount of the stamp."

"16. The affixing of such stamp or stamps under any order made for that purpose, shall have the same effect as if the said matter or proceeding had been duly stamped in the first instance."

power to order the stamps to be affixed, especially after judgment.

L. P. Duff, contra: The omission to affix the stamps was an irregularity which could be remedied by leave to affix the stamps, which was properly granted by the Judge under section 15.

DAVIE, C.J.: The knowing and wilful violation of the Act alluded to in section 15, imports a wilful violation with intent to evade its provisions: Sections 15 and 16 clearly point to such a case as this. There has been no such wilful violation of the Act in this case. It was simply impossible to comply with it. The subsequent affixing of the stamps being therefore regular, has, by virtue of section 16, the same effect as if the proceeding had been stamped in the first instance, and the refusal to set aside the judgment was proper. The appeal should be dismissed.

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DRAKE and MCCOLL, JJ., concurred.

Appeal dismissed with costs.

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BRIGMAN v. McKENZIE, *ET AL.*

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BRIGMAN v. McKENZIE

Practice—Local Judge of Supreme Court—Jurisdiction—Rule 1,075—Order ultra vires—Whether nullity—Full Court—Jurisdiction on appeal—Rule 354—Costs.

Notice of trial having been given in an action in the Supreme Court for trial with a jury, and the plaintiff not appearing, judgment was given for defendants.

Held, by the Full Court on appeal from the judgment:

1. A local Judge of the Supreme Court has no power to sit as a Trial Judge in an action.
2. An order issued by and purporting to be an order of the Supreme Court (although made *ultra vires*) is not a nullity, but is valid until set aside by the Court.
3. Although an appeal lies from such an order to the Full Court, the more convenient and inexpensive course is to move before a Judge to rescind it, and the appeal was therefore allowed with costs as of a motion to rescind.

Statement.

IN an action in the Supreme Court in which notice of trial before a Judge and jury had been given, FORIN, Co. J., assumed to sit at the trial as a Supreme Court Judge, and the plaintiff not appearing, he, on the application of the defendants, dismissed the action with costs. From this judgment the plaintiff appealed, on the ground that the County Court Judge had no jurisdiction to try the action.

Argument.

W. J. Taylor, for the appellants: FORIN, Co. J., had no jurisdiction to sit as a Supreme Court Judge at a trial, and no suggestion had been made by the respondents that he had any such right.

L. P. Duff, for the respondents: The order is interlocutory only: *Salaman* v. *Warner* (1891), 1 Q.B. 734, and the matter was properly heard before a Co. J. [*Per curiam: Salaman* v.

Warner does not apply, as this was not an interlocutory motion, but judgment at the trial.] This motion should have been made to a Judge—Rule 354—and not by way of appeal. The Full Court is not a Court of first instance: *Gibson* v. *Cook*, 5 B.C. 534. Either the order is valid until set aside, or a nullity as being made without jurisdiction. If the latter, then it is not a subject of appeal, for the Court only hears appeals from orders of a Judge within his jurisdiction. If valid until set aside, then, until so set aside, the order is as binding as if properly made by a Supreme Court Judge, in which case, also, it would not be a subject of appeal, but of special application under S.C. Rule 354. A judgment given by a Judge, *ultra vires*, can only be set aside under the above rule, and is not appealable: *In re The Scottish Ontario Land Company*, 21 Ont. 676.

Judgmen of DRAKE, J.

DRAKE, J.: The order in this case purports and on its face appears to be an order of the Supreme Court, and is so entered on the records of the Court. It was made by a local Judge of this Court, whose jurisdiction is of a limited nature, and who was not authorized to hear trials set down for hearing in the Supreme Court. The contention is that having been made in excess of jurisdiction, it is a nullity, and does not require any proceedings to be taken to cancel or remove it. This is not the case. However bad or imperfect an order may be, when it once is passed and entered by a proper officer, it becomes a part of the Court records, and must be set aside by a Court of competent jurisdiction. The Rule 354 provides for applications being made to the Court, or a Judge, to set aside orders made by default of the parties appearing, and in my opinion that course should have been adopted in this case, not but what the parties can come to the Full Court for the same purpose, but I do not think it right that where two courses are open, one simple and expeditious, the other costly, that the other side should have to bear the costs of the more expensive mode of

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procedure. I therefore consider that the appeal should be allowed, with costs not exceeding the costs which would have been incurred if the provisions of Rule 354 had been invoked.

MCCOLL, J., concurred.

DAVIE, C.J.: I think the appeal should be dismissed for want of jurisdiction. This is a Court of Appeal only.

Appeal allowed with only such costs as upon an application to a Judge in Chambers.

WELLER v. SHUPE, *ET AL.*

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Mechanic's lien—Sufficiency of affidavit—Labour and materials undiscriminated.

In an affidavit for a Mechanic's lien, the particulars of the claim as stated were "the putting in bath tubs, wash tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace, and waste pipes, $220.00."

FORIN Co. J., at the trial, refused a motion for a nonsuit, and referred it to the Registrar to ascetrain how much of the claim was for labour and directed judgment to be entered for the plaintiff for that amount.

Held, by the Full Court, on appeal, per MCCOLL and DRAKE, J.J., (Davie, C.J., dissenting), that the particulars of the claim were insufficiently stated, under section 8 of the Mechanics' Lien Act, 1891, and also that the claim could not be supported as including, indiscriminately with the claim for labour, a claim for materials, as to which there is no lien.

Per DAVIE, C.J., that the particulars and affidavit were sufficient, and that the separation of the price of the labour from that of the material was a function of the Court exercisable at the trial.

Statement.

APPEAL to the Full Court from a judgment of FORIN, Co. J., in favour of the plaintiff in an action to enforce a

mechanic's lien. The particulars of claim as stated in the affidavit appear in the head note and in the judgment of DAVIE, C.J.

L. P. Duff for the appellant. Under section 8 Mechanic's Lien Act, 1891, the statement of the plaintiff's claim should be as precise as the special endorsement on a writ of summons. The different items in regard to which the lien is claimed and the sum charged for each should be discriminated, and the particulars made sufficient to satisfy the plaintiff, whether in regard to each separate item he ought to pay or resist: *Walker* v. *Hicks*, 13 Q.B.D. 8. The claim here includes a charge for materials as to which there is no lien: *Haggerty* v. *Grant*, 2 B.C. 173. As to defective statement in affidavit, see *Smith* v. *Mackintosh*, 3 B.C. 26. Argument.

No one *contra*.

MCCOLL, J.: I think the affidavit does not comply with section 8.

DRAKE, J.: I also think the affidavit insufficient.

DAVIE, C.J.: I think the claim is sufficient, and I disagree with my learned brother Judges. It is perfectly true that there is no lien for material, but simply because a mechanic has made a claim for material to which he is not entitled along with a claim for labour to which he is entitled is no reason why his whole claim should be disallowed any more than a plaintiff should be denied judgment for his just dues, because he has sued for too much. The particulars of the claim are: "To putting in bath tubs, wash tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, $220.00;" and it is urged that these particulars are not sufficient, and that moreover the labour should have been separated from the material. But these particulars give the defendant abundant information of what is claimed against him; and if Judgment of DAVIE, C.J.

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the work was for a contract price, as probably it was, it is difficult to see what different particulars could have been asked. For aught that appears on the face of the particulars the whole contract may have been for labour ; but upon enquiry it turns out that some of it is for material, and it is said that for the reason, firstly, that the particulars are meagre ; secondly, that the materials and labour are not separated, the lien fails and must be discharged with costs. I fail to perceive the logic or justice of any such conclusion. If it becomes necessary to separate the price or value of the labour from that of the materials, of what use are the functions of the Court with its abundant machinery of enquiries and references, if not to disentangle a thing of this kind ?

It seems to me wholly at variance with the principle of the Lien Act, which is intended to provide a simple and effective procedure that the intelligent mechanic may take in hand personally, to defeat a lien, the justice of which is in no way impeached, upon such slender pretext as urged here.

Judgment of DAVIE, C.J.

Appeal allowed.

IN RE KAYE.

DRAKE, J.

[In Chambers].

1897.

March 20.

IN RE KAYE

Practice—Lunacy—Costs of inquisition terminated by death of alleged lunatic before verdict.

K., a person alleged to be of unsound mind, died during the progress of an inquisition as to his lunacy, and before verdict. On an application by the petitioner in lunacy, supported by an affidavit that the proceedings were taken *bona fide*, and for the sole and only purpose of protecting K.'s estate: DRAKE, J., made a declaration that the costs of the inquisition had been properly incurred and ought to be paid out of K.'s estate in due course of administration.

SUMMONS by William Augustus Richardson, resident medical officer of the Provincial Royal Jubilee Hospital, for a declaration that the costs of the proceedings in lunacy *re* Frederick Kaye, deceased, a supposed lunatic, were properly incurred, and that such costs, and also the costs of the application, ought to be paid out of his estate, in due course of administration. The deceased was taken to the hospital in November, 1896, suffering from paralysis. His property consisted of some real estate, and money in a bank. He was a bachelor, and had no relatives in British Columbia. On the 11th March, 1897, the deceased having become very feeble, the hospital authorities, through their medical officer, W. A. Richardson, petitioned the Court for an inquisition, concerning the lunacy of the deceased, the petition being supported by the affidavits of two medical men, one of whom was attending Kaye, that in their opinion he was of unsound mind, and wholly incapable of the management of himself and care of his property, and that he was suffering from paralysis and cerebral softening of the brain, and DRAKE, J., directed an inquisition accordingly. The alleged lunatic demanded a jury and appeared by counsel on the inquisition which opened on the 19th March; during that day and before any finding by the jury he died. The petitioner now applied for a declaration that

Statement.

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the costs of the proceedings were properly incurred, bringing in his affidavit stating the facts, and saying that he had been informed that some persons were desirous of moving Kaye from the hospital, and that Kaye being, in his opinion, of unsound mind, and incapable of managing his affairs, the hospital authorities had directed the proceedings, which were taken *bona fide* and for the sole and only purpose of protecting Kaye's estate, and having it controlled and managed under the direction of the Court, and were necessary and proper for such purpose. The application was heard by DRAKE, J.

Argument.

H. D. Helmcken, Q.C., for the application, referred to *In re Meares*, 10 Ch. D. 552.

P. Æ. Irving, for the solicitors on the record of the deceased.

A. P. Luxton, for the official administrator, to whom letters of administration of Kaye's estate had been issued.

Judgment.

DRAKE, J.: The applicant is entitled to a declaration that the costs were properly incurred, and ought to be paid out of Kaye's estate in due course, and there will be an order accordingly, and for the payment of the costs of Kaye's solicitors, and of this application.

Order accordingly.

NOTE: The form of the order was as follows:—"It is hereby declared and certified that the costs of the proceedings in Lunacy *re* Frederick Kaye, a supposed lunatic, were properly incurred, and that such costs and also the costs of this application and consequent thereupon, ought to be paid out of the estate of the above named Frederick Kaye, deceased, in due course of administration. And it is hereby ordered that the costs of the said proceedings in lunacy *re* Frederick Kaye, a supposed lunatic, and also the costs of this application and consequent thereupon be taxed, and after taxation be paid by the administrator out of the estate of the said Frederick Kaye, deceased, to the solicitors for the said W. A. Richardson, and to the solicitors upon the record for the said Frederick Kaye in the said proceedings."

FRANCOEUR AND McDONALD v. ENGLISH.

BOLE, CO. J.

1897.

May 18.

FRANCOEUR v. ENGLISH

Mining location—Mineral Act, 1896, Secs. 16, 19 and 27—Priorities between locators.

Per BOLE, Co. J.: 1. An error in the statement on the initial post of the approximate compass bearing of No. 2 post of N.E. and S.W. instead of N.W. and S.E. is fatal to the validity of the location of the mine.

2. That, as a fact, such a mode of location was calculated to mislead other persons desirous of locating claims in the vicinity; and therefore could not be treated as a *bona fide* attempt to comply with the provisions of the Mineral Act, 1896.

3. That the plaintiffs' prior location not having been recorded within the prescribed time was abandoned and of no validity as against the defendant's subsequent location properly recorded.

Statement.

ACTION by plaintiffs as locators and recorders of the "O. K." mineral claim for an order that the record by the defendant of the "Little Duke" mineral claim subsequently located by him and covering the same ground as the "O. K.," should be declared null and void and cancelled; for an injunction and damages. At the trial, it appeared that the plaintiffs had marked on their initial post the approximate compass bearing of the No. 2 post as northeast and southwest instead of northwest and southeast. The facts more fully appear from the judgment.

D. G. Macdonell, for the plaintiffs.

E. A. Jenns and *H. F. Clinton*, for the defendant.

Judgment.

BOLE, Co. J.: The plaintiffs claim to be owners of a mineral claim, known as "O.K.," situate on Pitt Lake, and allege that it was located on the 27th December, 1896; that on the 7th January, 1897, they applied to record the claim, and fyled the necesary declarations, and did all things necessary to entitle them to record it; that on the 26th

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January they received the record of said claim, duly issued; that subsequent to the 26th January, 1897, the defendants trespassed on the said claim and threatened to continue said trespass; that on the 8th February the defendants recorded the claim known as the "Little Duke," which claim is wholly located on the claim of the plaintiffs already mentioned, which record is a cloud on the title, and they ask: (1) That the record of the mineral claim issued by the Mining Recorder to the defendant in this action should be declared null and void, and removed as a cloud on the plaintiffs' title; (2) For a declaration that the plaintiffs are entitled to the said mineral claim by virtue of the record issued to them, and that the said record should date from the 7th January, 1897. That the defendant be restrained from trespassing on the said claim; and (3) Damages for such trespass.

Judgment.

From the evidence, it appears to me that the plaintiffs herein have not fulfilled the conditions of section 16 of the Mineral Act, 1896, because paragraph 4 of their declaration states as follows: "I have written on the No. 1 post the following words: We have this day located this ground as a mineral claim to be known as the "O.K." mineral claim, 1,500 feet in length by 1,500 feet in width; the direction of the location line is northeast and southwest; 750 feet of this claim lie to the right, and 750 feet to the left of this location," whereas the true direction of the line is northwest and southeast. And paragraph 5 is to the same effect.

It is true that section 16 (sub-section *d*) provides 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 this 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."

Now it appears to me that such a record was most decidedly calculated to mislead other persons desiring to locate claims in the vicinity; but it does not become necessary to decide the case upon this point alone, as I find that the only official record of the "O.K." claim which I can look at, namely, that on the 26th January, 1897, was made too late, and subsequent to the record of the "Little Duke," which appears to have been made in time. Section 27 provides: "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 official "O.K." record was confessedly not made within the time limited by the statute. With respect to what occurred between the Recorder and the applicants on the 7th January, I conceive I have at present nothing whatever to do. If the Recorder in any way failed to do his duty, the law has provided a remedy therefor; his action in the premises has, to my mind, nothing whatever to do with the matter now before me. Besides all this, the evidence of the plaintiff McDonald shews that at the time of the location he was working for Clinton, who, I gather, is interested with English, so that it is probable the defendant might be in a position to ask to have the plaintiffs, if their location was a good one, declared trustees for him. Plaintiff admitted he was in Clinton's employ on the Saturday and Monday, but considered himself justified in taking up a claim on his own account on the intervening Sunday; but in so doing he overlooked the fact that this is a Court of equity as well as a Court of law; so that it appears to me that the plaintiffs cannot be said to have even the merits in their favour, apart from all technical questions.

Judgment.

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Judgment.

As I understood the case of the *Nelson & Fort Sheppard Railway Company* v. *Jerry*, 5 B.C. 401, commonly known as the *Paris Belle case*, it appears to lay considerable stress upon the importance of priority of record, where there is a valid location, as in this case. It appears to me the record of the defendant having been made in time, and the record of the plaintiffs being made outside the prescribed time limit, I must give effect to the protection which the Act intended to extend to free miners. The Recorder's office is the natural and proper place to make enquiries, and to adopt any other rule would be to lead to endless confusion and difficulty. Holding this view, and being of opinion that the plaintiffs have failed to shew that they are entitled to the relief claimed, I must give judgment for the defendant, with costs.

Action dismissed.

JONES v. PEMBERTON.

DAVIE, C.J.

[In Chambers].

1897.

Dec. 1.

JONES v. PEMBERTON

Practice—Order XXX.—General summons for directions—Particular summons for examination—Costs.

Where a summons is taken out with respect to any of the matters for which under Rule 269 (*a*) a general summons for directions should have been taken, the costs will be reserved, to consider whether, in the event of any other summons being taken out, all such applications could not have conveniently been dealt with under a general summons, and the costs only of such an application allowed.

APPLICATION by the plaintiff for an order to examine the defendant. Statement.

W. H. Langley, for the application.

A. S. Potts (Drake, Jackson & Helmcken), *contra*, objected that one general summons for directions under Order XXX. should have been taken. Argument.

DAVIE, C.J.: The order will be that the costs be reserved to consider, in the event of any other interlocutory application being made, all such applications should not have been included in one general summons for directions, and conveniently disposed of in this manner by the Court or a Judge, and the costs only of such a summons allowed. Judgment.

Order accordingly.

NOTE (*a*): In every cause or matter one general summons for directions may be taken out at any time by any party, with respect to the following matters and proceedings: Particulars of claim, defence, or reply, statement of special case, discovery, (including interrogatories), commissions and examinations of witnesses, mode of trial (including proceedings in lieu of demurrer and trial on motion for judgment and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial.

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BANK OF MONTREAL v. HORNE

BANK OF MONTREAL v. HORNE.

Examination de bene esse—When permitted—Rule 749—Abridgement of time under.

The serious illness of a necessary witness is ground for granting an order for his examination *de bene esse*.

When justice so requires, the Court will make an order abridging the month's notice required by Rule 749 from the party desiring to proceed in the action in which there has been no proceeding for one year from the last proceeding.

Statement. APPLICATION to abridge the month's notice required under Rule 749 in an action where there has been no proceeding for one year, and for an order to examine a witness *de bene esse*.

A. Williams, for plaintiff.
J. H. Senkler, contra.

Judgment. BOLE, L.J.S.C.: The application herein is made to abridge the month's notice required by Rule 749, and to examine a witness on the ground that he is seriously ill. Bearing in mind the decision in *Webster* v. *Myer*, 14 Q.B.D. 231; *Saunders v. Pawley*, 14 Q.B.D. 234, I feel hesitation in granting the application; but, again, *Warner* v. *Moses*, 16 Ch. D. 100, seems an authority in favour of granting an order for the examination of a witness, where the interests of justice require it. No case all fours with the present application has been cited to me, and in the absence of express authority I am compelled to consider as an element influencing my decision, what course is best calculated to serve the administration of justice. If I refuse the application, and the Court of Appeal should hold I erred in doing so, the mischief would be irremediable if the witness died

meantime; while, if I am wrong in making the order to abridge the time and examine the witness, it is no more than a matter of costs. Under these very peculiar circumstances, I feel it is my duty to grant the application; costs to be costs in the cause.

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Order made.

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DRAKE, J.
[In Chambers].
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Examination for discovery—Right of defendant to withhold names of his witnesses—Order LXI. Rule 715, 716.

A party is not, upon his examination for discovery under order LXI., bound to disclose the names of his witnesses. The defendant in an action for maliciously swearing out a search warrant was asked upon such an examination to give the names of the persons upon whose information he proceeded as constituting reasonable and proper cause for his action, which he refused to do. On an application under Rule 715 to strike out his defence for such refusal:

Held, following *Smith* v. *Greey* 10 P.R. 482, that there should be a fair disclosure of the line of defence contemplated but no identification of persons such as would enable the opposite party to fix upon the defendant's witnesses and that the refusal was justified.

Statement.

SUMMONS under Rule 715 to strike out the defence of the defendant for refusal to answer questions upon examination for discovery.

Archer Martin, for the application.
A. E. McPhillips, contra.

Judgment.

DRAKE, J.: The plaintiff applies to strike out the

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defence because the defendant on his examination for discovery, on the advice of his counsel, refused to disclose the names of the witnesses on whose information he acted in swearing out a search warrant against the plaintiff.

Order LXI. refers exclusively to *viva voce* examinations of parties to an action before trial. The objects of this order are to ascertain the facts upon which the parties to the litigation respectively rely and for this purpose the examination may be of a searching character as far as regards the questions raised in the action. By Rule 715 any person refusing to answer a lawful question shall be deemed guilty of a contempt of Court and shall if a defendant be liable to have his defence struck out, but this rule is subject to Rule 716 where if a party objects to a question the validity of the objection shall be decided by a judge. The latter rule is the one under which the present case falls.

Judgment.

Mr. *Martin's* contention is that it is of great importance to know whether the persons on whose information the defendant relied are persons of credibility or whether they are persons who may have a grudge against the plaintiff. The cases cited in support of his contention refer to patent and trade mark cases where it might be essential to know the names of the persons who had dealt with the protected articles. See *Birch* v. *Mather*, 22 Ch. D. 629, and *Crossley* v. *Tomey*, 2 Ch. D. 533 there the defendant was held bound to give the names of the persons who it was alleged had made use of the invention prior to the date of the patent, these cases however were decided on a section in the Patent Act and cannot be looked upon as varying the general principles on which discovery is based. *Benbow* v. *Low*, 16 Ch. D. 93, decides that the interrogating party is not entitled in principle to see the evidence by which his opponent is prepared to support his case. In *Smith* v. *Greey*, 10 P.R. 482, Chancellor BOYD held that the general law applicable to discovery governed in patent cases and stated that there should be a fair disclosure of the lines of

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attack contemplated but no such individualizing of persons as would enable the plaintiff to fix upon the defendant's witnesses. This is a decision on rules similar to ours and it is one which commends itself to me as consonant with right. To disclose the names of witnesses by whom it is intended to prove certain facts would give the other side an advantage which unscrupulous persons would not be slow to take advantage of. In my opinion this summons must be dismissed with costs to the defendant.

Summons dismissed.

ELSON v. CANADIAN PACIFIC RAILWAY COMPANY.

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ELSON
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C. P. R.

Practice—Examination for discovery—Not obtainable as of right—Rule 708.

A party in an action is not entitled as of right to an order for discovery of documents by the opposite party, but must shew to the Court *prima facie* that there are documents to be discovered, and that they are material to the issue.

An application to examine a party before trial under Rule 708 should be supported by affidavit.

Statement.

SUMMONS in Chambers by the defendant Company for plaintiff to furnish an affidavit of documents, and also to examine the plaintiff for discovery under Rule 708.

W. Myers Gray, for the plaintiff.

Alexander Henderson, for the defendants.

Judgment.

BOLE, L.J.S.C.: The application herein is made on behalf of defendant: (1) For an affidavit of documents by the plaintiff; (2) for an order to examine the plaintiff *viva voce* before trial—no affidavits having been fyled. The rule *re viva voce* examination (708) is partly copied from Ontario Rule 492, and the summons should be, I think, supported

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by affidavit, as indeed was admitted to be the case on the argument; so that the latter part (2) of the summons must be dismissed. Now with respect to the first part (1) of the summons, asking for an order for discovery of documents under B.C. Rule 283 (corresponding English Rule 354), while it is true that the party applying for an affidavit of documents is not required to fyle an affidavit, still it does not follow that the order is granted as a matter of course, but the Court must ascertain from the pleadings the questions to be tried, and be satisfied that some good can be reasonably expected from making the order. In this case the action is brought by the plaintiff as administrator of his deceased son, who was killed in a railway accident, and the nature of the case renders it unlikely in the extreme that there are any documents to produce, nor is it suggested that there are any in existence. LINDLEY, L.J., *In re Wills Trade Mark* (1892), 3 Ch. 207, says: "There is nothing in modern times which requires greater care than making orders for discovery and inspection of documents. The old practice of the Court of Chancery was limited to cases with which the Chancery Courts were familiar, such as breaches of trust where all the documents were in the possession of a trustee, and the *cestui qui trust* knew nothing about the matter; and in that class of cases the practice was admirable, and, without it, it would have been impossible to administer justice. But the tendency to extend the power of the Court to order discovery in cases of a totally different character ought to be very carefully checked, and certainly not encouraged. Nowadays a man cannot run over another in the street without there being an application for an affidavit of documents." I therefore think the summons must be dismissed, costs thereof to be plaintiff's costs in the cause in any event.

Judgment.

Application dismissed.

REGINA v. REDNER.

BOLE, L.J.S.C.

1898.

Jan. 24.

REGINA v. REDNER.

Parent and child—Infant, a female over sixteen years—Right to custody of—Habeas corpus.

The parents of an infant who is under the age at which it may elect as to its custody, may be deprived of that custody if the Court is satisfied that such a course is necessary for the child's welfare.

Where an infant has attained the age of election, the Court ought to separately examine the infant, and adopt its wishes on the subject.

Statement.

AN illegitimate child named Ellen Atanasse had been placed by her parents when six years old in the Mission School for Indian and half-breed children at Fort Simpson, which is managed by the Methodist Church of Canada. After the child had been an inmate of the Mission School for about ten years, the mother, desiring that the child should be brought up in the Roman Catholic religion, applied for and obtained an order *nisi* for a writ of *habeas corpus* to issue. To this order *nisi* the defendant (the matron of the school) shewed cause, and evidence was given and the matter argued before BOLE, L.J.S.C., on 20th January, 1898. The facts sufficiently appear in the judgment.

G. E. Corbould, Q.C., for the Crown.

R. W. Harris, contra.

Cur. adv. vult.

January 24th, 1898.

Judgment.

BOLE, L.J.S.C.: Some ten years ago Apostle Atanasse, the putative father of Ellen Atanasse, with the consent of Mary James, her mother (an Indian woman), placed the girl at the school in question, which is a charitable institution for Indians and half-breed children, managed in connection with the Methodist Church of Canada. When handing

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over the child to the Rev. Mr. Crosby, Principal of the school, it is alleged, but this is positively denied by Mr. Crosby, that there was some stipulation made as to the child being educated a Roman Catholic; her mother and father being members of that church. Be that as it may, the girl has, since her admission to the school, been continuously educated in the Methodist Catechism, and now declares herself an adherent to that church; and, bearing in mind the surrounding circumstances and the entire omission of any reference to the alleged stipulations *re* the religious education of the girl in either of the affidavits of the mother of Atanasse fyled herein and the explanation given by the latter in reply to a question put by the Court, *i.e.*, that he forgot it, I am afraid that the allegations now made by both on this subject for the first time are due to erring memory and a misconception of the facts. The girl herself

Judgment.

positively swears she is over sixteen years of age, a statement confirmed by her appearance and family history, and even on Atanasse's own shewing she is nearly sixteen. From the evidence before me, I am satisfied as I find as a fact, that she is above the age of sixteen years. In order to remove any possible influence the defendant might have over the girl, she was, by consent, examined before me in the presence of both counsel, the Registrar and Stenographer, excluding all other persons, and she satisfied me beyond reasonable doubt that she voluntarily made the affidavit fyled herein, and wished to return to the school, and did not wish, but, on the contrary, was strongly opposed to being turned over to the care of her putative father and his wife; she alleged that while with them on a former occasion, when absent from the school, they both—*i.e.*, her father and her quasi stepmother—beat and otherwise ill-treated her. She also satisfied me that there was no justification or good grounds for her letter of 24th August last, wherein she made charges of cruelty against Mrs. Redner, which she knew were untrue, but that the letter

was recklessly written when the writer was in a fit of ill-temper, at a time when she was undergoing punishment for deliberate disobedience of reasonable orders. And even if the girl were not more than fifteen in August, 1897, as contended by her mother, I think that if I compelled her to leave the school, where she is happy and well treated, and handed her over to her mother, to be by her handed over to her putative father and his wife till August, 1898, when I have no doubt she would, if in her power, gladly return to the school, I would not be acting for the true welfare of the girl in the large sense in which the term was worded by Lord Justice LINDLEY, *In re McGrath* (1893), 1 Ch. 143, quoted with approval in *Regina* v. *Gyngall* (1893), 2 Q.B. 232 (C.A.) But it is not necessary to decide it on that view of the case alone; for, as I find the girl is above the age of sixteen, and, therefore, capable of consenting or not consenting, and is consenting to the place where she is, then the very ground for a *habeas corpus* falls away: *In re Agar-Ellis*, 24 Ch. D. 317.

Judgment.

I, therefore, think the application must be dismissed.

Application dismissed.

WALKEM, J.

1898.

Jan. 27.

CONNELL v. MADDEN.

Mineral law—Mineral Act, 1894, Sec. 4—No. 1 post in U.S.A.

CONNELL v. MADDEN

It appearing that the No. 1 post of a mineral claim was upon the United States side of the international boundary line:

Held, That the location was invalid.

Statement.

ACTION to enforce an adverse claim. The facts sufficiently appear from the judgment. The action was tried at Nelson before WALKEM, J., on 5th June, 1897.

P. McL. Forin, for the plaintiff.

W. J. Taylor, for the defendant.

January 27th, 1898.

Judgment.

WALKEM, J.: The plaintiff located and recorded a mineral claim in the Kootenay District as Boundary No. 2, in June, 1895. Prior to this, namely in August, 1894, a considerable portion of the same ground had been recorded by the defendant as being part of the Sheep Creek Star mineral claim. The defendant having given notice of his intention to apply for a certificate of improvements, the plaintiff has brought these adverse proceedings in order to oppose its issue, and also to test his right to the ground in dispute. The evidence at the trial shewed that the defendant had planted his No. 1, or initial post, 287 feet south of the international boundary line, and run his centre line northward. As a matter of common sense, a post thus planted in a foreign country could not be a boundary post within the meaning of any of the Mineral Acts, and, in my opinion, it would for that reason be a nullity. Moreover, the requirements of section 4 of the Mineral Amendment Act, 1894, to the effect that the "Provincial Government surveyor shall," when surveying a mineral claim, prepara-

tory to the issue of the Crown grant, "be guided entirely by posts No. 1 and 2, and the notice on No. 1, the initial post, and the records of the claim," could not, with respect to the initial post in question, be carried out without that officer committing a palpable and most improper act of trespass on foreign soil. Such a survey could not be sanctioned by the Provincial Government. The whole location of the Sheep Creek Star is, under the Mineral Acts up to, and inclusive of the Act of 1894, invalid for want of an initial post. It was argued that the plaintiff's title was defective, owing to one of his posts being on the Good Enough location; but that location was not shewn to be a valid one. The plaintiff is entitled as between him and the defendant to possession of the ground in dispute and to a declaration to that effect, and also to the effect that the location and record of the Sheep Creek Star, made in August, 1894, by the defendant, is invalid. The plaintiff is entitled to the costs of these proceedings.

Judgment.

Judgment for the plaintiff.

DRAKE, J.

1897.

June 12.

FULL COURT

1898.

Jan. 28.

REGINA v. LITTLE

REGINA v. LITTLE.

Coal Mines Regulation Act, C.S.B.C. 1888, Cap. 84, Sec. 4—Summary conviction—Prohibition without penalty—Quashing conviction.

The Coal Mines Regulation Act by section 4 provided: "No boy under the age of twelve years, and no woman or girl of any age, shall be employed in or allowed to be for the purpose of employment in any mine to which this Act applies below ground." By section 12, if any person contravenes or fails to comply with, etc., "any provision of this Act with respect to the employment of women, girls, young persons, boys or children, he shall be guilty of an offence against this Act." By section 95, "every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is . . . the manager, $100.00."

In 1890, section 4 was amended by inserting the words, "and no Chinamen" after the word "age."

The defendant was convicted before two Justices of the Peace of having employed a Chinaman in a coal mine under ground, and was fined $100.00.

Upon application for *certiorari* to quash the conviction:

Held, by DRAKE, J., confirmed by the Full Court, DAVIE, C.J., WALKEM and IRVING, JJ.: That a contravention of the amendment to section 4 prohibiting the employment of Chinamen was not made an offence under the Act for which any penalty is imposed and that the penal Act should not be extended beyond the reasonable construction which the words used would bear.

The Interpretation Act, Sec. 8, Sub-Sec. 21, providing that "any wilful contravention of any Act which is not made an offence of some other kind shall be a misdemeanour and punishable accordingly," did not assist the conviction.

Statement. APPLICATION by Francis Dean Little, manager of the Union Colliery Company, for a writ of *certiorari* to bring up and quash his conviction had before two Justices of the Peace for the employment of Chinamen in the Company's coal mines below ground contrary to section 4 of the Coal

Mines Regulation Act as amended by section 1 of the Coal Mines Regulation Amendment Act, 1890, by which he was fined $100.00 in respect of the offence charged. The grounds of the application were that the employment of Chinamen was not made an offence by the Act, and also that the prohibition of Chinamen from working in coal mines as provided was unconstitutional and *ultra vires* of the Provincial Legislature as being an interference with the question of aliens and their rights in this Province.

Robert Cassidy, for the application.
Gordon Hunter, contra.

Cur. adv. vult.

June 12th, 1897.

DRAKE, J.: A rule was obtained in two cases which are exactly similar, except that the Chinamen employed are different. The grounds of the rule are that the convicting Justices had no jurisdiction; that the Coal Mines Regulation Amendment Act, 1890, was *ultra vires* of the Provincial Legislature; that the employment of Chinamen in coal mines underground is not made an offence by the said Act as amended, no penalty being provided.

Judgment of DRAKE, J.

The rules in both these cases must be made absolute and the convictions quashed, and all moneys paid by the defendant in respect thereof must be returned.

The employment of Chinamen underground is forbidden by the Amending Act, 1890, but any such employment is not made an offence under the Act, for which any penalty is imposed. Section 12 of the Coal Mines Regulation Act, C.S.B.C. 1888, states in detail the several breaches of the preceding sections which shall be considered as offences against the Act; the employment of Chinamen underground is not one of such breaches which is to be treated as an

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offence against the Act—sections 13, 15, 18, 19, 54, 57, 71, 79, and some others. All deal with particular cases, which are to be treated as offences against the Act. The Legislature has been very careful in the enumeration of these various breaches for which penalties under section 95 can be recovered. A penal act should not be extended beyond the reasonable construction which the words used will bear. The statute has prohibited the employment of Chinamen underground, one effect of which would be that in case of breach of contract damages could not be recovered. The Court is asked to read into the Act a penalty which does not exist. The Interpretation Act, C.S.B.C., Cap. 1, Sec. 8, Sub-Sec. 21, was cited as supplying the want. That section says: "Any wilful contravention of an Act which is not made an offence of some kind, shall be a misdemeanour and punishable accordingly."

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Independent of the question whether the Provincial Legislature can, in view of the British North America Act, pass a penal law of this character, the language used clearly cannot be invoked to supply the want of jurisdiction in the Justices. It has the contrary effect, and conclusively proves that the conviction in question was beyond the jurisdiction of the Justices. This being so there is no need to discuss the question of *ultra vires* of the Provincial Legislature in passing the amendment to the Coal Mines Regulation Act. If it was necessary I am bound by the opinion of the Full Court, which has the effect of a judgment, although only given at the request of the Lieutenant-Governor-in-Council. It is not usual to give costs in questions where on *certiorari* the conviction is quashed, so there will be no costs.

Conviction quashed.

Statement.

From this judgment the Crown appealed to the Full

Court, and the appeal was argued before DAVIE, C.J., WALKEM and IRVING, JJ., on January 28th, 1898.

Gordon Hunter, for the appeal.
Robert Cassidy, contra.

DAVIE, C.J.: We think the judgment of the learned Judge appealed from is correct, and we think the appeal should be dismissed, but that costs should not be ordered against the Crown.

WALKEM and IRVING, JJ., concurred.

Appeal dismissed without costs.

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THE BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED, v. ELLIS *ET AL.*

Bills of Exchange Act, Sec. 20—Insertion of rate of interest—Authorization or alteration—Evidence.

Per DRAKE, J.: Where a promissory note is signed or endorsed, leaving a blank space for the rate of interest in an existing clause providing for interest, any party in possession of the note has under Sec. 20 of the Bills of Exchange Act, 1890, made applicable to promissory notes by Sec. 88; *prima facie* authority to fill in any rate of interest; but if the note when signed and endorsed had no clause providing for interest, the addition of such a clause, requiring interest, is an alteration not contemplated when the note was made or endorsed, and avoids it.

Held, on the facts, that the note in question when made and endorsed, contained an interest clause leaving a blank for the rate, and that the plaintiffs were entitled to recover the amount of the note with interest at eighteen per cent. as charged.

The evidence of a handwriting expert upon the question of whether the interest clause was written in before, at the time of, or after the signature and endorsement of the note, was admitted.

Upon appeal the Full Court (DAVIE, C.J., WALKEM and MCCOLL, JJ.), dismissed the appeal.

Statement. ACTION by endorsees against makers and endorsers of a promissory note.

E. V. Bodwell and *A. E. McPhillips*, for the plaintiffs.

C. E. Pooley, Q.C., and *F. Higgins*, for the defendants.

The facts sufficiently appear from the judgment.

Judgment of DRAKE, J. DRAKE, J.: By section 20 of the Bills of Exchange Act, 1890, if a Bill is wanting in any material particular, the person in possession of it has *prima facie* authority to fill up the omission in any way he thinks fit; a simple signature to a blank paper delivered by the signer in order to be converted into a bill, operates as an authority to fill in and use the signature as that of drawer or acceptor, and by

section 88 the provisions of the Act relating to bills apply with necessary modifications to a promissory note, and the maker of a note corresponds to the acceptor of a bill, and the first indorser to the drawer of an accepted bill. The result is that if a note is wanting in any material particular, the person to whom it is given, before he circulates it, can fill up the blank, but this does not authorize any alteration in a bill or note which has been duly executed, for instance, if the rate of interest is altered : *Sutton* v. *Tooner*, 7 B. & C. 416, or if the words "lawful interest" are converted into six per cent : *Warrington* v. *Early*, 23 L.J.Q.B. 47. These are alterations which will avoid a note.

The term alterations includes additions not contemplated when the note was made and indorsed, such as adding a place of payment, or a clause imposing interest.

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The plaintiffs in the action, as holders, sue the defendant Ellis, as maker, and the other defendants as indorsers of a promissory note for $5,000.00, dated May 17th, 1896, and payable six months after date, namely, on 20th November, 1896, with interest at eighteen per cent. per annum. The plaintiffs have recovered judgment against Ellis, and now seek to recover judgment against the indorsers.

From the evidence it appears that Ellis had discounted a note with the British Columbia Corporation for $5,000.00, indorsed by the same parties. The holders of that note requiring payment when it became due, Ellis went to the present plaintiffs and arranged for them to make the advance to take it up, which they did on his handing to Mr. Holland, the manager of the plaintiff Company, a note for six months, with interest at ten per cent., and Mr. Ellis received a cheque for $5,000.00. When the note became due it was not paid, and went to protest on the 18th May, 1896. Mr. Ellis not being able to take up the note, obtained the same several indorsers to indorse a fresh note, which is the one now sued on. That note was filled up by Mr. Brown,

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in his own hand writing, except the figures 18, which refer to the amount of interest. The note, which I have carefully examined, has every appearance of having been written at one time, with the exception of the figures (18). It was suggested that the last words, "as before maturity," are written in a cramped manner as to indicate the possibility of these words having been written after the signature was affixed. I do not attach much weight to this criticism. If the word "maturity" had not been carried to the next line, there would still be ample room to write in the other words as large as the rest of the line without touching the signature and in a straight line. The signature was also the subject of comment as having been written unusually small, in order, as it was suggested, to enable the impeached words to be inserted, and that Mr. Ellis was a party to a fraudulent conspiracy to defraud the indorsers. The other notes shew that the signature of Mr. Ellis was written in his usual manner.

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The note is *prima facie* a valid note, without any alteration visible, and was signed as an accommodation note for Ellis, and was a third renewal for the same principal sum as the previous notes.

The defendants, except Mr. Higgins, all distinctly assert that the words " with interest thereon from date until paid at the rate of 18 per cent. per annum as well after as before maturity " were not on the note when they endorsed it, and that the note ended with the words value received. The contrary is as distinctly asserted by the plaintiffs. This compels a very careful analysis of evidence. (Here the learned Judge discusses the evidence and proceeds.) I have not referred to Mr. Gumpel's evidence, but I think it was receivable, especially as this is a case of disputed handwriting, or rather as to when a document was written, and the Court is entitled to the best evidence that can be obtained in order to arrive at a just conclusion. It is true, expert testimony is at best a question of opinion, based in

many cases on a theory propounded by the person calling the expert. If the defendants had called an expert to prove the impossibility of the disputed paragraph being written at the time alleged, I should have admitted it. This witness deals with reasons why in his opinion the note was written, as alleged by the plaintiffs, and that opinion is confirmatory to the plaintiffs' case. If the plaintiffs' case relied solely on expert testimony, I should not have attached any weight to it, if opposed by direct testimony to the contrary. Having thus gone with care over the evidence, and having to weigh conflicting testimony, I have come to the conclusion that the plaintiffs have made out their case, and give judgment for them with interest at eighteen per cent. to date.

Judgment for the Plaintiffs.

Statement.

From this judgment the defendants brought an appeal to the Full Court, which was argued before DAVIE, C.J., WALKEM and MCCOLL, JJ., on 1st February, 1898.

C. E. Pooley, Q.C., and *F. Higgins*, for the appeal.
E. V. Bodwell and *A. E. McPhillips, contra.*

Appeal dismissed with costs.

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IN RE QUAI SHING, AN INFANT.

Parent and child—Female infant under sixteen—Right of adoptive father to custody of, as against stranger.

In *habeas corpus* proceedings to recover possession of a female child stated to have been adopted and brought up by the applicant, and to have been taken away from him against his will, by a Refuge Home.

Per DRAKE, J.:

1. A person who has adopted and brought up a child obtains thereby no legal right to its custody.
2. The child being a female under sixteen, the age of consent or election as to custody, her choice should not be considered, but her welfare and well being only, and that same were, on the facts, furthered by continuing the custody of the Refuge Home.
3. If the child had been over the age of consent, the Court would have no right to determine who should have the custody or control of her, but only to set her at liberty if detained in unlawful custody against her will.
4. The Court has power under Supreme Court Act, Sec. 10, and Rule B.C. 751, to award costs upon a rule *nisi* for *habeas corpus*.

Upon appeal to the Full Court per WALKEM and IRVING, JJ., dismissing the appeal.

Adoption is not recognized by the law of England, and a foster-parent has no more legal right to the custody of the child of their adoption than a stranger.

Per WALKEM, J.:

The Court has jurisdiction to award costs in *habeas corpus* proceedings.

Per IRVING, J.:

The Court has no jurisdiction to award costs in *habeas corpus* proceedings, but the Full Court has jurisdiction to award costs of appeal.

Per DAVIE, C.J., dissenting (allowing the appeal with costs).

Although the adoption of a child into a family may confer no right to its custody, as against a parent, it constitutes a legal *status* capable of being maintained against a mere invader of the household, and the adoptive father is a person in *loco parentis* for the purpose of recovering the child if taken out of his custody by a stranger.

Statement. APPEAL by one Seid Sing Kow, from an order of DRAKE, J., dismissing a rule *nisi* for writ of *habeas corpus* to bring

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in the body of one Quai Shing, a Chinese girl alleged to be under the age of sixteen years.

The affidavit of the applicant stated that he had adopted the child about five years before, out of the household of one Lim Fei, who was believed to be her uncle, and that since that time the applicant had kept the child as a member of his own family. That when he was absent from home a police constable had taken the child away and placed it under the care of the Chinese Refuge Home, a missionary institution in the City of Victoria, instituted for the purpose of adopting, educating and bringing up Chinese children.

In answer to the application an affidavit by the infant was fyled, which stated that she was about sixteen years old, that she had been kidnapped in China, and sold as a slave, and was brought to Vancouver by the wife of Lim Fei, and that she afterwards lived with them at New Westminster, and that she was sold by Lim Fei to the present applicant, Sing Kow, with whom she lived for five years. The affidavit went on to state circumstances indicating that the applicant's household was an improper and immoral place of abode. It further stated that she did not want to go back to the applicant, but would prefer to stay at the Chinese Home, and was not kept there against her will. There were several other affidavits, *pro* and *con*, put upon the material questions of fact in dispute.

Statement.

F. B. Gregory shewed cause.
H. D. Helmcken, Q.C., contra.

October 26th, 1897.

DRAKE, J.: In this case one Seid Sing Kow applies for a rule *nisi* for a *habeas corpus* to issue to bring up the body of a Chinese girl under the age of sixteen, alleging she is detained in unlawful custody. The applicant is no relation of the girl, and is not a guardian or in any way interested

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in her welfare otherwise than having been her employer and, as he alleges, having been asked to adopt her, by another Chinese woman, also no relative. The child is now in the Chinese Home, and is apparently satisfied with her position, and is well cared for and trained for future usefulness, both morally and intellectually. The circumstances under which she came under the control of Miss Bowes are fully detailed in the affidavits fyled in the case, and I must remark on the great length at which hearsay and gossip have been made to do the duty of facts in these documents. The child is under the age of sixteen and therefore her consent is immaterial. In the *Agar-Ellis case*, 10 Ch. D., 49, Lord ESHER discusses the law. He says anyone who alleges that another is under illegal control, may apply for a writ of *habeas corpus*, following the *Hottentot-Venus case*, 13 East. 195, and thereupon the person in whose control the child is, must appear before the Court. The child's assent is not considered if under the age of consent, but her welfare and well-being only, unless the applicant is legally entitled to the custody and control of the infant. In such a case the Court orders the infant to be handed over to the parent or guardian, or other legal custodian, but here neither the present applicant nor Miss Bowes, the respondent, are entitled in law to the custody and possession of this child. I have, therefore, to consider what is best for her. She is contented with her present position, and is being boarded and educated, and not a suggestion has been made against the treatment which these waifs and strays receive in the Chinese Girl's Home as now conducted. Under any circumstances I should decline to order the child to be given up to the applicant if she was of the age of consent; all the Court could do would be to set her free from control, and let her elect with whom she would like to live. I therefore discharge the rule with costs. As the right to award costs in applications of this character has been questioned, I have examined the authorities *In re Cobbett*,

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14 M. & W. 175: The counsel conceded in argument that the Court had power to award costs when the application came before the Court on a rule *nisi*.

Section 10 of the Supreme Court Act, C.S.B.C. 1888, Cap. 31, gives the Court complete jurisdiction in all civil and criminal cases, and Rule 751 says that subject to the provisions of any Act and the S.C. Rules, the costs of all proceedings in the Supreme Court shall be in the discretion of the Court or Judge. I am not aware of any Act which deals with the costs of applications for *habeas corpus*. If the writ is granted on the application of a person wrongfully detained in custody, it is granted without costs, but if it is refused on the ground that no case is made out, I can conceive that the question of costs may be of importance. In the case of the *Queen* v. *Jones, et al.* (1894), 2 Q.B. 382, costs were given, and although the language of the Act on which that was decided is not exactly the same as ours, yet it is sufficiently near to enable me to treat it as an authority for the present order. I therefore discharge the summons with costs.

Judgment of DRAKE, J.

Rule nisi discharged with costs.

The applicant appealed from this judgment to the Full Court, and the appeal was argued before DAVIE, C.J., WALKEM and IRVING, JJ., on 27th January, 1898.

Statement.

H. D. Helmcken, Q.C., for the appeal: The applicant having placed himself in *loco parentis*, is entitled to the same right in regard to the custody of the child as a father: *Powys* v. *Mansfield*, 3 Myl. & Cr. 359. The custody of foster-parents is recognized: *In re White*, 9 T.L.R. 575. The custody of a natural mother is preferred to that of the putative father in the case of illegitimate children, and the Judges there interviewed the child: *Re T. C. Lewis*, 9 T.L.R. 226; see also: *Re White supra; In re Fitzgerald, Ex parte Child*, 2 Com. L.R. 1801; *Re Suttor*, 2 F. & F. 267;

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Reg. v. *Smith*, 22 L.J.Q.B. 117; *Knowlman* v. *Bluett*, L.R. 9 Ex. 1, 307. Custody of girls under the age of sixteen years belongs to the father, and the age of sixteen is fixed on account of the Criminal Law: Simpson on Infants, pp. 142, 213; *Reg.* v. *Howes*, 3 E. & E. 332; *Mallinson* v. *Mallinson*, L.R. 1 P. & D. 221. The policy of law is to extend the right of guardianship beyond mere consanguinity: Am. and Eng. Ency. of Law, Vol. XIX., pp. 342-344. As to costs: *In re Lewis*, 9 T.L.R. 226, it is decided that the Court has no power to order costs. Also, *Re Beatrice Taylor*, 3 T.L.R. 718; *In re Mills*, 34 Ch. D. 24.

Argument.

F. B. Gregory for respondents: The law of England does not recognize the right of adoption: *Thomasset* v. *Thomasset*, (1894), P.D. 295; Jarman & Bythewood on Convey., Vol. I. p. 525, Note O. The Court will be governed by what is best for the child: *Reg.* v. *Gyngall*, 4 Rep. 448. Unless the applicant be the parent, he has no more right than an absolute stranger: *Re Ah Gway*, 2 B.C. 343. As the learned Judge below put aside the question of alleged immorality, it is for the Court to consider whether he was right in deciding that the appellant is not entitled in law to the custody of the child. Counsel also cited *Rex.* v. *Isley*, 5 A. & E. 441, p. 445, and *Reg.* v. *Nash*, L.R. 10 Q.B.D. 454.

Cur. adv. vult.

February 8th, 1898.

Judgment of DAVIE, C.J.

DAVIE, C.J.: I cannot agree that the applicant has no legal claim to the custody of this child. He is not her father, it is true, nor her legally constituted guardian, but the girl came under his care five years ago, when at the age of eight or nine years, he adopted her, as a member of his family, at the request of Lim Fei, her uncle, who had taken charge of his brother's child upon his death. The applicant's family, consisting of his wife and two little daughters, live with him. One of his sons died last year, and the other is

being educated in China. From the time when he adopted her until she was forcibly taken out of his possession in August last, by a constable acting without semblance of warrant or legal authority, handed over by him to a Mrs. Tyson, and sent by her to the Refuge Home at Victoria, Quai Shing has been reared with and treated as one of the applicant's family.

The notion that an adoptive parent has no claim to the custody of his adopted child, which the law will recognize, proceeds on a passage in a note to Jarman & Bythewood's Conveyancing, Vol. I. p. 525, and upon a ruling of the late Chief Justice of this Court in the case of *In re Ah Gway*, 2 B.C. 343. The passage in Jarman says: "The law of England, strictly speaking, knows nothing of adoption, and does not recognize any rights, claims, or duties arising out of such a relation, except as arising out of an express or implied contract." But the writer here is speaking of rights, as against the father, for he goes on to say: "The law makes the father the guardian of his children by nature, and nurture, and his right, except so far as limited by statute, is absolute against all persons whatever, including the mother of the children." Whilst asserting that as against the father the law knows nothing of adoption, the author does not say that the adoptive parent has no legal status, as against the mere invader of his household, and that is the point for consideration here. Even as against the father the remark in Jarman requires qualification, for the father may have waived, or abandoned the control of his child, and, as remarked by Mr. Eversley in his work on Domestic Relations, p. 539, "In so far as the Court of Chancery will in the interests of the children enforce the waiver, or abandonment, of the control of the father (or mother), up to that point it might be said to countenance the claim of the adoptive parent, not on the ground of any right in the latter, but of the material well-being of the infant."

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We are now dealing with the case of an unmarried female, under the age of sixteen years, regarding whom the Criminal Code distinctly enacts, by section 283, that every one is guilty of an indictable offence and liable to five years' imprisonment, who unlawfully takes, or causes to be taken, any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her. Can there be the slightest doubt that as against strangers, the adoptive parent is a person having the lawful care or charge of the child of his adoption, so as to make it an offence to take the child out of his custody? Human society peremptorily answers "No!" and under British rule, at all events would long since have demanded an amendment of the law did it permit of any but the negative construction, for how many thousands of homes might be plunged into mourning, more bitter than that of death, if the law stood idly by and permitted the orphan and adopted child, received into the family circle, reared as the rest of the children, knowing and being reminded not that it is of different blood from them, and perhaps not so, to be ruthlessly torn from the fireside, by a mere stranger, who (benevolent although his intentions might be) conceives the idea that he can look after the child better than its own foster-parents.

Judgment of DAVIE, C.J.

Section 283 of the Code is a mere re-enactment of a law passed three or four centuries ago, 4 & 5 Ph. and M. Cap. 8. In the *Ah Gway* case (*ubi sup.*) the late Chief Justice, speaking of a claim to the custody of a female child under sixteen years old, says: "Nobody can have a valid claim except the father, or a duly appointed guardian, or some person, as a school master, to whom the infant has by proper authority been confided or apprenticed." But the statute admits of no such restriction. The words are: "or of any other person having the lawful care, or charge of her." Of two things one—the care or charge of an adoptive

father is either lawful or it is unlawful. But it cannot be said to be unlawful, that is, when no one with a superior right claims the child. The care or custody of the adoptive father is therefore lawful, and, being lawful, the law enforces the custody by punishing the man who invades it. From which it follows that the right can also be enforced upon *habeas corpus*; see Simpson on Infants, p. 213-214, where it is remarked that the right to enforce by *habeas corpus* the custody of a female child up to the age of sixteen years, is on account of the Statute 4 Ph. & M.; and see, per Lord Justice LINDLEY, in *Thomasset* v. *Thomasset*, L.R. (1894), P.D. 295, to the same effect.

The applicant in this case is a person in *loco parentis*, which is defined by Sir WILLIAM GRANT as a person assuming the parental character or discharging parental duties, and by Lord ELDON as a person "meaning to put himself in *loco parentis* in the situation of the person described as the lawful father of the child": *Powes* v. *Mansfield*, 3 Myl. & Cr. 359, and although there are abundant expressions to be found in the books, that such a person, or the adoptive father, whichever you may call him, has no claim or right to the custody of the child, yet what is meant is that such person has no claim as against the father, mother, or person having a paramount right. For instance, in *Reg.* v. *Nash*, L.R. 10 Q.B.D. 454, where a woman placed the custody of her natural child with friends who reared it until the child was seven years old, when the mother demanded it back. JESSEL, M. R., in giving the child to the mother, remarked that "the appellants had not a particle of right to the custody of the child." Of course the learned Judge was speaking of right as against the mother, but counsel in this case, in arguing against the right of the adoptive parent, has quoted the learned Judge's remarks literally, as if applied, not against the mother simply, but as against all the world. I ask again, if instead of the mother being the claimant for the child in the Nash case,

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the claim had been put forward by some stranger who had taken the child from the custody of Mr. and Mrs. Nash, can there be any doubt they would have been subject to indictment under the Act; and in what different position does the man, constable though he was, stand here, or what better right than he have the Refuge Home, who have received the child from or through him? Consideration of benevolence and good intention are no defence in law to an indictment under the statute.

Of course I do not lose sight of the fact that notwithstanding the claim of the foster-parents, paramount considerations may justify the Court in giving the custody of the child to a stranger. But not only foster-parents, but actual parents, may have their children taken from them in the same way, as in *Andrews* v. *Salt*, L.R. 8 Ch. 622. In the case of the parent a case of gross moral turpitude must generally be established to warrant so extreme a step, but in the case of foster-parents, considerations, other than of turpitude are frequently taken into account, the Court always aiming to do what is best in the child's interest. For instance, in *In re White, an Infant*, 9 T.L. R. 575, the infant was taken from the possession of foster-parents by an order appointing a stranger to be guardian, but that was done not because the foster-parents had no lawful claim to the custody of the child, but because it was right that the child should be reared in on efaith, and the foster-parents were going to bring it up in another. As remarked by Mr. Justice CHITTY in that case, "the child had been wrongfully withdrawn from Roman Catholic instruction." No consideration of that kind, however, arises here, although perhaps it might be argued with considerable force that this child had been wrongfully withdrawn from Chinese instruction, as to which I say something presently.

Judgment of DAVIE, C.J.

What is, however, to the point, is the assertion upon the affidavits, stoutly denied by the applicant, and not found as a fact by the learned Judge, that this child, in charge of

the applicant and his wife, is being brought up in an atmosphere of vice. This accusation ought to be enquired into, for, whilst the Court, acting in the best interests of the child, will rescue it from the custody of the vicious, yet it will not condemn the applicant of what he denies, and which the Judge appealed from has not found against him, without due enquiry. Such charges cannot be disposed of simply on affidavits of assertion on the one side, and denial on the other. If the charge of immorality be made out, and it be necessary to commit this child to other custody, it will be for the Court to consider, in the light of decided cases, whether it will be more in the interests of this Chinese child that she should be brought up according to the instincts, customs and religion of her own people, than be made the subject of an attempt to proselytize her to the customs, habits and creed of an alien race. One principle adopted by the Court in deciding what is best for the child's welfare, is not to place it in an atmosphere of religion, different to that to which it has been accustomed: Per BRETT, M. R., *Reg* v. *Gyngall*, 4 R. 457. We must always remember that the law knows no distinction of race or religion, but all stand equal before the law. If we were in China, and the tribunals there were to uphold the right of benevolent Chinese societies to take our children from us, and raise them as Chinamen, we should denounce it as an outrage, but is it not precisely the same kind of an outrage upon the Chinese which is asked recognition in this case?

Judgment of DAVIE, C.J.

I think the proper order will be to remit this case to the learned Judge whose decision is appealed from, with the opinion that the applicant has a legal claim to the custody of the child, as against the Refuge Home, but that he may be deprived of that custody, if upon investigation the learned Judge finds gross moral turpitude in the applicant's household, or other misconduct sufficient in the Judge's opinion to deprive him of the custody of the child.

I think, in conclusion, I should call attention to the

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singular affidavit, purporting to be made by the child herself. She evidently speaks no English, as the affidavit was taken through the medium of an interpreter. The affidavit makes the girl say she is sixteen years' old; a personal interview of the child might tend to confirm, either this statement, or that of her father that she is not yet fourteen. The affidavit goes on to say that she was sold for $350.00, and saw the money. It might be interesting to enquire how this child became acquainted with the decimal currency of the country, and as to her knowledge and understanding of it. It would also certainly be to the point to ascertain that the extraordinary story of the affidavit is altogether the child's own. As it is we are dependent entirely, for what the child states, upon the one interpreter. The Court wants to hear from the child herself, and to be assured that the words of the affidavit have not been put into her mouth. If we are dealing with the custody of an illegitimate child, the Court would see the child and ascertain its wishes; at least the same consideration should be extended to this child, but here the order giving the child to the Refuge Home has been made without interviewing her, or being assured that she is not in reality under duress.

Judgment of DAVIE, C.J.

I think the appellant is entitled to the costs of this appeal.

WALKEM, J.: During the argument of this appeal it was suggested that the appellant's right to a *habeas corpus* might well be tested by considering whether an indictment for abduction would lie in cases like the present, under section 283 of the Code, which is as follows: "Every one is guilty of an indictable offence, and liable to five years' imprisonment, who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of

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her." It is apparent that under this section it would be incumbent upon the prosecution to shew that such a girl's foster-parent was one who could be said to have had the "lawful care or charge of her," at the time she was taken from him, otherwise an indictment would unquestionably fail. Section 283 is in the same language as section 20 of 9 Geo. IV., Cap. 31, and of the re-enactment of it as section 55 of 24 & 25 Vic., Cap. 100, both being in amendment of Cap. 8 of 4 & 5, Ph. & M. It has, therefore, been in force in England for about eighty years. It was also in force in Canada, prior to Confederation, as section 56 of 32 & 33 Vict., Cap. 162; and has since been the law of the Dominion. Notwithstanding the lapse of eighty years in England, and of the lesser period in Canada, not an instance can be found in any of the several standard works on criminal law, including Bishop's, Mr. Justice TASCHEREAU'S, and Mr. Crankshaw's, of such a prosecution having been even instituted. The inference from this is self-evident. A child, as a servant, may be said to be in the "lawful care or charge" of its master; and it has been held that a bar-maid "employed at a distance from her father's house, was in the lawful care or charge of her employer and not of her father": *Reg.* v. *Henkers*, 16 Cox, 257. It is also said to be an offence to take a girl out of the custody of her putative father: Crankshaw, 219, and cases cited. But the present appellant is not a putative father, as his affidavit shews.

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The cases on *habeas corpus*, of a civil nature, shew that adoption is not recognized as part of the law of England.

In *Reg.* v. *Nash*, 10 Q.B.D. 454, the Court of Appeal held that foster-parents have no more legal right to the child of their adoption than a stranger. The reports of the same case in the Law Journal (N.S) and Law Times of that year, (1883) Vol. XLVIII. p. 448, are fuller than that given in 10 Q.B.D. The case was that of a young woman who had an illegitimate child, and placed it with Nash and his wife on the understanding that she should pay for its support. She

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paid something, and, owing to illness, paid no more. She afterwards lived an immoral life. After the Nashes had supported the child for about seven years, the mother wished to get it back with a view to placing it with her married sister. The Nashes refused to give it up, but the Court, on proceedings on *habeas corpus*, made an order against them. They appealed. In the course of his judgment, JESSEL, M. R., after observing that the Nashes wished to retain the child, said: "They are pure strangers to the child, and they have not a particle of right to do so." LINDLEY and BOWEN, L.JJ., after stating that they were "of the same opinion," added some remarks of their own on the case. The appeal was dismissed, and the child given to its mother's married sister on the ground that it was for its benefit that she should have charge of it. In all such questions the Court considers the benefit or welfare of the child to be of primary importance. In a later case, *In re White*, 9 T.L.R. 575, decided in 1893, Mr. Justice CHITTY, acting upon that principle, preferred the claim of Mr. King to that of the foster-parents in the case of an orphan, although the child was attached to the parent and had been well treated by him. The contest for its possession arose out of a dispute about religious education; but I refer to the case as one that shews, in a marked manner, that the relationship of foster-parent was not, in a legal sense, recognized by the learned Judge. Both contending parties were, in the eye of the law, strangers; and the fact that the child would, in the opinion of the Court, be better cared for, morally and physically, by Mr. King, turned the scale in that gentleman's favour.

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Ah Gway's case, 2 B.C. 343, referred to by Mr. *Gregory*, was decided by the late Chief Justice. It was the case of a Chinese woman applying to have an adopted child restored to her by the Chinese Home, which had got possession of it. The *habeas corpus* was refused as the Chief Justice considered that it was better, in the child's interests, that it

should remain where it was. The present case may be said to resemble *Ah Gway's*, save in name and sex of the applicant, the respondent here, as there, being the matron of the Chinese Home. I agree with the principle upon which my brother DRAKE has decided it, and with the conclusion which he has drawn from the evidence. I am, therefore, in favour of dismissing the appeal with costs. His power to award costs as he did on the failure of the present appellant to obtain a *habeas corpus* on a rule *nisi*, has been questioned; but, in my opinion, he had that power, as the Courts seem to have possessed it prior to the Judicature Acts. In *Cobbett's case*, 14 M. & W. 175, which is referred to in his judgment, the Court only decided that where the writ is issued absolutely in the first instance, costs will not be allowed for or against a person in custody, as Cobbett was, for contempt, whether he succeeds or fails in obtaining his discharge. But the Court did not question the statement of Cobbett's counsel, to the effect that had he unsuccessfully applied upon an order *nisi*, costs might have been given against his client. From this I apprehend that the Court had that jurisdiction—a jurisdiction which has not been taken away by any Act that I know of. The case of *In re Mills' Estate*, 34 Ch. D. 24, referred to by Mr. Justice IRVING, merely decides that costs which would not have been allowed before the passing of the Judicature Acts, should not be allowed afterwards, inasmuch as those Acts have neither increased nor curtailed the jurisdiction of the Courts in respect of costs.

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It cannot be denied that the separation of a foster-parent and child must often cause pain and unhappiness; but such a separation would not be directed by the Court except in cases where the well-being of the child, as in this case, unmistakeably required it.

IRVING, J.: The pith of the judgment appealed from is to be found in the words: "Neither the present applicant nor Miss Bowes, the respondent, are entitled in law to the

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custody and possession of this child. I have therefore to consider what is best for her." The argument covered a very wide field, but I do not think it necessary to now refer to more than three or four cases.

In the case of *Reg.* v. *Nash*, 10 Q.B.D. 454, decided in 1883, a writ of *habeas corpus* was sought by a mother of an illegitimate child to recover the custody of her child from Nash and his wife. The mother had in 1876 delivered to the Nashes the child, then an infant of a few days or months' old, intending to pay them for keeping it; she did make some payments, but owing to ill health, was unable to continue them. The Nashes, nevertheless, kept the child without payment, from 1876 till 1883, roughly speaking, six or seven years. In this case the applicant has kept the child some five years. At the end of the six or seven years she applied to the Nashes for the child, and they refused to deliver it up. She applied for a writ, but the application was refused by NORTH, J. The mother then appealed to the Divisional Court, who ordered the writ to issue. On the hearing of the appeal from the Divisional Court to the Court of Appeal, JESSEL, M. R., said: "The appellants (*i.e.*, the Nashes) have not a particle of right to the custody of the child."

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In the Law Times' report of the same case, Vol. XLVIII. p. 448, JESSEL, M. R., is reported thus: "She (the mother) now wants to get her child back, and these poor people (the Nashes) want to keep it from her; but they have no claim whatever to the child. They are mere strangers, and have not a particle of right to its custody." And LINDLEY, L. J. (after speaking in a way that shews he thoroughly sympathized with the Nashes in their being deprived of the child) says: "They have no more right to the custody of the child than any other stranger has, and the affection even of a natural mother gives a better right than the regard of a mere stranger." These quotations shew how the rights of persons standing in a position similar to the applicant in this case,

were regarded by the two eminent Judges; and had it not been for a remark of BOWEN, L.J., I should have thought this was ample authority for the conclusion arrived at by DRAKE, J., but it was suggested by BOWEN, L.J., that the question they were deciding in *Regina* v. *Nash*, was not the abstract rights of benefactors who had brought up a child for many years, but that the real question was, whether as between the mother and the Nashes, the Court ought, in that particular case, to give preference to the mother. I find that the point is covered by the case of *In re Medley*, I.R. (1871) 5 C.L. 84, decided by O'BRIEN, FITZGERALD and GEORGE, JJ. Therefore, I thought that further authority was desirable before concluding that the judgment now appealed from should be upheld. That was the case of an application for the custody of an infant eight years of age.

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The applicants for the writ were two in number, one the maternal aunt, and the only next of kin of the infant, and the other the secretary of an Orphan Society. The respondents were respectable people. The father of the infant had died shortly before the child was born; the mother had placed him with the McCanns, the respondents, when three weeks old, to be nursed, and, as they swore, to be brought up as their own child. Afterwards she left Ireland, went to England and died there. Previously to her departure, she went to see the child, when she said she would never take him from the McCanns. The child was in the habit of visiting the aunt, and on the last of these visits, the aunt, instead of sending him back to the McCanns, sent him to the Orphan Society; a few days later he ran away and returned to the McCanns, who, when applied to, refused to deliver him up. The Court were of opinion that neither party had the legal right to the custody of the child, but intimated they were willing to examine the child. This being refused, the Court made no rule, leaving the aunt to apply to the Court of Chancery. The third case is *In re Ah Gway*, reported in 2 B.C. 343, a decision by the late Chief

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Justice of British Columbia, on facts very similar to the case in hand, where he says: "Even assuming Chin Su's statements to be true, *viz:* That Ah Gway is her niece, confided to her by her widowed mother for education, etc., that would hardly give Chin Su the absolute right for which she contends, or any legal rights at all over the infant's person." I cannot see that the appellant here has any greater right to the custody of this child than the Nashes had to the custody of Rose Carey, or the McCanns or the maternal aunt to the custody of young Medley, or Chin Su to the custody of the child Ah Gway, and yet in all these cases it is laid down that the adoptive parent, or foster-parent, is a stranger having no legal rights over the custody of the child who had been the object of their benevolence.

The decisions in *Barnardo* v. *McHugh*, in (1891), 1 Q.B. 194, and also in (1891), A.C. 388, and the subsequent passage of the Custody of Children Act, 1891, are deserving of attention.

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The applicant, then, in my opinion, has no legal right to the custody of the child, nor have the respondents. They both stand on an equal footing, so far as their legal rights are concerned. I therefore agree with the decision of Mr. Justice DRAKE, that neither the present applicant nor Miss Bowes is entitled in law to the custody of the child. In those circumstances it became his duty by virtue of the prerogative which belongs to the Crown as *parens patriæ*, (see *Barnardo* v. *McHugh* (1891), A.C. 395) to consider as the ultimate guide for the Court, what was best for her. In the exercise of that discretion—for it is a matter of discretion—see *R.* v. *Barnardo* (1891), 1 Q.B. at 215, per LOPES, L.J., he decided that it was in the interests of the child that he should not interfere with the present condition of affairs. In a case of this kind, discretion having been exercised, I do not think that it ought to be disturbed, except for very grave reasons, and I see no reason to interfere in this case.

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On the question of costs, I have the misfortune to disagree with the decision of the learned Judge below. Our Rule 751 is the English Rule 1, of Order LXV. reproduced. *In re Mills Estate*, 34 Ch. D. 24, decided that the English rule did not enable the Court or Judge to order costs to be paid by persons who before the Judicature Act came into operation, could not have been ordered to pay them; that the order was only to regulate the mode in which costs were to be dealt with in cases where the Court antecedently had jurisdiction to award costs. It was to remedy this state of things that section 5 of the Judicature Act of 1890 was passed.

When on 1st January, 1893, we adopted our Supreme Court Rules of 1890, we adopted, so it seems to me, the English rule impressed with the decision given in *In re Mills*, *supra*, and the Act of 1896, giving to our rules the force of statutes, could not alter the interpretation to be put on Rule 751. I therefore think that *Reg.* v. *Jones* (1894) 2 Q.B. 382, is not applicable here, and that this Court has no jurisdiction to award costs in *habeas corpus* matters.

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As to the costs of this appeal, were it not for the Act of 1897, I should say that there should be no costs of appeal to either party, but as the respondent has succeeded in the main point, I suppose she is entitled to her costs, and I so decide, but I shall not be sorry if the majority of the Court are able to take a different view of the question. If it were convenient, I think the questions as to costs here and below, might well be re-argued.

Appeal dismissed, but respondent held not entitled to costs in Court below. No costs of appeal.

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LANG v. THE CORPORATION OF THE CITY OF VICTORIA.

Practice—Right of party to compel entry of a judgment pronounced against him.

DRAKE, J. (IRVING, J. concurring), affirming BOLE, L.J.S.C., refused to compel the plaintiff, or permit the defendant, to perfect and enter the order for judgment for the plaintiff pronounced at the trial. The defendants desired to prosecute an appeal from the judgment, and the plaintiff desired to delay that appeal.

Per DAVIE, C.J., dissenting: A judgment pronounced in an action is the property of both parties, and each party has an absolute right to have it entered up.

Statement.

APPEAL to the Full Court by the defendants, from a judgment of BOLE, Co. J., sitting as a Local Judge of the Supreme Court, dismissing a summons of the defendants to shew cause why the District Registrar of this Court at Vancouver should not proceed to draw up or settle the minutes of the order for judgment for the plaintiff herein, upon the findings of the jury, pronounced by the honorable Mr. Justice MCCOLL, on Nov. 6th, 1897, upon cross motions for judgment upon said findings, made by the plaintiff and defendants, and why the plaintiff should not forthwith enter in the office of the said District Registrar, and issue and perfect the said order, or why in default thereof the defendants should not be at liberty to enter, issue and perfect the said order for judgment for the plaintiff.

Robert Cassidy, for the application.
D. G. Macdonell, contra.

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

BOLE, L.J.S.C.: Rule 361 does not exactly follow English Rule 463 (39) which reads thus: "The Judge shall, at or after trial, direct judgment to be entered as he shall think right, and no motion for judgment shall be necessary in

order to obtain such judgment," thus making it obligatory on the Judge to direct judgment to be entered, but is copied from old Rule R.S.C., English, 1892, and seems to contemplate that the successful party may, after trial, move to enter judgment, and apparently makes no provision for a situation such as seems to have arisen in the present case. The plaintiff has the conduct of his own cause, and when he fails to take a step in the action in the manner and within the time limited by the rules, has to suffer a penalty for his failure. But if the plaintiff declines to proceed to perfect the judgment obtained by him, is there any process to compel him to do so? No authority has been cited to me shewing that plaintiff is bound to settle the order for his judgment, or that in case he does not do so the defendant can obtain same. It is true the plaintiff originally took out a summons to settle the judgment before the Registrar, but it appears that on the return day only the defendants' solicitor appeared, and as the Registrar was not then asked to either settle the minutes of the order or adjourn, the summons is now before me. I certainly feel the case is one of some hardship for the defendant corporation, as the matter is one which they naturally desire to have concluded one way or another; but it may be that the Court of Appeal will be able to see some way out of the difficulty, possessing as they do, greater powers of dealing with such a matter than can be exercised by a single Judge. My attention has been called to *Taylor* v. *Nesfield*, 24 L.J.Q.B. 126, but in that case the plaintiff succeeded on one count, and the defendant on another, and the *postea* was delivered by the plaintiff to the defendant for the purpose of getting his costs taxed, and he used it for the purpose of entering up judgment against himself on the first count, and for himself on the second count, and the Court refused to set aside the judgment so entered. I am, however, inclined to think that the defendants' proceeding under this summons is probably unnecessary, the rule giving time to appeal, is

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calculated from the time the order for judgment is drawn up, is framed on the ground that until the order is drawn up the appellant cannot be quite sure what he is appealing from, but it must be remembered that as soon as a final judgment is given, that judgment is good, independent of being drawn up or not. "Power is given to the Judge at *nisi prius* to do what he could not have done before, to direct judgment to be entered according to the verdict, which is the same thing as giving him power to give or pronounce judgment. Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the Judge has pronounced is the judgment which is to be entered; no subsequent ceremony, no signing of judgment is now necessary, and the intention of the rule clearly is that from the moment when the Judge has pronounced judgment, and entry of judgment has been made, the judgment is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day it is pronounced by the Judge in Court," per Lord ESHER, M.R.: *Holtby v. Hodgson* 24 Q.B.D., at 107 (C.A.), *vide* also *In re Resca Coal Company*, 31 L.J. Ch. 429, and *Salaman* v. *Warner* (1891), 1 Q.B. 734 (C.A.) I think I must, however, dismiss the present application, costs to be costs in the cause.

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

Application dismissed.

Statement.

The defendants brought an appeal from this judgment to the Full Court, which was argued before DAVIE, C.J., DRAKE and IRVING, JJ., on the 8th February, 1898.

Robert Cassidy, for the appeal.
D. G. Macdonell, contra.

Judgment of DRAKE, J.

DRAKE, J.: Mr. *Cassidy* appeals against an order of His

Honour, Judge BOLE, refusing the defendants' application that the plaintiff should sign judgment on the verdict rendered in her favour. The defendants, thinking that judgment had been signed and entered, obtained an order restraining the plaintiff from issuing execution; this order is still in force. The plaintiff's counsel, knowing that another case arising out of the same accident has been taken by way of appeal to the Privy Council, refuses to sign judgment until the result of the appeal is known. The defendants wish to take this case to the Privy Council and thus put the plaintiff to considerable costs which may all be thrown away. She objects, and not unreasonably, to this course.

There is no doubt but that the plaintiff can, in certain cases, for good cause shewn, be compelled to sign and enter the judgment which he has obtained, or if he refuses the defendants will be allowed to do so for him, but this is not one of those cases. The defendants are in no way prejudiced by the plaintiff's inaction, and, if it should become necessary to renew the application, I think the present judgment should not stand in the way.

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IRVING, J., concurred with the judgment of DRAKE, J.

DAVIE, C.J.: The only question in this appeal is whether the defendants have the right to enter up the judgment which the plaintiff has recovered against them, and which the plaintiff will not enter up. The right seems too clear for controversy. In Viner's Abridgment Tit. A., Judgment: "Where a man may pray and have judgment against himself," it is said: "In action upon the case upon a promise to pay several sums at several days, if the action be brought for default of payment at the first day, and before any other day of payment incurs, and the defendants plead *non assumpsit* and it is found against him *scilicet* that he *assumpsit modo and forma.* But then the plaintiff would not enter

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the judgment for fear that he should be barred to have new action upon the same promise if default be in the other payments. Yet the defendant may enter judgment according to the verdict if he will." 2. "If a verdict be found for the defendant, though the defendant will not pray judgment yet judgment shall be given for the defendant at the prayer of the plaintiff, because then he may have his *attaint* against the jury (the ancient method of seeking a reversal of the verdict)." *Taylor* v. *Nesfield*, 24 L.J.Q.B. 126, carries out the same principle, and in Chitty's Arch., 12th Ed. 524, it is said: "The party entitled to sign judgment may in general postpone doing so as long as he pleases, unless the opposite party take steps to compel the signing of the judgment."

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The verdict in the case is as much the property of the party against whom it is rendered, as of him who has obtained it. It settles the issue litigated between the parties, and may be of greater importance for the nominally unsuccessful party to uphold, than for the party in whose favour it is given.

It being therefore clear that either party has the right to perfect the verdict, I cannot see why the Court should deprive the unsuccessful defendant of that right any more than it would stay the hand of the successful plaintiff. It is a question of right, not of discretion, and if it were a question of discretion, that discretion should not be exercised to take from a party what belongs to him. In this case we are told the defendants desire to perfect the verdict so as to appeal against it, and some question has arisen whether they can appeal until the judgment has been entered up. A perfectly good reason, I should say, if it were necessary to give one, but I do not think it is. It is not for the Court to inquire their reason, or whether they have any.

It matters not what their reason is, they have a legal right, and the only duty of the Court is to enforce that right,

certainly not to take it from them. In my opinion the appeal should be allowed.

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Appeal dismissed.

NOTE: By general order of Court subsequent to this decision, it was directed that "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."

JAMIESON v. CITY OF VICTORIA.

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Municipal law—Municipal Act 1892, Sec. 104, Sub-Sec. 115, Sec. 202—Lien for taxes—Discharge of by sale—Release.

A sale of land for taxes under a by-law passed pursuant to the Municipal Act, 1892, Sec. 104, Sub-Sec. 115, exhausts the lien of the Municipality upon the lands, for taxes, given by section 202 of the Act; and the purchaser at the tax sale takes the lands discharged of any lien in respect of taxes actually due at the time of the sale over and above the taxes for which the land was sold.

MOTION to continue an interim injunction restraining the Municipal Corporation of the City of Victoria from selling plaintiff's lands for taxes. The plaintiff had purchased the lands from the city at a sale for taxes held under

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a by-law passed pursuant to section 104, sub-section 115 (*a*) to enforce the lien for the payment of taxes given by section 202 (*b*). Besides the taxes in respect of which the lands were sold to the plaintiff there were in fact due to the City at the time of the sale two years further arrears of taxes, and the City claimed that the plaintiff took the lands under the sale to him subject to a lien or incumbrance for the amount of such additional taxes and now proposed to sell the lands to realize the same under a subsequent by-law. By consent the motion was treated as the hearing of the cause.

H. E. A. Robertson, for the plaintiff.
W. J. Taylor and *C. D. Mason*, for the defendants.

DAVIE, C.J. : The City held a public auction on the 1st October, 1895, of land on which more than two years arrears of taxes had accumulated, and the plaintiff purchased thereat the East ½ of Lot 794, and received from the City a deed conveying the fee simple, but without any covenants for title, or against incumbrances. Under section 115 of section 104, of the Municipal Act of 1892, which was the Act in force at the time of the sale, the City could only pass by-laws for the sale, and sell, for taxes two years in arrear, but in fact, at the time of the sale there were taxes due for other two years subsequent to the years

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NOTE—(*a*) 104. In every Municipality the Council may, from time to time make, alter and repeal by-laws for any of the following purposes: (115) For the sale at public auction of land or improvements or real property upon which there shall be at the time of the passing of such by-law unpaid municipal taxes in arrear for the period of two years prior to the passing of such by-law.

NOTE—(*b*) 202. The taxes accrued, and to accrue, on any land, real property, or improvements shall be a special lien on such, having preference over any claim, lien, privilege, or encumbrances of any party, except the Crown, and shall not require registration to preserve it.

for the taxes for which the sale was held. The City now seek to sell for these subsequent taxes, but it seems to me that the City, by the sale already held have divested themselves of their lien, and must be taken to have sold free from all incumbrances. The question seems concluded by authority. In *Tomlinson* v. *Hill*, 5 Gr. 231, Chancellor BLAKE says that a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the act of Parliament, and to the same effect is the decision of MOWAT, V.C., in *Mills* v. *McKay*, 15 Gr. p. 192. The case of *Thompson* v. *Colcock*, 23 U.C.C.P. 508, is distinguishable. There the second sale was upheld but that was because of the particular statute applicable to that case, which vested the land in the purchaser freed from all charges and incumbrances "except taxes accrued since those for non-payment whereof it was sold." No such exception appears in our Act of 1892.

Judgment.

The parties have agreed to take this motion as the hearing of the case. I therefore give judgment in favour of the plaintiff for a perpetual injunction against the sale.

The plaintiff will have her costs of suit.

Injunction made perpetual.

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IN RE THE COMPANIES' WINDING UP ACTS AND THE KOOTENAY BREWING, MALTING AND DISTILLING COMPANY.

RE KOOTENAY BREWING CO

Public company—Winding-up—Insolvency—Practice—Affidavit.

To the making of a winding up order it is essential: (1) That the petition upon its face make a sufficient case for the winding up, and (2) That the petition should be supported by a sufficient affidavit fyled before its presentation. Leave to fyle a supplementary affidavit refused.

Statement.

PETITION for winding up the Company. The facts fully appear from the judgment.

A. C. Galt, in support of the petition.

Thornton Fell, for the Company.

L. P. Duff, for the Bank of Montreal, creditors of the Company.

Judgment.

DRAKE, J.: William Adams, a creditor of the above Company presented a petition for winding up the same on the 30th October, 1897, alleging that the Company was incorporated under the Companies' Act, 1890; that the Company was insolvent within the meaning of the Winding Up Act; that the petitioner trading as Adams & Burns was creditor for $7,000.00 upon bills of exchange drawn and accepted by the Company and dishonored.

There is no affidavit in support of the petition, but there are several affidavits fyled by and on behalf of the petitioner. These affidavits allege facts arising after the fyling of the petition which might be sufficient to make a winding up order, if admitted by the Company and if anterior to the petition. From Mr. *Galt's* affidavit it appears that the petitioners were judgment creditors prior to the fyling of

the petition, viz., 28th October. It also appears that on the 23rd September the Company executed a mortgage to the Bank of Montreal of all of their assets except book debts.

Mr. *Duff* for the Bank of Montreal and Mr *Fell* for the Company, oppose the petition on the ground that there is no affidavit verifying the petition as required by Rule 3 of the Winding Up Rules, and further, that the petition shews no facts sufficient to warrant a winding-up order. The affidavit in support of the petition is required by the rules. The petition itself must disclose grounds on which the Court can act; all that this petition alleges is that the Company is insolvent within the meaning of the Act. The Court has to judge whether this is so or not from the facts disclosed. Here no facts are disclosed.

The insolvency of a company is statutory. All the petition alleges is that the petitioner is a creditor on dishonoured bills of exchange. The only clause that can apply to the petitioner is sub-section *(a)* of section 5 of the Winding Up Act "that the Company is unable to pay its debts as they became due." Section 6 defines the meaning of this sub-section, shewing that before a company can be treated as insolvent on this ground a notice of demand for payment must be made and a refusal for 60 days. This has not been done and sub-section *(h)* of section 5 cannot be invoked in aid of the petitioner because no execution had been issued and unsatisfied at the time of fyling the petition. In the case of *Steam Stoker Company*, L.R. 19 Eq. 416, BACON, V.C., dismissed a winding-up petition on the ground that statements in the petition were insufficient to sustain the petition following *In re European Life Assurance Society*, L.R. 10 Eq. 403. And JAMES, L.J., *In re Wear Engine Works Company*, L.R. 10 Ch. App. 188 at p. 191, says: "We wish it to be understood that a winding-up petition must allege facts which justify a winding-up order; and it is not enough that a sufficient case be shewn in

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evidence; a sufficient case must be stated on the petition, that the order may be *secundum allegata et probata.*" Here the petitioner has alleged no facts on which the Court can act and he seeks to supply the omission by circumstances which have arisen *ex post facto.*

I do not consider that this is a case for amendment, because by section 7 the winding-up is to commence from service of notice of the presentation of the petition, and if the petition can only be amended by alleging facts of insolvency which have arisen since the date of the fyling of the petition, other persons rights may be injuriously affected. I therefore dismiss the petition with costs.

Judgment.

Petition dismissed.

IN RE VICTOR M. RUTHVEN.

DAVIE, C.J.

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Re RUTHVEN

Criminal Law—Committal by Bench warrant—Bail—Whether committing Judge functus officio.

A judge who has committed a prisoner for trial for perjury under R.S.C. Cap. 154, Sec. 4 (*a*), is not thereby *functus officio* but may subsequently admit the prisoner to bail.

APPLICATION (in Chambers) to DAVIE, C.J., for the admission to bail of Victor M. Ruthven whom he had ordered into custody by a bench warrant for perjury committed in the trial of a County Court action being tried before him sitting as a County Court Judge. Statement.

Archer Martin, for prisoner: The Court having committed prisoner is not *functus officio* and has not exhausted alternative of Cap. 154. The Court will exercise its discretion in all cases to bail a prisoner, Tourlin's Law Dicty. Tit. Bail; Arch. Cr. Prac. p. 330. Mellor's Crown Practice, p. 373. When a man is in custody on a warrant Argument.

NOTE—(*a*) "Any judge of any court of record, etc., may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, etc., or other proceeding made or taken before him, direct such person to be prosecuted for such perjury if there appears to such Judge or Commissioner a reasonable cause for such prosecution, and may commit such person so directed to be prosecuted until the next term, sittings or session of any Court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the Court without leave, and may require any person, such Judge or Commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid."

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of commitment he has a right to apply for bail: *Reg.* v. *Mason*, 5 P.R. 125. Court is bound to admit to bail: *Reg.* v. *Frost*, 4 T.L.R. 756.

A. G. Smith, Dep. A.-G., contra: Section 533 (*b*) authorizes Superior Court to make rules regarding bail, and these rules have been made by this Court, importing the English Rules which have no provisions as to bail. In Ontario the Province has its own *Habeas Corpus Act*: *Reg.* v. *Cox*, Ont. 228, 230.

DAVIE, C.J.: In this case acting under R.S.C. Cap. 154. I directed the prisoner to be prosecuted for perjury and committed him until the next Assizes. The Act provides that the Judge may commit, or may permit the person directed to be prosecuted to enter into a recognizance, etc., to appear and take his trial, etc. It is suggested that having already committed the prisoner, my powers relating to him are at an end; that I must either commit or else admit to bail, but cannot exercise the latter after having invoked the former.

Judgment.

I think, however, construing the section as I am bound to do in favour of liberty, it must be read as authorizing the exercising of both powers. Particularly do I think that this construction must be the right one, as otherwise apparently there would be no power to bail.

I therefore direct the said V. M. Ruthven to be prosecuted, etc., and I permit him to enter into recognizances with two or more sureties, himself in $1,000.00 and sureties in same amount conditioned for his appearance at the next Assizes. The form of the recognizance to be submitted to me and the sureties to be to the satisfaction of the Superintendent of Police.

Bail allowed.

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LANG v. VICTORIA

Practice—Judgment—Entering—Time—Appeal—Whether lies from an order before it is entered.

Held, by the Full Court *per* DAVIE, C.J., and WALKEM, J. (Drake, J. dissenting): A judgment is appealable from the moment that it is pronounced, and an objection to the hearing of an appeal, otherwise regular, that the judgment appealed from had not been entered, overruled.

ON AN APPEAL by the defendants from a judgment pronounced by McColl, J., at the trial in favour of the plaintiff, the defendants' counsel raised a preliminary objection that the order for judgment for the plaintiff appealed from, which had been drawn up, had not been entered by the plaintiff.

Statement.

It appeared that the defendants' solicitor, supposing that the plaintiff's solicitor had entered the order for judgment, and the formal judgment thereunder, had made an application by summons to stay all proceedings by way of execution, etc., under the judgment upon giving to the plaintiff security for the amount of the judgment and costs, and an order was made accordingly. Defendants' counsel, besides contending that the right to take the objection was waived by the plaintiff by accepting the order for security, said that the defendants were taken by surprise and that there was no written notice of the objection under Supreme Court Act, 1897, Sec. 12. These objections to the preliminary objection were overruled, but the Court adjourned the argument of the appeal to permit the defendants to apply to enter, or compel the plaintiff to enter, the plaintiff's order for judgment. The defendants applied accordingly and the application, and an appeal to the Full Court from the refusal of it, were dismissed. See *Ante* p. 104.

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The defendants appeal from the plaintiff's judgment now came on for argument subject to the objection as to the non-entry of the judgment.

Robert Cassidy, against the objection.
D. G. Macdonell, contra.

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DAVIE, C.J.: I think that the appeal should proceed notwithstanding the judgment has not been drawn up and completed. The Court has decided that the defendant cannot force the plaintiff to complete his judgment nor complete the judgment for him. Hence the defendants' hands will be tied unless they can go on with their appeal in the absence of the formal steps to complete judgment.

Judgment of DAVIE, C.J.

Under the practice in England where, as with us, the time for appealing runs from the time when the judgment is signed, entered, or otherwise perfected, it was held that notice of appeal before the order drawn up was regular, *In re Harker*, 10 Ch. D. 613, but it was pointed out during the argument that the appeal could not be set down until after the order had been drawn up; but this was because of the old Order LVIII. Rule 8, which is now the English marginal Rule 872, and which requires the party appealing to produce to the proper officer of the Court of Appeal the judgment or order appealed from. Even under this rule, the appeal may now be entered without the order, though the appeal is not allowed to come into the list for hearing, until the judgment or an office copy is produced; see Ann. Prac. 1896, p. 1053. In British Columbia, however, Rule 872 has been varied by omitting the requirement to deposit a copy of the judgment appealed from. Our Rule (678) requires simply the notice of appeal to be fyled together with a praecipe for hearing the appeal two days before the day of hearing, and then provides that "such officer shall thereupon set down the appeal to be heard." This seems

to me a clear indication that the appeal may proceed without the judgment being drawn up. It is true that another rule requires every judgment, etc., to be entered, but that is not for the purposes of appeal, the proceedings upon which are governed by a distinct order. The practice in Ontario is to hear appeals irrespective of the formulating of the judgment: *Henderson* v. *Rogers*, 15 P.R. 241, and the judicial rule apart from any restriction by statute or rule, is that the judgment takes effect from its pronouncement: *Risca Coal Co.*, 31 L.J. Ch. 429. Our statute imposes a limitation upon the times within which appeals may be brought, but it does not say they may not be brought before those times. I think the appellants have a right to proceed with their appeal.

Judgment of DAVIE, C.J.

WALKEM, J.: The question before us, although one of practice, is an important one. Can an adverse judgment be the subject of appeal before it is entered or otherwise perfected? "A judgment" as defined in Co. Lit., 39a and 168a, "is the sentence of the law as pronounced by the Court upon the matter contained in the record." The entering of it is a purely ministerial act essential for certain purposes—amongst them, for instance, execution or estoppel.

Judgment of WALKEM, J.

An appeal before Lord WESTBURY by the *Risca Coal and Iron Company*, 31 L.J. Ch. 429, was opposed on the ground that the order complained of had not been drawn up. The provision for appeal from an order after it "shall have been made," was held by Lord WESTBURY to mean "after it shall have been pronounced" not "drawn up." In subsection 1 of section 7 of the Supreme Court Amendment Act of 1897, the equivalent of the word "made" viz: the word "making" occurs e.g. "Appeals may be brought within the following limits of time from the making of the judgment order or decree appealed from: (*a*) 6 months in the case of final orders, judgments or decrees. (*b*) 30

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days in the case of interlocutory judgments, orders or decrees."

In sub-section 2, the 30 days in the case of an interlocutory order are to be computed from its pronouncement; but the 6 months in the case of a final judgment are to be reckoned from the time of its being signed, entered or otherwise perfected.

"The language of Order XLI. Rule 3, is really very clear," as Lord ESHER remarks in *Holtby* v. *Hodgson*, 24 Q.B.D. 103 at p. 107. The expression "where any judgment is pronounced by the Court or Judge in Court" is intended to contrast with the well-known expression "the Court or a Judge" in many other rules, that is to say, exclude the case of a Judge sitting in Chambers; and the intention of the rule clearly is that, from the moment when the Judge has pronounced judgment, and entry of the judgment has been made, the judgment is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day when it is pronounced by the Judge in Court." Comparing the judgment in this case with that given in *Standard Discount Company* v. *La Grange*, 3 C.P.D. 67, at p. 71, BOYD, C., observes in *Kelly* v. *Wade*, 14 P.R. p. 69, that: "There is a distinction to be observed between mere interlocutory orders of a Judge, and judgments or orders pronounced by the Court affecting the merits. In the latter case, the deliverance of the Divisional Court was an effective judgment from the day when it was pronounced by the Court, for the formal signature of the judgment would be merely the record that it had been pronounced." According to Lord WESTBURY'S views in the *Risca Coal Company case (supra)*, "if the form of appeal is by petition, nothing is more common than for the appellant petitioner to represent on the face of the petition that he is unable to state the very terms of the order by reason of the opposite party not having yet drawn up, passed, and entered the order; and no one has doubted that the not

Judgment of WALKEM, J.

complying with the statement of the very words of the order does not in the smallest degree prejudice or affect the appeal." In the English Marginal Rule, 872, the party appealing is to produce to the proper officer of the Court of Appeal, the judgment or order appealed from; but this rule has only been partially adopted here as the deposit of a copy of the judgment under appeal is not required (see Rule 678). *Henderson* v. *Rogers*, 15 P.R. 241, which has been referred to by the learned Chief Justice, shews that appeals may be heard in Ontario without any formal judgment being drawn up. It has been said that if a judgment appealed from is not drawn up there is nothing before the Court; but the cases I have cited are to the contrary effect. Section 7 only provides for an appeal being brought within certain periods, viz: from an interlocutory order within 30 days after its pronouncement, and from a final judgment within 6 months after its being "signed, entered or perfected." This seems to me to be a provision solely intended for computation of time. It may, or may not, fall short of its object; but it certainly does not change in any way the law as laid down in the English authorities that I have cited.

Judgment of WALKEM, J.

Every judgment, it is true, must by another rule, be entered by the proper officer; but that direction is for the purposes of record and not of appeal. It is a cardinal rule "that the Court should be guided more by the words of a clause dealing specifically with the matter under consideration than by any general inference," to be drawn from other clauses, per WILLES, J., in *Roberts* v. *Bury Commissioners* L.R. 4 C.P. 760. The appeal provision that we are considering is the one by which we must, in the main, be guided. It will be seen that it refers to the signing of a judgment which Lord ESHER points out has not been necessary since the passage of the Judicature Acts. However, the provision does not require that a judgment shall be entered, etc., as a condition precedent to appeal by the

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party complaining of it; and in the absence of that condition, Mr. *Cassidy* seems to me to be entitled in accordance with the judicial decisions I have referred to, to have his appeal inscribed on the appeal list, and heard.

DRAKE, J.: Mr. *Cassidy* moves to set an appeal down for hearing although there has been no order signed, entered or otherwise perfected. By Rule 448, every judgment shall be entered by the proper officer in a book kept for that purpose. In matters arising in Chambers an order made there is signed by the Judge, but only when the party applying for it chooses to take it out; he may abandon the order if he pleases. In the case of trials before the Court the successful party can enter his judgment or refrain from so doing. By Rule 670 an appeal shall lie to the Full Court from every judgment, decree or order, whether final or interlocutory; if there is no judgment or order what becomes of the right of the Full Court to hear an appeal? By the Supreme Court Amendment Act, 1897, Sec. 7, an appeal shall lie to the Full Court from every judgment, order or decree made by the Supreme Court, or a Judge thereof, whether final or interlocutory, and the section then defines the period in which appeals shall be brought from and after the time at which the judgment order or decree was signed, entered or otherwise perfected. The perfecting of the order, that is, its final completion, is the important part of this section, for until it is finally completed it is subject to correction and amendment, after perfecting it cannot be varied. See *Preston Banking Company* v. *Allsup* (1895), 1Ch. 141; *Suffield* v. *Watts*, 20 Q.B.D. 693. The time for appealing commences to run from the perfecting of the order; this is equivalent to saying that until the order is perfected there is nothing that the Full Court can take cognizance of. In the case of *Holtby* v. *Hodgson*, 24 Q.B.D. at p. 107, Lord ESHER discusses the meaning of Order XLI., Rule 3, which is the same as our Rule 449,

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and he points out after the trial the entry of the findings of the Court by the associate is equivalent to the entry of judgment. But the powers of the associate to enter the findings are governed by English Order XXXVI., Rule 41, which is not in our rules. We have, therefore, to look elsewhere for what is meant by perfecting a judgment, and we find Rule 448 before mentioned. This, then, is the entry of the judgment, but a judgment cannot be entered until there is an order for it, and there apparently was none in this case, and even if there was, there is no duty cast on the successful party to perfect his judgment. Mr. *Cassidy* as an alternative contention suggested that, if he had no right of appeal because no judgment had been perfected, yet he might have a right of appeal because Mr. Justice McColl refused the application to enter judgment for the defendant on the findings of the jury, this, of course, would be an appeal from an interlocutory judgment and would have to be brought within 30 days after the refusal. See *Standard Discount Company* v. *La Grange*, 3 C.P.D. 67, where Lord Bramwell says: "When there is another step to be taken in an action such as entering judgment an order to enter judgment is interlocutory only." The question in this branch of the case is, was the notice of appeal given in time? The trial apparently took place on the 14th October, and notice of appeal was given 22nd November, and further than this it is not made the subject of appeal by the notice. I have only now to refer to the cases cited by Mr. *Cassidy* in support of his proposition that he can appeal notwithstanding the order for judgment has not been perfected. In *Smith* v. *Grindley*, 3 Ch. D. 80, notice of appeal had been given after the order appealed from had been left for entry, but before it had actually been entered, the Court held the notice good. It is clear that there was an order complete before the appeal was heard.

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The *Risca Company*, 31 L.J. Ch. 429, merely decides the meaning of the words "order made" under the 12 &

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13 Vic. Cap. 108. *Kelly* v. *Wade*, 14 P.R. 69, decides that an order for a new trial, although not drawn up, was an effective order preventing the other side issuing execution in the original judgment. A judgment of the Court for certain purposes speaks from the time it is pronounced, but for the purposes of appeal it has to be perfected. The Full Court can only hear appeals against orders drawn up and perfected. To hold otherwise, would introduce uncertainty in practice, where certainty above all things is essential. It would enable dissatisfied litigants to appeal on all occasions, although no order, decree or judgment had been perfected, and thus reduce the practice of the Court to chaos.

Motion allowed and appeal ordered to be placed on the list.

COURSIER v. MADDEN.

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Arrest—Ca. re.—Intention to quit, etc.—Motion for discharge—Practice —Amendment.

Defendant applied to the Court upon affidavits denying his intention to leave the Province, for an order setting aside a Judge's order for a writ of *ca.re.* and the writ of *ca.re.* issued thereunder upon which he had been arrested.

Held: 1 The application should have been to discharge the defendant, under section 6 of 1 & 2 Vic. Cap. 110, but an amendment of the notice of motion was allowed.

2. A proposed transit through foreign territory on a journey from one part of the Province to another does not constitute a leaving of the Province sufficient to warrant an arrest.

Semble: An application to discharge a party arrested under a writ of *ca.re.* need not be made by order *nisi* but may be made by notice of motion.

Statement.

APPLICATION by the defendant, by notice of motion "that the order made herein and the writ of *capias* issued under the said order may be set aside, and further that the writ of summons herein may be set aside, or in the alternative that all proceedings in this action may be stayed." The *ca. re.* was issued upon an affidavit that the defendant was indebted to the plaintiff in the sum of $192.64 for goods sold and delivered by the plaintiff to the defendant, and that the defendant was "leaving Victoria for the Yukon country in the steamer Islander now in Victoria and about to depart for Skagway." It is also stated that the defendant on the day of his arrest being asked for payment, and "whether he denied that he owed the amount of the claim said 'no,' and I will pay it as soon as I get back from the Yukon." In support of the defendant's motion his affidavit was read stating "that in the month of May last I went to Dawson City, in the N.W.T., and returned

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to this city about two weeks ago. Since my return to Victoria I have obtained from the Superintendent of Police of the Province, a license to carry on an hotel and sell spirituous and fermented liquors at Teslin Lake in this Province, and it is my intention so soon as arrangements have been completed therefor, to proceed to Teslin Lake aforesaid and build an hotel, and personally carry on the business of an hotel keeper at that place, and I have no intention of leaving this Province. * * * *
I deny that I told him that I would pay this claim as soon as I got back from the Yukon * * * and I further say that I have no intention of going to the Yukon River, nor did I say that I was about to go there."

Robert Cassidy, opposed the motion: Assuming that the plaintiff's affidavits disclosed facts sufficient to warrant the order for the arrest, and there is no objection on that head, and no suggestion of irregularity, the only application open to the defendant, on affidavits denying his intention to leave the Province, is by way of order *nisi* for his discharge under section 6 of 1 & 2 Vic. Cap. 110. That is a purely statutory motion and must be made, if at all, in the way provided by the statute. Here no such application is made. On an application to set aside the order and writ, etc., it is only open to defendant, providing he sets them out to object to the insufficiency of the original affidavits or some other irregularity in the proceedings for his arrest. It is not open to him on such a motion to shew that he was not about to leave the Province; *Robertson* v. *Coulton*, 9 P.R. 16. The mere oath of a defendant that he does not intend to leave the country is not sufficient: *Stewart* v. *Waugh*, 33 L.J.Q.B. 86; *Duncan* v. *Jacob*, 3 Jur. 149, and an affidavit denying that he was going to the place named by the plaintiff without shewing that he was not going to leave England is insufficient: *Robinson* v. *Gardner*, 7 Dow. 716. The defendant's affidavit is cunningly drawn so as to give the impression that he was not leaving the Province without

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saying so distinctly. He does not deny that he *was* going to the Yukon country, but says he *is* not going to the Yukon *River*. The "is" instead of "was" is alone fatal for perjury could not be assigned, though he was in fact going at the time of his arrest.

Geo. Jay, Jr., contra.

DAVIE, C.J.: I think the application should have been to discharge the defendant out of custody and not to set aside the order, as I think the order is fully authorized by the affidavit on which it is founded, both as to the debt and the intention of the defendant to leave British Columbia, but the impression that the defendant is going to leave British Columbia formed upon the affidavit made in support of the order, is removed by the affidavit which I think establishes his intention to go no farther than Teslin Lake, where he has obtained a license to carry on an hotel within the Province and that he has given security to the Superintendent of Police for that purpose. It is true that in his affidavit he says he is not going to the Yukon River, whereas the statement on which the defendant was arrested was that he was going to the Yukon country, but then he could not truthfully deny that he was going to the Yukon country, for, as I understand it, Teslin Lake is part of the Yukon country, the head waters of the Yukon. The affidavit is not so cunningly drawn, as carelessly drawn. What a careful draftsman would have done would be to admit that the defendant was going to the Yukon country, but then to have explained that part of the Yukon country, and the part to which he was going, was situated in British Columbia.

Judgment.

I understand that in going to Teslin Lake, the defendant will have to go through Fort Wrangel, which is in American territory. But I do not think a transit such as this is a quitting British Columbia within the meaning of the Act Possibly it might be otherwise if it was established

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that the defendant's leaving was with intent to defraud creditors, for then, being once out of the jurisdiction he would have every opportunity of carrying his fraud into effect. But I am satisfied the defendant's only object is to go from one part of British Columbia to another, and that so far from any intention to defraud creditors his object is to restore his fortunes, so as to enable him to pay his debts. That being the fact, this is not the case for a *ca.re.* under the Act. Moreover, it is not alleged against the defendant, as cause for arrest that he is going to Fort Wrangel, but to the N.W.T., which I am now satisfied is not the fact.

In *Robertson* v. *Coulton*, 9 P.R. 16, OSLER, J., remarks: "If I could see any reason for thinking that the defendant was not about to quit Ontario with intent, etc., I would allow the notice of motion to be amended by asking that the defendant should be discharged on that ground," and as I am now satisfied that the defendant is not about to quit British Columbia within the meaning of the 1 & 2 Vic. Cap. 110, I think the justice of the case requires that I should permit the application to be amended to ask the defendants discharge out of custody. As I have to give this indulgence I shall allow no costs of the motion.

Judgment.

The order will be to discharge the defendant from custody or to cancel the bail bond, if one has been given, or return the deposit, as the case may be. There will be no costs.

Defendant discharged.

GORDON v. THE CORPORATION OF THE CITY OF VICTORIA.

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GORDON v. VICTORIA

Costs—Amendment—Terms.

In the statement of defence to an action under Lord CAMPBELL'S Act by the plaintiff to recover damages for the death of her husband, killed owing to the alleged negligence of the defendants, the defendants in their statement of defence denied that the plaintiff was the widow of the deceased, but at the trial moved upon notice to withdraw that defence. The Chief Justice allowed the amendment but imposed as a condition, against the consent of the defendants' counsel, that the defendants should pay the costs of the action up to and including the costs of the first day of the trial.

Held, by the Full Court (Walkem, Drake, McColl and Irving, JJ.), allowing the appeal, that the defendants had a right to withdraw any part of their defence upon payment of the costs thrown away by the plaintiff owing to that issue being raised.

APPEAL from an order as to costs made by the Chief Justice at the trial. The facts sufficiently appear from the head note. Statement.

Robert Cassidy, for the appeal.
C. Wilson, Q.C., contra.

WALKEM, J.: The order appealed from cannot be supported. The defendants had a right to amend by withdrawing any issue raised by the statement of defence upon payment of such costs as were thrown away by the plaintiff owing to that issue having been presented. As an offer to pay such costs was made by counsel at the trial, the appeal must be allowed with costs. Judgment of WALKEM, J.

DRAKE, MCCOLL and IRVING, JJ., concurred.

Appeal allowed.

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BIGGAR v. THE CORPORATION OF THE CITY OF VICTORIA.

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Venue—Preponderance of convenience—View—Fair trial.

In an application by defendants to change the place of trial from Vancouver to Victoria of an action under Lord CAMPBELL'S Act for damages for the death of plaintiff's husband caused by the collapse of a bridge within the city limits of Victoria, owing, it is alleged, to the negligence of the Corporation, it appeared that all the witnesses on both sides, except two from abroad, reside in Victoria, and that a view of the bridge by the jury was desirable. The plaintiff resisted the application on the ground that a fair trial could not be had in Victoria.

Held, by WALKEM and DRAKE, JJ., IRVING, J., *dubitante*, that the place of trial should be changed to Victoria notwithstanding the suggestion that a fair trial could not be had there owing to the interest, adverse to the plaintiff, of the ratepayers of the defendant Corporation. It was, however, made a term of the order that the defendants should obtain a jury of the County none of whom were such ratepayers.

An order made in Chambers upon a summons duly served, no one appearing *contra*, is not an *ex parte* order, and an appeal will lie from it to the Full Court notwithstanding Rule 577, *Hudson's Bay Company* v. *Hazlett*, 4 B.C. 351 distinguished.

Statement.

APPEAL by the defendants from an order of BOLE, L.J.S.C., dismissing summons of the defendants to change the place of trial from Vancouver to Victoria. The application was made upon an affidavit stating that the cause of action arose and the plaintiff and defendants both reside in the City of Victoria, that the action was to recover damages for injuries alleged to have been received by the plaintiff by the collapse of Point Ellice Bridge at Victoria, on the 26th May, 1896, that it would be necessary for both the plaintiff and defendants to call a large number of witnesses at the trial, that all the witnesses on behalf of the defendants, and all the witnesses for the plaintiff, with the exception of two

engineering experts living in Seattle, live in Victoria. That the number of the defendants' witnesses would be upwards of 14, among them being two police officers, the coroner, and the Surveyor-General of the Province; that the trial would occupy from four to six days, and the expense of taking the witnesses to Vancouver and keeping them there during the trial would be very considerable, and much greater than if the trial took place at Victoria. That owing to the technical nature of the evidence relating to the structure of the bridge in question, it would be almost impossible for a jury, without personally viewing the bridge, to arrive at a fair understanding of the matter. That there would be no difficulty, unless obstacles were thrown in the away, in arranging to obtain a jury from the County, none of whom would be ratepayers of the City. The plaintiff fyled two affidavits in which the deponents stated that from conversations with a large number of residents and ratepayers of the City of Victoria they firmly believed that a jury chosen to try the action at Victoria would be more or less biassed in favour of the defendants, and that a large number of ratepayers of the said City are firmly convinced that the city is not liable for the disaster, and that it would be difficult to convince any jury chosen in the said City or the County of Victoria otherwise, and that they believe that the plaintiff could not obtain a fair and impartial trial in Victoria. The application was argued in Chambers by counsel for both parties before Mr. Justice McColl at Vancouver, and he reserved judgment, afterwards intimating that he desired further materials. The defendants, however, pressed for judgment upon the materials which the parties had thought proper to bring forward. Mr. Justice McColl then referred the application to His Honour Judge Bole, sitting as a local Judge of the Supreme Court, for re-argument, and the defendants were notified accordingly but declined to attend before him upon the ground that the application had already been argued.

Statement.

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Judge BOLE thereupon made an order, reciting the original summons which had been referred to him and the affidavits fyled thereon, and that no one appearing for the defendants in support of said summons, the same was dismissed.

From this order the defendants appealed to the Full Court, and the appeal was argued before WALKEM, DRAKE and IRVING, JJ., on the 16th March, 1898.

Argument.

Robert Cassidy, for the appeal: No discretion upon the question has been exercised against us. The matter has not been really adjudicated upon.

[DRAKE, J.: The Court would like to hear you upon the question of your right to bring this appeal. You permitted the summons to go by default. Your proper course would be to apply before Judge BOLE to allow the summons to be re-considered before himself or some other Judge in Chambers under Rule 577, the summons having been disposed of *ex parte*. The learned Judge referred to *Hudson's Bay Company* v. *Hazlett*, 4 B.C. 351.] The summons may have been disposed of *ex parte* but no order made upon notice, by summons or otherwise, to the opposite party, is an *ex parte* order. The order in such a case has the force of a judgment *inter partes*, final or interlocutory, as the case may be, and an appeal lies from it. [IRVING, J.: That was decided by the Full Court in *Denny* v. *Sayward*, 4 B.C. 212.] I refer also to *Flett* v. *Way*, 14 P.R. 123, the effect of which is that where a summons is disposed of *ex parte*, the party against whom the order is made may either appeal or move to re-consider it at his option. In this case the defendants did not desire to move before Judge BOLE to re-consider, as they think the matter never ought to have been before him.

Per Curiam: We think you are entitled to proceed with the appeal.

Mr. Cassidy then cited *Bridcut* v. *Duncan*, 7 T.L.R. 514, on the question of preponderance of convenience as against the suggestion of inability to obtain a fair trial; *Roche* v. *Patrick*, 5 P.R. 210. On the question of view: *Hodinott* v. *Cox*, 8 East 268; *Levy* v. *Rice*, 5 L.R.C.P. 119.

The defendants did not think it necessary to produce affidavits contradicting the suggestion that a fair trial could not be had at Victoria. There are a large number of similar actions representing claims for the death of over 60 residents of Victoria by reason of the disaster, and, other things being equal, the City would have every reason to apprehend a strong prejudice in favour of the numerous relatives of these unfortunate persons. The only suggestion made in the affidavits is as to pecuniary interest on the part of ratepayers, but the City are prepared to obtain a jury of non-ratepayers.

D. G. Macdonell, contra: The plaintiff should not be deprived of his right to select the place of trial upon a mere question of convenience and expense, where he is satisfied that he cannot obtain a fair trial in the place to which the venue is proposed to be changed. It is a question very largely for his own consideration, and here he would prefer to pay the difference in expense to going to trial in Victoria.

Argument.

WALKEM, J.: We must be governed by the facts as they appear from the affidavits. It is not denied that the witnesses for both sides, with the exception of two experts for the plaintiff, reside at Victoria. The defendants state it would be necessary for them to call upwards of 14 witnesses, and that the trial will occupy from 4 to 6 days, so that in point of expense and preponderance of convenience the balance is decidedly in favour of Victoria. At $2.00 a day the cost of witnesses for the 6 days would be $84.00, besides travelling and hotel expenses, while if the trial be held at Victoria it will be unnecessary to keep all the witnesses on hand during the whole period of the trial,

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but arrangements could be made to have them in attendance as required.

The most important element, however, appears to me to be that a view of the bridge by the jury will be essential to a proper understanding of the case by them.

As it is stated that the Sheriff will be able to get a jury of persons who are not ratepayers of the City of Victoria, the objection on the ground that a fair trial cannot be had there is removed, as, apart from the question of possible pecuniary interest on the part of the jury, there is no probability of prejudice against the case of the plaintiff to be apprehended from a Victoria jury, but if anything the reverse. I think, therefore, that the appeal should be allowed and the venue changed to Victoria. Costs of the application below to be costs to the successful party in the action, and the costs of this appeal to be costs in the cause to the appellant if successful in the action.

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DRAKE, J.: I agree. The preponderance of convenience is in favour of a trial at Victoria. The most important element, however, is that, in my opinion, a view of the bridge by the jury is necessary to a proper understanding of the case. A model of the bridge is certainly an assistance in undertaking the case, but upon matters of detail such as are involved here, it is impossible to sufficiently understand the matter without seeing the bridge itself.

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IRVING, J.: I have a good deal of hesitation in changing this venue. I do not think the affidavit as to the ability of the Sheriff to obtain a jury of non-ratepayers is sufficiently specific. It should have set out the jury list from which it is proposed that the jury will be drawn, and indicated the number of non-ratepayers thereon so that the Court would be able to judge upon that point for itself. The defendants' application is strongly supported by the case of *Bridcut* v. *Duncan*, 7 T.L.R. 514.

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As pointed out in *Allinson* v. *The Medical Council* (1894), 1 Q.B. 750, the administration of justice should be removed from the mere suspicion of unfairness, and the plaintiff here evidently thinks that he cannot get a fair trial in Victoria. As I am, however, only giving a decision in the case now before the Court, I think it right, though with hesitation, to concur with the decision of my learned brothers that the venue should be changed. It will, however, be a term of the order that the action be tried before a special jury, none of whom are ratepayers of the City of Victoria.

Appeal allowed.

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C. P. R. v. McBRYAN.

Water and water courses—Trespass—Right of landowner to relieve himself of flooding by backing water on to lands adjoining—Pleading.

In British Columbia the cultivation by means of irrigation, of land so situated as not to be otherwise capable of cultivation, is a natural and reasonable user of such land; and an injury to the defendant's land caused by such irrigation of his own land by an adjoining proprietor, could not lawfully be averted by any erection upon the defendant's own land diverting it upon the property of another.

Upon appeal to the Full Court (Walkem, Drake and Irving, JJ.):

Per DRAKE, J.: The owner of land may protect himself from injury arising from an accumulation of water on his neighbour's land, and which under ordinary circumstances would find its way on to his own land, but in thus protecting himself he must not injure an innocent third party.

Where an injury is caused to the land of another by artificial means, such as using water on one's own land for irrigation, the party injured can abate the nuisance in a manner least injurious to the person creating it.

Per IRVING, J.: That the water was diverted upon the plaintiff's land by means of an artificial erection on the land of the defendant, which was not a natural user of his land, but was a violation of the rule of law expressed in the mamim *sic utere tuo* etc.

WALKEM, J., concurred.

Statement.

APPEAL to the Full Court by the defendant from the judgment of McCOLL, J., on the second trial in favour of the plaintiffs granting a perpetual injunction and $125.00 damages in an action to restrain the defendant from backing water coming from the land of one Shaw, on to an embankment of the plaintiffs' line of railway and for damages. The action was originally tried before WALKEM, J., when judgment was pronounced in favour of the plaintiffs for $125.00 damages, but a new trial was granted upon the suggestion that the injury to the plaintiffs was in reality caused by their own act in concentrating the flow of

water from Shaw's land by damming it up by their railway embankment and concentrating its flow upon the defendant's lands by means of a culvert cut through the embankment in such a way as to increase the previously existing mischief to the defendant's land arising from the flow of such water before the operations of the plaintiffs. This contention on the part of the defendant was, however, abandoned at the second trial.

The defendant before the second trial had also added Shaw as a third party for the purpose of claiming indemnity against him as the original cause of the mischief for any damages which the plaintiffs might recover against the defendant.

The findings of the jury between defendant and Shaw appear in the judgment of McColl, J.

E. P. Davis, Q.C., for the plaintiffs.
Charles Wilson, Q.C., for the defendant.
L. G. McPhillips, Q.C., for Shaw.

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McColl, J.: The material facts are, I think, sufficiently stated in the report of the judgment of the Full Court, 5 B.C. 187.

The defendant having proceeded against Shaw as a third party, obtained on the 15th April, 1897, an order that "the question of indemnity between the defendant and third party be determined at the trial of this action," and went down to trial accordingly; but, after evidence had been taken, counsel for the defendant frankly stated that he could not complain of the filling in by the plaintiffs of the trestle, and thereupon the case as between the plaintiffs and the defendant was withdrawn from the jury, without objection by either party, it being, as I then understood, assumed on both sides that the judgment of the Full Court was after the surrender of the point referred to, binding upon me, and entitled the plaintiffs to judgment.

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The question of indemnity between the defendant and the third party was then tried, and ultimately the following questions and answers were submitted to and obtained from the jury:

1. Did Shaw during the year 1895, previous to the damage complained of, use water in irrigating reasonably and with due care, and without negligence? No.

2. Is there a natural depression through Sullivan's property? Yes.

3. To what extent, if any, is the defendant responsible by negligence or otherwise, for the water which flowed along the depression and on to the railway track at the time complained of? Mr. McBryan is not responsible to any extent whatever.

4. From the nature of the soil on the Sullivan ranch, would irrigation water percolate, and (part of it) find its way into the depression, and ultimately to McBryan's dam? No.

5. What was the proximate cause of the injury complained of by the C.P.R.; the surplus irrigation water or the dam? The surplus irrigation water.

6. When was the dam built by McBryan? In 1883.

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Subsequently it was urged for the defendant that the judgment of the Full Court does not preclude my giving such judgment as I think right upon the facts, and with some doubt I think it was not intended to do so. The defendant not having either upon the pleadings or at the trial raised against the plaintiffs any question of negligence in the use by Shaw of water for irrigation, as having been the source of the danger against which the defendant sought to guard by the enlargement of his dam, cannot of course, avail himself in his contest with the plaintiffs of the findings of the jury upon the question between himself and Shaw as third party.

The irrigation as practised by Shaw up to the time when the dam was enlarged was apparently not complained of by the defendant. It would seem that the dam, when of its former size had before then protected the defendant's land, and that the plaintiffs' line of railway as constructed with the trestle was made with reference to the dam, and so as to avoid injury to the defendant. If, by the construc-

tion of the railway, his land was injuriously affected, this was a matter for compensation to him by the plaintiffs.

I do not doubt that I ought not in the circumstances to assume that any increase there may have been in the quantity of water flowing from Shaw's land to the defendant's land at the time of the enlargement of the dam, was caused by Shaw having negligently or otherwise improperly irrigated his land, rather than from his having brought under cultivation a larger area than before ; or indeed from some other cause not negatived, affording no ground for complaint against him.

I am of opinion that in British Columbia the cultivation by means of irrigation of land so situated as not to be otherwise capable of cultivation, is a natural use of such land ; that the principle applied in *Hurdman* v. *N. E. Railway*, 3 C.P.D. 168, should be applied in this case also, and that therefore injury to the defendant's land caused only by the exercise by Shaw with skill and in the usual manner of the right to irrigate, could not lawfully be averted by the defendant by diverting the water complained of upon the plaintiffs' property to its damage, even by means of an erection situate wholly upon his own land, if made merely for such purpose.

The order for judgment against the defendant will reserve judgment upon the question of indemnity between him and the third party, by which, as I have already intimated to counsel, I do not at present think that the real question between them can in the circumstances be properly determined ; but I am ready to hear argument if desired.

From this judgment the defendant brought an appeal to the Full Court which was argued before Walkem, Drake and Irving, JJ., on January 14th, 1898.

Charles Wilson, *Q.C.*, for the appeal.

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

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L. G. McPhillips, Q.C., on behalf of Shaw asked to be heard upon the appeal, which was refused.

The arguments of counsel may be sufficiently collected from the report of the previous appeal, 5 B.C. 187.

Cur. adv. vult.

March 18th, 1898.

DRAKE, J.: The Full Court ordered a new trial when this case was up before them in May, 1896, and on 21st September, 1897, the action was again litigated and resulted in a judgment for the plaintiffs for $125.00 damages and costs. The defendant appealed, and raised the same questions that were discussed on the previous appeal.

Ostrom v. *Sills*, 24 O.A.R. 526, on which the defendant relied as supporting his proposition, that he was justified in raising on his own land any dam or obstruction which would prevent the water that came down to him from the upper land from injuring his fields, even if in so doing he injured a third party, is no authority for any such proposition. It decides that a proprietor may fill up depressions in his own land, even if in so doing he kept back water that would naturally come to him from land at a higher level, and thereby injured the proprietor of the higher land. It is, I think, clear law that an owner of land may protect himself from injury arising from an accumulation of water on his neighbour's land, and which, under ordinary circumstances would find its way on to his land, but in thus protecting himself he must not injure an innocent third party.

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It is also clear that when an injury is caused to the defendant by a third party as in this case by artificial means such as using water for irrigation, that the party injured can abate the nuisance in the manner least injurious to the person under whose auspices the nuisance was committed. *Roberts* v. *Rose*, 3 H. & C. 162 at p. 190, is an authority on this head. With these few remarks I have

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nothing to add to the judgment I gave on the previous appeal.

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Irving, J.: This appeal arises out of the new trial held pursuant to the judgment of the Full Court reported in 5 B.C. p. 187.

The defendant admits that if there is any cause of action he is liable in the sum fixed in the first trial, but he relies upon his rights as a landed proprietor, *i.e* (according to Lord Blackburn) the right to use his land in the natural course of user, unless in so doing he interferes with some right created by law or contract, see *Wilson* v. *Waddell*, 2 App. Cas. 95.

The plaintiffs are also landed proprietors and they *prima facie* have a right to enjoy their land free from invasion of filth or other matter coming from any artificial structure on land adjoining, see *Humphries* v. *Cousins*, 2 C.P.D. 239, per Denman, J., at 243.

Judgment of Irving, J.

In this case the defendant put up on his own land an artificial erection (*i.e.* a work made by man) see *Broder* v. *Saileard*, 2 Ch. D. 692 at p. 700, and by means thereof accumulated upon his own land a quantity of water, a much larger quantity of water than could or would have been collected if he had used his land in the natural way, he then raised this artificial structure some feet higher and this subsequent raising caused damage to the plaintiffs. The plaintiffs rely on the maxim *sic utere*. It is necessary for them to shew (1.) that their own land was damaged and (2.) that the defendant was using his land in an unnatural way. The first element is admitted, and I think that the defendant by erecting this dam for the purposes of accumulating water in the way he did, was making an unusual, or extraordinary use of his land and of the water. Having so collected this body of water by this extraordinary user, and having injuriously affected the plaintiffs' property, the defendant violated that rule of law which will not

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permit any one even on his own land, to do an act, lawful in itself, which being done in that place, necessarily does damage to another. But for the defendant's act in accumulating water no mischief would have accrued.

Mr. *Wilson*, for the defendant contended that *Ostrom* v. *Sills*, 24 O.A.R. 526, governed this case. The ratio of that judgment, so far as the maxim *sic utere* is concerned, was that the defendants (for whom judgment was given) were not erecting the barrier as a medium for conducting the water from their own premises to, and casting it upon the plaintiffs' premises. Now that is exactly what the defendant is doing here. He is doing that which Mr. Justice Moss says at page 539 he cannot do. "He cannot collect and concentrate such waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor." There is also this further difference between that case and this. Mr. Justice Moss points out at page 542 that the defendants in building (a warehouse) upon their lands were there making a reasonable and natural user of their own premises, but here the defendant had done something different, he has erected a dam as a medium for conducting the water from his own premises to, and casting it upon the plaintiffs' premises.

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The two cases of *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, and *Hurdman* v. *N.E. Railway*, 3 C.P.D. 168, the former affirming a doctrine laid down by Lord HOLT in *Tenant* v. *Goldwin*, 2 Raymond p. 1089, that every one must so use his own as not to do damage to another, and the latter dealing with an artificial structure, seems to me to settle this case, irrespective of the case of *Roberts* v. *Rose*, 3 H. & C. 162.

As the plaintiffs consent to the injunction being varied so as to permit of the dam being reduced to its original height, the order should be so varied, and the appeal dismissed with costs.

WALKEM, J., concurred.

Appeal dismissed.

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Criminal law—Extradition—Evidence.

Where an application for extradition is founded upon deposition evidence it will be required to strictly conform to the conditions prescribed by the Act for such evidence, and nothing will be inferred in its favour.

The warrant of the Magistrate in the foreign jurisdiction was dated before the date of the swearing of the deposition.

The evidence consisted in part of admissions stated to have been made by the accused, but there was nothing to shew that the admission was not procured by any inducement to the prisoner to make a statement.

Held, the evidence was insufficient upon which to extradite the accused.

Statement.

APPLICATION for extradition of one Ockerman upon a charge of having, at the City of Portland, in the State of Oregon, U.S.A., embezzled certain property of the Benevolent Order of Elks.

W. J. Bowser, for the prosecution.

Charles Wilson, *Q.C.*, and *J. H. Sənkler*, for the accused.

Judgment.

BOLE, L.J.S.C.: In this case Mr. *Bowser*, representing the State of Oregon, applies under Cap. 142 R.S.C. for a warrant of committal under the Extradition Acts. The accused was, it appears, secretary of the Benevolent Order of Elks, at Portland, Oregon, hereafter referred to as the Society, and it is alleged that in that capacity he, within the period of about five years before December, 1897, embezzled some $1,588.00, the property of the Society. The evidence relied on by the prosecution as sufficient to justify the issue of a warrant of committal is confined (*a*) to two depositions, (*b*) to certain alleged admissions. As to the depositions is is to be remarked that the one made by Mr.

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Bingham was sworn on the 31st January, 1898, while the Magistrate's warrant, which was presumably to some extent founded thereon, was issued on the 18th January, 1898, and with respect to this deposition I may say, quoting the words of Lord BRAMWELL, it does not "condescend to particulars." It alleges that the deponent, having examined the books kept by the accused, is satisfied that between 1892 and the date of the examination there appears to be a deficiency of over $1,500.00, and that same has not been paid to the treasurer of the Society or any other officer of the Corporation, but does not, as one might reasonably expect, give any ground or reason for his statement as to the alleged non-payment; not even stating that he received any information from the treasurer on the subject, he gives no items nor any information with respect to dates and no copy of the account is attached or referred to in the deposition, so that assuming, for argument sake, that Mr. Bingham's bookkeeping is not at fault and he does not give any opportunity of checking it, still the fact remains that the deponent is relying on hearsay evidence when he states that the money has not been paid over to the treasurer or the Society's officers. But, vague as Mr. Bingham's deposition is, that made by the other witness, Mr. Baker, is even more unsatisfactory, and neither of these gentlemen appear to be in a position to speak from personal knowledge as to the alleged offence of the accused. The books of the Society are not produced nor is their absence accounted for, and I think the treasurer might surely have been produced from a place so near as Portland, or at least made a deposition; so that the case presented on the depositions cannot to my mind, be described as satisfactory. The so-called admissions by the accused do not, I think, supply the absence of properly drawn depositions, as they were of a vague and uncertain character and not clearly shewn to be unequivocal admissions of the offence charged. Section 592 of the Code allows the prosecutor to give in evidence

admissions, confessions or statements made at any time by the person accused, which by law, would be admitted against him. Now, Mr. Connor's evidence, although in terms denying that any inducement or threat was held out is, with respect to the conversation between himself and the accused, of a fragmentary and incomplete kind, and while there is no reason to suppose Mr. Connor's evidence was not perfectly true as far as it went, still it is quite possible he may have forgotten much of what was said on that occasion, but beyond the right the accused person undoubtedly has to have the whole of the conversation in which the alleged admission was made given in evidence (Roscoe 11th Ed. p. 51), it must be also borne in mind that to make a confession by a prisoner admissible it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducement to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed; the *Queen* v. *Thompson*, (1893) 2 Q.B. 12. This has not, I think, been proved satisfactorily, and I therefore cannot base my warrant on this part of the evidence alone. As to the depositions already referred to I can hardly do better than quote the words of GWYNNE, J., *In re Lewis* 6 P.R. 236 at p. 237: "When a prosecutor who seeks to have a person arrested in this country for committal under the Extradition Treaty, finds it more convenient to use *ex parte* affidavit evidence taken abroad in preference to bringing the living witnesses for examination face to face with the accused at the hearing of the complaint, it is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities with which the Legislature hath surrounded the production of this species of *ex parte* testimony shall be strictly complied with. We have no right to deprive him of the protection which the non-compliance with any of these forms may afford to him,

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however heinous may be the offence with which he stands charged, he has a right to insist that only legal evidence shall be received against him." I also desire to adopt the language of Mr. Justice OSLER in the last paragraph of his judgment, *In re Parker*, 9 P.R. 332 at p. 335, as applicable to this case, as also to refer to Sir Edward Clarke's work on Extradition at page 186. For the reasons already stated I am not prepared to hold that there is sufficient evidence before me to justify my issuing the warrant of committal asked for, and I think the prisoner must be discharged.

Judgment accordingly.

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Admission of foreign Attorney—R.S.B.C., Cap. 24, Sec 37, Sub-Secs. 4-5.

An attorney from another Province, who, if originally admitted in B. C. would have had to serve five years, must shew five years' service before he can be admitted in B.C.

ACTION for mandamus. The plaintiff was admitted as an advocate in the North West Territory after a three years' studentship as prescribed there. He was afterwards, upon his qualification as advocate of the North West Territory, and without any further probation, admitted as an attorney of the Court of Queen's Bench, in Manitoba, a Province in which articled clerks are required to serve under articles a term of five years before admission.

Statement.

He now applied for admission as a B.C. solicitor, but the Law Society refused to admit him without a further period of service under articles of two years. He then commenced an action for a mandamus, commanding the Law Society to enter his name on the books of the Society as an applicant entitled to be admitted as a solicitor on his having been entered on the books for at least six months, and on his otherwise having complied with the provisions of the Act and the rules of the Society. The motion for judgment was argued on 15th January, 1898, before DRAKE, J.

Belyea, for plaintiff.
A. E. McPhillips, for defendants.

DRAKE, J.: The applicant in this case applies under section 37 to be admitted as a solicitor of this Province. According to his statement he was admitted as a solicitor

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in the North West Territory, where three years is the compulsory time of study. After having been so admitted, he complied with the regulations affecting the profession in the Province of Manitoba, and was admitted as a solicitor there. He then applied to the Law Society of this Province for admission to the profession here.

The Law Society refused his application on the ground, as I understand, that having obtained the status of a solicitor in a place where five years' study is not compulsory, he cannot (by being admitted in Manitoba where five years' study is compulsory) claim admittance in this Province without completing the full term of five years as a student.

I think a careful consideration of section 37, sub-section 5, will shew that the position taken by the Law Society is hardly in accordance with the intention of the Act. In case an applicant for admission has been admitted in various portions of Her Majesty's Dominions, he can select whichever of these various admissions most nearly fulfils the requirements of our Act. If it was intended that five years' study should be essential to the applicant before he could claim admittance here, the Act would have said so; but it carefully uses the term, "base his claim for admission," thus recognizing the right of an applicant to base his claim for admittance on any prior admittance he chooses to select.

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I therefore think that he is entitled, provided he fulfils the requirements of the statute to be admitted to the Law Society of British Columbia, and I think he should not be prejudiced by the delay that has been caused by the objections which have been taken. If I have the power I order that the notices required to be given by Mr. Gwillim for admission be given forthwith *nunc pro tunc*.

Order accordingly.

Statement. From this judgment the defendants appealed to the Full

Court, and the appeal was argued 1st April, 1898, before WALKEM, MCCOLL and IRVING, JJ.

A. E. McPhillips, for the appeal: The plaintiff was admitted as an attorney in Manitoba, after a term of service under articles of less than five years, and as such should serve under articles for a sufficient time to complete the full term of five years. The Act, and particularly sub-section 5, of section 37, in effect requires the applicant to shew a five years' service, and not merely that he has been called or admitted in a jurisdiction where, amongst other terms of study and service under articles, there is a five years' provision. He was stopped.

Belyea, contra: The plaintiff did not base his claim on his standing as an advocate of the North West Territory, but on his standing as an attorney in Manitoba, a Province in which the usual term of service under articles is five years, and the Court could not enquire behind that. Where the language of the Act is clear and explicit, effect must be given to it whatever may be the consequences: *Warburton* v. *Loveland*, 2 Dow & Cl. 480; *Hornsey Local Board* v. *Monarch Investment Building Society*, 24 Q.B.D. 1. The contention that we are evading the Act is unsound. See *Yorkshire Railway* v. *Maclure*, 21 Ch. D., at 318; *Ramsden* v. *Lupton*, L.R. 9 Q.B. 28.

Argument.

April 5th, 1898.

WALKEM, J.: I am unable to agree with the construction placed by the Court below upon sub-section 5 of section 37 of the Legal Professions Act. The whole section must be looked at so as to see what the Legislature meant by the sub-section. "It is beyond dispute," observes Lord HERSCHELL 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

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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." The last few words are singularly applicable to the present case; for if sub-section 5, which I shall quote hereafter, is considered alone and apart from other provisions in section 37, the intention of the Legislature in respect of the admission to the profession in this Province of practitioners of the other Provinces can not but be misunderstood. "A literal construction of an Act has, in general, but a *prima facie* preference. To arrive at the real meaning, it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object." Maxwell on Statutes, 2nd Ed. 27.

Judgment of WALKEM, J.

The Legal Professions Act has no preamble; but if one were needed, it will be found in the several preambles of the original Acts for which the present one is substituted. The object of the Legislature as stated in those preambles, was to regulate the admission of persons who shall be allowed to "practise in the Courts of the colony as barristers, attorneys, solicitors and proctors." See R.L. B.C. 1871, Nos. 47, 73, 81, 102, and the preliminary incorporation, in the present Act, of the Law Society is but a means to that end. The history of an enactment may always be referred to in accordance with "the general rule which is applicable to the construction of all other documents, *viz.*, that the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words relate to." Maxwell on Statutes, 2nd Ed., p. 28.

The plaintiff was admitted as an advocate in the North West Territory after a three years' studentship, as prescribed there. He was afterwards, and without any further probation, admitted in Manitoba as a solicitor, under, as I understand it, an exceptional provision, or rule, in force there

applicable to cases such as his. He was, consequently, so admitted, viewing his case in the most favourable light, upon a three years' term of service only; and there is no suggestion that he was, at the time, a graduate of any University. Sub-section 4 of section 37, in effect, lays down a standard of qualification for the position of solicitor. With respect to residents of the Province, a studentship under a practising solicitor, of five years duration, reducible to three in the case of graduates of any recognized University of the United Kingdom or Canada, is, amongst other things, required; and, with respect to solicitors of the United Kingdom, or any of the Superior Courts of the colonies, or of the Provinces of Canada, who come here for admission, a probationary term of six months has to be spent. Other requirements in each of the above cases are mentioned; but it is unnecessary to allude to them as they are not in question now.

Then follows sub-section 5, *e.g.*: "Provided, also, that any barrister or solicitor who shall base his claim for call or admission upon his having been called or admitted, as the case may be, as a barrister or solicitor in some place or Province where barristers or solicitors are called or admitted after a term of study or articles less than five years (except in case of a graduate of any recognized University of Great Britain or Ireland, or the Dominion of Canada), must, before call or admission in this Province, serve as a student-at-law or under articles for a sufficient time to complete the full term of five years.

Reading the two sub-sections together, it seems to me that the Legislature has plainly said: "Our standard of qualification is, amongst other things, a studentship, in the case of residents here, of five years, reducible to three in the case of University graduates; and in the event of any other Province or place having a similar standard of service, its practitioners will be admitted without any further service; but should its term of service be less than five

DRAKE, J.
1898.
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years—save in respect to University graduates—the full service of five years shall be completed here."

In Manitoba, a five years' term of service, such as ours, has been adopted; but, by an exceptional rule, as I have said, a service of three years elsewhere, *viz.*, in the Territories, is recognized there as sufficient. We are asked to shut our eyes to the existence of this rule. To do so, one would have to first admit that our legislation is subject to the control of Manitoba—an absurdity on the face of it. Changes may hereafter be made in the legislation of that Province which, while retaining the five years' service in regard to students, may create wide differences in other respects between our present statute and theirs. No one would pretend to say that such changes would be binding here. The appeal must be allowed, but without costs.

Judgment of WALKEM, J.

McCOLL, J.: While I agree with the reasons given by Mr. Justice WALKEM for his opinion that the appeal should be allowed, and I do not suppose that I can usefully add anything, yet out of deference to Mr. Justice DRAKE, from whom we are differing, and to Mr. Justice IRVING who dissents, and because of the great importance of the question, I desire to state shortly my views.

Judgment of McCOLL, J.

The respondent relies upon the language of sub-section 5 of section 37 of the Legal Professions Act as meaning that inasmuch as students-at-law and articled clerks within the Province (Manitoba), upon his admission as a solicitor within which he bases his claim to be entitled to admission here, are called or admitted only after a "term of study or articles" not less than five years, the circumstance that he himself was admitted in that Province as being an advocate of the North West Territory after the lesser "term" of three years (sufficient there) is immaterial.

If the question were to be decided upon the sub-section alone, I think the wording is rather opposed to such construction than consistent with it.

The words "barristers or solicitors" being used instead of "students-at-law or articled clerks" the proviso, if not designedly framed for the purpose of including cases like the present one at least, as it seems to me, itself affords room for the suggestion that such an intention is indicated. But in construing this enactment regard must be had to the whole Act, which I do not doubt contemplates the establishing a "term" of five years—required for students and articled clerks within this Province as requisite also for barristers or solicitors desiring to be called or admitted here, without the possibility of the substitution for this declared and uniform qualification of any unknown or fluctuating equivalent permitted in any other Province to a barrister or solicitor asking call or admission there if in the like position as the respondent. I need not add that I express my opinion with diffidence owing to the different opinions held by other members of the Court.

IRVING, J., agreed with DRAKE, J.

Appeal allowed, Irving, J., dissenting.

NOTE.—See now the Amendment Act of 1898.

WALKEM, J.

1898.

Aug. 4.

IN RE SMITH ASSESSMENT APPEAL.

Municipal Clauses Act, Sec. 135—Assessment of private streets.

RE SMITH ASSESSMENT APPEAL

A street, the fee in which is in a private owner, who however, cannot close it by reason of lots abutting thereon having been sold according to a plan shewing said street, should be assessed at a nominal figure only. An appeal lies from a decision of the Court of Revision in relation to the assessment of such property to a Judge of the Supreme Court.

APPEAL from the decision of a Court of Revision in relation to the assessment of certain streets in Victoria City the fee in which was still vested in a private owner. In 1892 the assessment of the streets was fixed by DRAKE, J., at $1.00 and in 1893, CREASE, J., made an order on the application of the then owner (Smith's predecessor in title) that the assessment should be changed from $1.00 to $3,200.00 at which figure the assessment remained until the present complaint by Smith. The Court of Revision refused to alter the assessment. It was admitted that the value of the streets to the owner was purely nominal, as it was not in his power to close or otherwise interfere with them as against owners of abutting lots.

Statement.

W. J. Taylor, for the respondents, took an objection that the Court could not entertain an appeal by reason of the fact that it was not shewn that there was other similar property in the municipality within the meaning of the proviso in section 135, sub-section (3) of the Municipal Clauses Act, R.S.B.C., Cap. 144, and argued further that the assessment having been fixed for several years at $3,200.00 and the circumstances being unchanged the assessment should be confirmed.

Argument.

Hunter, for the appellant, was stopped from arguing the last objection, and as to the first, argued that the language used was "similar" and not "of the same kind" and that ordinary public streets were "similar" to the property in question for the purposes of estimating the assessable value.

WALKEM, J.: I think there is an appeal notwithstanding the peculiar language of the above proviso in section 135, and that the Court of Revision was wrong in refusing to reduce the assessment to the real value of the streets to the owner which is purely nominal; and there is nothing in the contention that the action of the former owner in voluntarily procuring the assessment at $3,200.00 precludes the present owner from having the assessment put on the right basis. The appeal is allowed with costs.

Judgment.

Appeal allowed with costs.

WALKEM, J.

1898.

Aug. 17.

RE NELSON SAWMILL COMPANY.

Winding-up Rules—No. 46.

RE NELSON SAWMILL COMPANY

All applications made to the Court in its winding-up jurisdiction must be made by summons.

Statement.

MOTION by the liquidator for a direction that a creditor deliver over to him certain securities.

Sir *C. H. Tupper, Q.C.*, took an objection that the application should have been by summons.

Johnson, for the liquidator.

Judgment.

WALKEM, J.: The rule is in effect a statutory rule and such being the case it must be followed. See *Reg.* v. *City of London Court* (1892), 1 Q.B. at p. 290.

Motion dismissed with costs.

GILL v. ELLIS.

WALKEM, J.

1898.

Aug. 8.

GILL v. ELLIS

Vacation—Pending Trial—Rule 736 (d).

A cause called on for trial before vacation and adjourned to a day in vacation, is not a *trial pending* within the meaning of Rule 736 (d) and so cannot be heard during vacation.

THIS action was set down for trial in Victoria on 29th July, and on that day, as there was no Judge available to try the case, it was adjourned by consent to 8th August, by WALKEM, J. Statement.

August 8th.

Luxton, for the defendant, objected to the trial proceeding during vacation.

Duff, for plaintiff.

WALKEM, J.: The trial is not pending within the meaning of Rule 736 (*d*) and must be adjourned until after vacation. Judgment.

Trial adjourned.

McCOLL, J.
[In Chambers.]
1898.
June 16.

STEELE v. PIONEER TRADING CORPORATION.

Practice—Judgment debtor corporation—Examination of officer of—Return of nulla bona.

A judgment debtor is examinable under Rule 486, notwithstanding that a *fi. fa.* in the Sheriff's hands has not yet been returned *nulla bona.*

STEELE v. PIONEER TRADING CORPORATION

APPLICATION to examine A. J. Mangold, as an officer of the defendant Company, under Rule 486.

The facts fully appear from the judgment.

J. H. Senkler, for plaintiff.
J. A. Russell, contra.

McCOLL, J.: In addition to the affidavits fyled, Mr. Mangold was cross-examined before me upon his affidavit on the application.

It appears that the defendant Company was formed in England for the purpose of exploring for and acquiring mining properties in British North America, and for such other purposes as might be conducive to this object—that Mangold holds an unlimited power of attorney from the Company to act for it within any part of such territory in any way in which it could act by any means, and that he is the person and the only person so representing the defendant Company, or entitled to act for it as regards any business which it has hitherto undertaken. In these circumstances I think he is liable to examination.

Judgment.

It was objected that an execution against goods having been issued and not returned, the order cannot be made, and *Ontario Bank* v. *Trowern*, 26 C.L.J. 190, 13 P.R. 422, was cited. The Ontario enactment there under consider-

ation differs from our rule, and its object is different. One provision is in aid of execution, and the other of attachment of debts. The case of *Jensen* v. *Sheppard*, Vol. I., No. 1, B.C. Law Notes, decided by Mr. Justice DRAKE on 30th January, 1894, is against this objection, and I would follow it even if I did not agree with it, but if I may say so, I think it was rightly decided.

Order accordingly.

WALKEM, J.

1898.

June 6.

REGINA v. GORDON.

Criminal Law—Right of Crown to an adjournment after election to proceed without a material witness.

REGINA v. GORDON

Although the Crown elects to proceed with a speedy trial in the absence of a material witness, and although the trial has commenced the Court has power to grant an adjournment to enable the Crown to get the witness.

SPEEDY TRIAL. The prisoner charged with larceny had been in custody for nine months, awaiting a speedy trial, several postponements having been granted at the instance of the Crown, and none at the instance of the accused. The Crown now elected to go on without a witness who had given evidence in the Police Court, and the trial commenced and one or two witnesses had given their evidence.

Statement.

Smith, D.A.-G., for the Crown, now applied for an adjournment to procure the witness who was in Cassiar.

Hunter, contra: The accused has been in jail for several months awaiting a speedy trial and has never sought an adjournment. The Crown ought to be held to its election, especially after the trial has commenced and as the nature of the evidence was known. This is not the speedy trial provided by the law.

Argument.

WALKEM, J.: I have no doubt I have the power to grant the adjournment notwithstanding that there was an election and that the trial has commenced, and I think that this is a proper case in which to exercise it.

Judgment.

Adjournment granted.

RIDEOUT v. McLEOD.

WALKEM, J.

[In Chambers].

1898.

Aug. 17.

RIDEOUT v. McLEOD

Compromise of action by clients—How solicitor affected as to costs.

Where a defendant in good faith settles an action with the plaintiff in such a way as to deprive the plaintiff's solicitor of his costs, such solicitor is not entitled to leave to proceed with the action for the recovery of his costs.

APPLICATION by the plaintiff's solicitor for leave to proceed with the action. The facts fully appear from the judgment.

Statement.

Belyea, for the application.

Duff, *contra*.

WALKEM, J.: The defendant effected a settlement of the debt and costs in this action with the plaintiff, without the intervention of the solicitors of either party. The plaintiff's solicitor has not been paid his costs; and for the purpose of recovering them he now asks for leave to proceed with the action as if it had not been settled, or, in the alternative, for an order charging the defendant's partnership interest in the firm of Shipley & McLeod with the amount of such costs.

Judgment.

Parties to an action may compromise it without the knowledge of their solicitors, "but they must do so honestly," and not with the intention of "cheating their solicitors of their proper charges": *Per* LINDLEY, L.J., in the case of *The Hope*, 8 P.D. 144. In the present case there is no evidence to shew that the defendant knew that the applicant had not been paid his costs. It is alleged, although not on affidavit, that a writ of execution has been fruitlessly issued for the debt and costs adjudged to be paid to the plaintiff, and that therefore the defendant must have

WALKEM, J.
[In Chambers]
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known at the time he settled with the plaintiff that her solicitor had not been paid. But this does not necessarily follow, for a solicitor may, and sometimes does, require payment of his costs by his client as the action progresses. Again, under our rules, a solicitor may arrange with his client for the payment of a lump sum in lieu of taxable costs. There is no evidence to shew that neither of these arrangements had been made between the present plaintiff and her solicitor. In other words, it has not been shewn that the defendant had notice that the ap-applicant had not been paid. The case, therefore, is not within the case of *In re Margetson and Jones*, 66 L.J., Ch. 619, or *Price* v. *Crouch*, 60 L.J., Q.B. 767. Furthermore, the defendant states on affidavit that the settlement was made in good faith, and under the belief on his part that the plaintiff was the proper party to settle with.

Judgment.

I must, therefore, dismiss the application, but without costs, as I think the defendant improperly refused to answer questions put to him with respect to the settlement of the action, when brought before the examiner in December last.

Application dismissed without costs.

IN RE NELSON CITY BY-LAW, No. 11.

McColl, J.

1898.

July 11.

RE NELSON CITY BY-LAW

R.S.B.C., Cap. 1, Sec. 10, Sub-Sec. 20, and Cap. 144, Sec. 89—Expiry of prescribed time—Non-juridical day.

An application to quash a by-law made on the day next following the time limited by R.S.B.C., Cap. 144, Sec. 89, which time expired upon a holiday, is in time.

R.S.B.C., Cap. 1, Sec. 10, Sub-Sec. 20, is not confined to matters of procedure only.

MOTION to quash Fire Limits By-Law, No. 11, 1897, of the City of Nelson, by Hugh R. Cameron, a resident of Nelson, interested in the said by-law. The by-law was promulgated by publication in the B. C. Gazette on 22nd July, 1897. Section 89 of Cap. 144, R.S.B.C., provides that "No application to quash a by-law, order, or resolution, in whole or in part, shall be entertained, unless the application is made within one month after the promulgation of the by-law, or the passing of the order or resolution, except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to or has not received the assent of the electors." The last day of such month fell on Sunday, August 22nd, and on August 23rd, counsel for Cameron obtained an order *nisi* to quash the by-law. Statement.

A. S. Potts, for the City of Nelson, on the return of the motion contended that the application was out of time. He cited *Dechene* v. *Montreal* (1894), A.C. 640, and *Lowther* v. *Logan*, 33 C.L.J. 329. Argument.

Bodwell, for the motion, relied on R.S.B.C., Cap. 1, Sec. 10.

McColl, J.: The sole question is whether under the enactment now, R.S.B.C., Cap. 144, Sec. 89, an application Judgment.

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to quash made on the day next following the time limited, which expired upon a holiday, was in time. The case of *Dechene* v. *Montreal* (1894), A.C. 640, was relied upon as conclusive against the applicant. But the Judicial Committee merely held in that case that the enactment then under consideration, section 20, 49-50, Vict. C. 95 Que., was in substance only a re-enactment of section 3 of the Code of Civil Procedure, and on looking at the Act itself I find this section of the Code referred to at the end of the enactment as its "source." There is, I think, no foundation for the suggestion that sub-section 20, section 10, Cap. 1, R.S.B.C., is confined to matters of procedure. The real question is whether this application is within the exception provided for by section 10 itself, and must, it seems to me, be answered affirmatively. This view is supported by the doubt expressed in the case referred to as regards the Act under which the application then in question was made, and which appears to me not stronger as an expression of intention than the one with which I am dealing.

Judgment.

Objection overruled.

RE DWYER AND THE VICTORIA WATER WORKS ARBITRATION.

WALKEM, J.
[In Chambers].
1898.
Aug. 18.

RE DWYER AND VICTORIA WATER WORKS

Arbitration—Cost of—Deduction of from amount of award—B.C. Stat. 1892, Cap. 64, Sec. 3 (i).

A Judge sitting in Chambers has no jurisdiction to order the costs of the successful party in an arbitration proceeding under B.C. Acts, 1873, No. 20 and 1892, Cap. 64, Sec. 3 (*i*), to be deducted from the amount awarded by the arbitrators.

APPLICATION on behalf of the City of Victoria for the payment of the costs of an arbitration proceeding, and for leave to deduct such costs from the amount of the award. The facts fully appear in the judgment. Statement.

C. Dubois Mason, for the application.
Walls, contra.

WALKEM, J.: This is an application on behalf of the Corporation of the City of Victoria for an order, in the first place, for the payment of costs incurred in an arbitration respecting the disputed value of certain land, taken from Mr. Joseph Dwyer for water works purposes under the expropriation provisions of the above Acts; and in the next place, for leave to deduct such costs, when taxed, from the award made by the arbitrators, and pay the balance to Mr. Dwyer, or into Court in the event of his refusing it. Judgment.

The Corporation took possession of the land in January, 1896, after offering $500.00 in lieu of $1,000.00 demanded for it.

The award was made on the 31st January, 1898, in the following words:

"We, the undersigned arbitrators, appointed to fix the value of land taken by the Corporation of the City of Victoria for water works

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purposes, from Joseph Dwyer, hereby award him the sum of five hundred dollars. The land mentioned aforesaid as shewn on plan accompanying this award, is in section 58, Lake District, and contains ten acres more or less."

As no more was awarded than was offered, it is clear that Mr. Dwyer is liable for the costs, inasmuch as he comes within the proviso in sub-section (*i*) of section 3 of the Amending Act of 1892, which is as follows :

> (*i*) All the costs of any such arbitration, and incident thereto, including the fees of the arbitrators, shall be borne by the Corporation of the City of Victoria, unless the arbitrators shall award the same or a less sum than shall have been offered by the Commissioner, in which case the owners or occupiers shall bear the said costs incident to the arbitration, and the costs of the arbitrators.

Judgment.

With regard to the second branch of the application, namely, for leave to pay the balance of the award, after deducting the taxed costs, to Mr. Dwyer, or into Court, it must be dismissed, as I have no jurisdiction, sitting in Chambers, to deal with it.

I make no order as to the costs of this application.

Application for deduction refused.

HASSARD v. RILEY.

WALKEM, J.

1897.

Sept. 20.

HASSARD v. RILEY

Default judgment—Defective special indorsement—Rules 15 and 242.

A statement of claim having been required, if no other statement of claim is delivered, there must be a good special indorsement under Rule 15 to sustain a default judgment under Rule 242.

Statement.

APPLICATION to set aside a judgment signed in default of defence. The facts fully appear in the judgment.

Argument.

Duff, for the summons: The writ is not specially indorsed as required by Rule 15, and if so, no statement of claim was delivered although required, and it is clear a statement of claim must be delivered before judgment can be signed in default.

Hunter, contra: The language of Rule 242 is, "if plaintiff's claim be only for a debt or liquidated demand," not "if has been specially indorsed," and while a statement may not be good for the purposes of Order XIV., it may be good enough for the purposes of a default judgment if it clearly shews a claim for a debt or liquidated demand.

Judgment.

WALKEM, J.: The defendant applies to set aside a judgment which has been signed against him, ostensibly under Rule 242, which is as follows: "If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs."

The first question is: Was the defendant in default with his defence? The plaintiff's writ is indorsed:

"STATEMENT OF CLAIM."—"The plaintiff's claim is against the defendant as maker of a promissory note for $5,150.00, dated 9th December, 1893, payable twelve months after

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date, with interest at the rate of six per centum per annum." Particulars :

Principal	$5,150 00
Interest to date hereof	1,120 12
	$6,270 12
Cr.	
By contra account	245 65
Balance due	$6,024 47

"The plaintiff also claims interest on $5,150.00 of the above sum at six per cent. from the date hereof until payment or judgment. Place of trial," etc.

The defendant appeared and formally demanded a statement of claim. The demand was not complied with, but judgment was signed on the ground that the foregoing indorsement was equivalent to a statement of claim. Every writ of summons must be indorsed with a statement of the nature of the claim made, or the relief or remedy required, (Order II., Rule 1), and, "If no statement of claim has been delivered and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered," etc., "deliver it within three weeks of the time of receiving such notice." Order XX., Rule 1, (*c*). Order XX., consisting of eight rules, refers solely to the "statement of claim" as a pleading quite distinct from a plaintiff's indorsement on his writ. It has been held, however, in *Anlaby* v. *Praetorius*, 20 Q.B.D. 764, that a writ specially indorsed under Order III., Rule 6, is in itself a statement of claim. Hence the question arises—Is the indorsement in question a special indorsement under Order III., Rule 6, namely, such an indorsement as would support an application for summary judgment under Order XIV., for that, I should say, is a fair test of whether an indorsement is special or not? In the first place, the interest is admittedly over-calculated, assuming the rate to be six per cent., for in the item "Interest to date hereof," no rate is

Judgment.

mentioned. In the next place, the "Cr. By contra account" is not specific enough. It gives no information as to how the amount is made up, and bears no date; and it matters not that that information ought apparently to be within the defendant's own knowledge. See *Godden* v. *Corsten*, 5 C.P.D. at p. 18, and *Clarkson* v. *Dwan*, 17 Ont. P.R., pp. 94 and 206. For these reasons I consider that the indorsement is bad as a special indorsement within the meaning of Order III., Rule 6, and is therefore not equivalent to a statement of claim. The judgment must be set aside with costs. I see no reason for imposing terms as the defendant has not been in fault.

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Judgment set aside with costs.

DUNLOP v. HANEY.

Practice—Parties—Joinder of defendants—Claimants to same mining ground.

All claimants under the Mineral Act to any part of the ground covered by the mineral claim of a plaintiff may be made defendants to an action by him to enforce an adverse claim by him against any one of such claimants.

WALKEM, J.
1898.
Feb. 28.
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DUNLOP v. HANEY.

APPLICATION by the defendant Haney for an order striking out his name as defendant as being improperly joined, or in the alternative that the plaintiff elect which defendant he would proceed against and that the action be dismissed as against the others. The action was by Alexander Dunlop, as administrator of Thomas D. Dunlop, deceased. The statement of claim alleged that Thomas D. Dunlop

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located the "Pack Train" mineral claim, situate in Trail Creek Camp, in August, 1890, and died on the 17th December, 1890; that to the time of his death he had represented the claim according to law, and that the defendant Fitzstubbs, as Gold Commissioner, took possession of the claim as administrator, and thereby dispensed with the performance of works thereon; that Letters of Administration were granted to the plaintiff on the 2nd July, 1895, and that since that date he had duly represented and performed the required assessment work on the claim; that the defendants Haney, Clark and Spellman, or their predecessors in title, at different times subsequent to August, 1890, each acting independently of the other, staked out claims known as the "Legal Tender," "Olivett," "Copper Chief" and "Legal Tender Fraction," all of which claims were alleged to cover the same ground as the "Pack Train." The defendant Clark had applied for a certificate of improvements, but none of the other defendants had so applied. The plaintiff claimed to adverse Clark's claim, a declaration of title as against all the defendants, an injunction, and delivery up and cancellation of the records of the claims of the defendants Haney and Spellman.

Statement.

Argument.

Barnard, for the application: The plaintiff cannot join all these defendants in one action, as his cause of action against each one is different. They are not joint *tort-feasors*, for the acts of trespass are all separate and were at different times. *Gower* v. *Couldridge*, 14 T.L.R. 165; *Smurthwaite* v. *Hannay* (1894), A.C. 494, and *Sadler* v. *G.W. Ry. Co.* (1896), A.C. 450.

Lawson, for the defendant Clark.

White (Eberts & Taylor), for the plaintiff, *contra*.

Cur. adv. vult.

Judgment of WALKEM, J.

WALKEM, J.: This summons is to strike out Mr. Haney's

name, on the ground that he is improperly joined as a defendant. The statement of claim alleges that the plaintiff located the "Pack Train" mineral claim, situate in Trail Creek Camp, in August, 1890, and that he died on 17th December, 1890, and that the defendants Haney, Clark and Spellman, or their predecessors in title, at different times subsequent to August, 1890, severally located the same ground claims as the "Legal Tender," "Olivett," "Copper Chief" and "Legal Tender Fraction."

The defendant Clark has applied for a certificate of improvements, but none of the other defendants have done so. The plaintiff's action is in the nature of an adverse claim against Clark, and he asks for a declaration of title as against him and the other defendants, also an injunction, and the delivery up and cancellation of the records of the "Legal Tender," "Olivett," "Copper Chief" and "Legal Tender Fraction."

It was contended by the applicant (Haney) that the cause of action alleged against the defendants were separate and independent tortious acts, and that the case came within the decisions in *Sadler* v. *Great Western Ry. Co.* (1896), A.C. 450, and *Smurthwaite* v. *Hannay* (1894), A.C. 494.

I at first decided that Haney's name should be retained as being one of more incumbrancers on the land in controversy; and I made an order to that effect, which is about to be appealed from. Since the making of the order I have had occasion to consider a similar point in an adverse claim brought by Clark, the principal defendant herein against Haney and the present plaintiff, Dunlop; and I held in the final judgment in that action that the applicant for a Crown grant under the old law is the only person who could properly be made a defendant in an adverse claim, as such a claim could only arise in consequence of the Crown grant having been applied for. The same rule, in my opinion, applies under the recent Mineral Acts, where a certificate of improvements is applied for, for adverse

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proceedings are made applicable to such a case. The cause of action in this case is the application by Clark, to which Haney is no party, for such a certificate. Haney's name should, therefore, contrary to the view I first took of this matter, be struck out. Adverse claims should, as a rule, be brought for the possession of the mineral ground in controversy, that is to say, by way of ejectment; *Becker* v. *Pugh*, 13 Pac. Rep. 906.

Application dismissed.

From this judgment the defendant Haney appealed, and the appeal was argued before DRAKE, MCCOLL and IRVING, JJ., on the 3rd May, 1898.

A. E. McPhillips, for the appeal.
W. J. Taylor, contra.

Cur. adv. vult.

9th May, 1898.

Judgment of DRAKE, J.

DRAKE, J.: The plaintiff issued his writ on the 19th June, 1897, and his statement of claim on the 24th June. After setting out his own title to the "Pack Train" mineral claim, he alleges that the three above-named defendants staked and recorded three other claims over the "Pack Train" ground. Their records and staking were independent of each other, and no joint claim by the defendants is alleged. The statement of claim nowhere alleges that Haney now asserts any claim to the land occupied by the plaintiff. No defence has been put in by any of the defendants. On 15th February, 1898, a summons was taken out by Haney, asking that he be struck out of the action as being improperly joined. The argument before the learned Judge was not based on the omissions in the

pleadings, but on the ground that under the Mineral Act, R.S.B.C., Cap. 135, Sec. 37, the right of adversing was limited to one who disputed the right of a claim-holder to obtain a certificate of improvements, and that no action could be commenced until the advertisement referred to in section 36 had been published. On a careful consideration of the objects and intent of the Act I do not think that there is any bar to a party bringing an action with reference to a claim at any time prior to the application for a certificate of improvements. If he does not do so within sixty days after publication in the Gazette, his claim is barred for ever. The right of action exists independent of section 37 ; if we were to hold otherwise, a claimant might be unable to have a settlement of his rights until someone applied for a certificate of improvements. Prior to the Judicature Act ejectment could only be brought by a plaintiff with a legal title.

Judgment of DRAKE, J.

Now, the plaintiff is entitled to the same relief on an equitable title that the Court of Chancery would formerly have given. See *General Finance, &c., Co.* v. *Liberator Building Society*, 10 Ch. D. at p. 24, but the distinction between equitable and legal titles is not abolished, (*Clements* v. *Matthews*, 11 Q.B.D. at p. 814). I remark on this because I think the action for possession of land is not identical with the old writ of ejectment, and under the Mineral Act the person adversing can claim possession, or he can claim damages for trespass. The defendants further argued that the statement of claim disclosed separate and independent causes of action by separate defendants and no joint liability at all. The question then is, are these defendants proper parties? The defendant relies on the case of *Sadler* v. *G. W. R. Co.* (1896), A.C. 450. That was an action at law for damages for separate torts, and each defendant was called upon to answer for his separate acts in respect of separate causes of action. The present case is of a different class. It is to establish the plaintiff's right to land which a num-

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ber of defendants claim in whole, or in part, as belonging to them. Are they properly made parties? In *Poore* v. *Clark*, 2 Atk. at p. 515, Lord HARDWICKE states the general rule as follows: "If you draw the jurisdiction out of a Court of law you must have all parties before the Court who will be necessary to make the determination complete, and to quiet the question." In *Small* v. *Attwood*, You. at p. 458, Lord LYNDHURST states the rule in a similar way. The object of the suit is the criterion whether any particular party is, or is not to be made a party. See Calvert on Parties. This being the rule, the plaintiff is right in joining all parties who claim any right in the land; but as he has not shewn that Haney asserts or claims any right in the land, he is not properly a party.

I think as both parties are wrong there should be no costs of this appeal, with liberty to the plaintiff to amend his claim forthwith.

Judgment of McCOLL, J.

McCOLL, J.: The question discussed upon the appeal—though perhaps not clearly raised by the statement of claim—is whether an adverse claimant, who brings an action, as required by section 37 of the Mineral Act, may properly join as a defendant a third person claiming to be entitled to the claim, or some portion of it, under a separate location, the action being merely for a declaration of the plaintiff's right to the claim.

It was objected for the appellant that the rights of such a defendant and a third party are so entirely separate that the joinder would be improper, and the cases of *Smurthwaite* v. *Hannay*, and *Sadler* v. *G. W. Ry. Co.*, were relied upon. It is necessary to examine the Act for the purpose of ascertaining the exact situation created by it. Where such an action is brought, section 37 gives to a successful plaintiff the right to a certificate of improvements in accordance with the judgment. The certificate is made unimpeachable except for fraud, and entitles the holder to

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a Crown grant. The only condition attached to the successful plaintiff's right to the certificate is compliance with the requirements of section 36 as to survey of the claim, etc. The question to be determined is, how is the third party claimant to assert his right against the plaintiff?

It seems to me that the natural and effective way for him to do so is by application to be added as a defendant in the action, and if he has this right, it follows that the plaintiff might properly have made him a defendant. What the plaintiff requires, is to establish his right to the claim, not merely as against the particular person who is applying for the Crown grant, but absolutely, in order that he himself may obtain it. Must he then limit his first action as suggested, and, if successful in it, contest the claim of every claimant separately? If so, it is equally necessary for every one of the adverse claimants, however numerous, to contest the right of each of the others by a separate action. This, in many cases, would result in intolerable circuity of action, indeed, sometimes in an almost endless chain of litigation, for which the modern practice of the Court affords no parallel, and which is as much at variance with the express provisions, as with the manifest intention of the Act to afford to the lawful holder of a mineral claim speedy means of obtaining a certificate of improvements and the Crown grant. The action is not on contract or for tort, but to establish the right to property, and inasmuch as the Act gives to the successful party the right to a Crown grant, whether he is otherwise entitled to it or not, why should he not be required on the one hand, and entitled upon the other, to have the question of title determined once for all? The reason for the decisions mentioned does not exist in such a case, and their authority, therefore, cannot apply.

Judgment of McCOLL, J.

In actions respecting property the Court always permits all parties interested in the object of the litigation to be made parties, or to be represented, as, for instance, in actions

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to establish wills, or by way of interpleader. But apart from this, I own that I am not pressed with the objection. Unless prevented by force of the statute, the duty of the Court is to determine the rights of the parties under an Act in a reasonable way, and to adapt and apply the rules of Court accordingly. These rules should, if necessary, yield to the Act, and not be allowed to control it.

With reference to the American authorities referred to by Mr. Justice WALKEM, I think, with great deference, that the radical difference between the two systems of procedure renders them unsafe guides.

I agree with the disposition of the appeal proposed by Mr. Justice DRAKE.

IRVING, J., concurred with DRAKE, J.

Appeal dismissed without costs.

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POUNDER v. CORNER

Practice—Dismissal of application for judgment under Order XIV.—Time for putting in defence—Rule 197.

The dismissal of an application for leave to sign judgment under Order XIV., is equivalent to giving leave to defend, and the defendant has therefore eight days in which to deliver his defence unless otherwise ordered.

APPEAL to the Full Court, constituted of two Judges under the "Supreme Court Amendment Act, 1897," Sec. 5, Sub-Sec. (2), from the judgment of IRVING, J., setting aside on terms a judgment signed by plaintiff in default of a defence by the defendant. An application for judgment under Order XIV., was refused on 8th February, 1898, and on 12th February the plaintiff signed judgment in default of a defence. On an application to set aside the judgment, an order was made setting it aside on the terms of the defendant's giving security for the amount claimed and costs, and the defendant appealed.

Statement.

McPhillips, Q.C., for the appellant.
Macdonell, for the respondent.

DRAKE, J.: This is an appeal from Mr. Justice IRVING, setting aside the judgment obtained by the plaintiff herein on terms of security being given. The affidavits shew that the action is brought on a promissory note dated in October, 1896, and payable thirty days after date; the writ was issued on the 25th January, 1898, and the defendant appeared on 31st January; on 5th February plaintiff took out a summons under Order XIV., for judgment; this was heard on the 8th February and refused. On 12th February the plaintiff signed judgment in default of a defence; on 15th February the judgment was set aside on

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the terms of giving security for debt and costs; the defendant objects to give security ordered, and therefore this appeal. If a judgment is set aside for an error or slip on the part of the defendant, terms are generally imposed, and as the question of terms is one of discretion, that discretion should not be lightly interfered with; the affidavit shews that it was not until twelve months after the note sued on became due, that the defendant discovered something which led him to believe that the chattels for which the note was given were not the plaintiff's property. This fact alone would be a sufficient justification for the order for security if the judgment was signed, owing to the same slip or mistake of the defendant, but if the judgment was signed before such a step could be properly taken, it falls within the decision of FRY, L.J., in *Anlaby* v. *Praetorius*, 20 Q.B.D. 764, where he says there is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside when the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms, but although the Court is bound to set aside an irregular judgment, it has always exercised a discretion as to costs. The plaintiff having applied for judgment under Order XIV., was refused; a refusal to allow judgment to be entered under this order, is equivalent to giving leave to the defendant to defend, and in such a case if no time is mentioned, the defendant has eight days after the order.

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In the *Margate Pier Company* v. *Perry*, W.N. (76) 53, ARCHIBALD, J., held that indorsing the summons for judgment with the words "no order," was equivalent to giving leave to defend. That being so the plaintiff could not sign judgment until the expiration of eight days after the disposal of the summons for leave to enter judgment. See Rule 197. The summons was heard on 8th February, and udgment could only be signed on the 16th; here it was

signed on the 12th and therefore prematurely, and the defendant is entitled to have it set aside *ex debito justitiæ* without terms. The case of *Smith* v. *Fulton* was mentioned, which was heard before the Full Court, but there is no written judgment in that case and the only note appears that the appeal against the order of the Chief Justice was dismissed, and it is very probable that Rule 197 and the *Margate Pier Company* case were not brought to the attention of the Court, neither were the facts the same, for in that case three successive applications were made for judgment and more than eight days had elapsed between the determination of the first and last. In my opinion the appeal should be allowed with costs to the defendant in any event; the order appealed against will be set aside and the defendant to have one week from entering order to put in defence.

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McColl, J., concurred.

Appeal allowed with costs.

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Life Policy—Succession duty—Beneficiary domiciled in B.C.

The proceeds of a life policy payable at death without the Province are not liable, in the hands of a beneficiary domiciled in the Province, to Succession duty under R.S.B.C., Cap. 175.

Statement.

ORIGINATING summons for an order, that probate of the will of William Templeton, deceased, be issued to his executrix and for the determination of the question as to whether or not the Succession Duty Act applies to insurance moneys where the same are specifically disposed of under the policies and also where policies were made payable out of the Province, payment of the duty having been demanded by the Registrar.

Macdonell, for the executrix.
Wilson, Q.C., for the Crown.

Judgment.

IRVING, J.: This is an application to determine the amount of Succession duty (if any) payable by the executrix of the late William Templeton, in respect of five policies of insurance effected by him on his life.

Under the Succession Duty Act, R.S.B.C., Cap. 175, it is provided (subject to certain exceptions which need not now be referred to) all property situate within this Province passing by will or intestacy . . . shall be subject to a Succession duty, varying in amount according to the scale laid down in the Act.

The deceased, who, by his will had left everything to his widow, had during his lifetime taken advantage of the provisions of section 7 of the Families Insurance Act, R.S.B.C., Cap. 104, and by a writing identifying three of the policies by their respective numbers had declared those three policies for the benefit of his wife. These three policies

therefore, formed no part of his estate and therefore could not pass by his will. They, accordingly, are not liable to Succession duty. This was conceded during the argument. As to the remaining two, the question is not an easy one to decide.

The policies in question are payable at some place or places without the Province, but the deceased at the time of his death had his domicile within the Province.

Policies of insurance have been described as "choses in action": *Ex parte Ibbetson*, 8 Ch. D. 519; also in *Lee* v. *Abdy*, 17 Q.B.D. at p. 312, as "choses in action which have no locality," but by a fiction of law, personal property, which in itself has no visible locality, is for many purposes governed by the law of the person's domicile; this fiction has crystallized into the maxim *Mobilia sequuntur personam.*

The House of Lords and the Judicial Committee of the Privy Council have, at different times, laid down the following canons for the construction and application of Taxing Acts:

Judgment.

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words if there be admissible, in any statute, what is called an equitable construction certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute": *Partington* v. *The Attorney-General* (1869), L. R. 4 H. L. at p. 122. "The first thing to do is to discover the true scope and intention of the statute": *Blackwood* v. *The Queen*, 8 App. Cas. at p. 91, and "inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain, other than that which it has expressed . . . you must inquire

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whether or not the words of the Act have reached the alleged subject of taxation": *Tennant* v. *Smith* (1892), A.C. at p. 154. "The subject is not to be taxed without clear words for that purpose . . . and the Act must be read according to the natural construction of its words." *In re Micklethwait* (1855), 11 Ex. at p. 456. These canons were summed up by the present Lord Chancellor in *Lord Advocate* v. *Fleming*. "There is a plain interpretation to be put upon plain words . . . In dealing with taxing Acts we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted." *Lord Advocate* v. *Fleming* (1897), A.C. at pp. 151 and 152.

Judgment.

By section 4 of the Act under consideration it is provided that—subject to certain exemptions specified in section 3—all property situate within this Province shall, in addition to Probate duty, pay a Succession duty, according to a graduated scale, and this case accordingly resolves itself into a question whether or not the words of the Act have reached the two policies of insurance and the moneys payable thereunder, in respect of which the Crown claims Succession duty.

No decision has been given by our own Courts on the construction of this Act, and, although numerous decisions on the English statutes were cited, decisions on the English methods of taxation are of little value unless it be found first, that the Provincial Legislature has adopted similar methods. See *Blackwood* v. *The Queen*, at p. 91. The only authorities of any use in a case like this are those which establish some principles which a Judge can follow in deciding the case before him. Our statute, differing as it does from the English Succession Duty Act, Legacies Duty Acts and Probate Duty Acts, must be decided on its own words controlled by the principles mentioned in the earlier part of this judgment.

The aim and object of our Act is to levy a tax on property—I should say on a certain property—passing by will or intestacy, or any interest or income therein, which shall be voluntarily transferred by deed, grant or gift made, (*a*) in contemplation of the death of the grantor, or (*b*) made or intended to take effect after such death, etc., etc., and the property to be taxed is "all property situate within this Province."

Section 2 gives a definition of the word property—a definition wide enough according to the literal meaning of the words used to include all property wheresoever situate, including not only personal property actually situate within this Province, but also that class of personal property which, from its nature, is not capable of having any situation, but is, by the application of the maxim *Mobilia sequuntur personam*, attached to the domicile of the testator.

Judgment.

Our Succession Duty Act was introduced here in 1894 from Ontario, where it, I understand, was originally framed in 1890. Now in considering its provisions, it must be remembered that the Privy Council in 1882, had dealt at great length with the construction of an Australian Taxing Act in character very similar to the present Act. In that case (*Blackwood* v. *The Queen*, 8 App. Cas. 82), that Board pointed out that although there was nothing in the law of nations which prevented a Government from taxing its subjects on the basis of their foreign possessions, yet unless the Crown did so by apt words the inference would be that it only intended to tax that which was under its own hand, and did not intend to levy a tax in respect of property beyond the jurisdiction. I think it is right to assume that this case was in the Legislative mind at the time of the passing of our statute in 1894, and that the draftsman of the Act in introducing the words "situate within this Province" after the very wide words "all property" intended to limit the property subject to taxation

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to those assets within the Province which alone are chargeable with duty according to that decision.

In *Blackwood* v. *The Queen* (afterwards followed in *Henty* v. *The Queen* (1896), A.C. 567, the Colonial Full Court decided that by reason of the maxim *Mobilia sequuntur personam*, personal property in the nature of movable property, outside the colony, belonging to a testator domiciled in the colony, was liable to duty imposed by the Colonial statute. This decision was reversed by the Privy Council on the ground that it was not made apparent by the statute that the Colonial Legislature intended that maxim should apply.

The first four sections of our Act standing by themselves, in my opinion, justify the conclusion that "all property situate within this Province" means all property situated in the ordinary acceptation of that word, and not in its technical sense; so reading these sections there is little difficulty in working out the rest of the Act.

Judgment.

Section 5 requiring the executor to fyle a statement of all the deceased's property, enacts that he shall give a bond equal to 10 per cent. of the sworn value of the property liable to Succession duty. Here clearly there are two classes of property, one dutiable and the other non-dutiable. Then comes a group of sections, 6, 7, 8, 9, relating to the appraisement by a Provincial officer of the district, in which any property subject to the payment of the duty is situate. These seem to me to point to property having an actual situation within the Province, and not to property which can only be deemed to be situate within the Province by legal fiction.

How can these moneys, payable without the Province, be said to be situate within the Province, if we put "a plain interpretation on plain words?" Whether the situation of the property passing under the will is fixed by the head office of the company, or by the place of payment, or by the territorial jurisdiction of the Courts through which the

claim (if resisted) must be recovered, whichever of these tests we adopt, the policy moneys are not situate within this Province.

There must be judgment against the Crown.

Judgment for claimant.

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Practice—Tender—Evidence of, or dispensation with.

Placing money to the credit of a solicitor in a bank, in a place where the solicitor resides, and notifying him thereof, do not constitute a good tender.

Silence on the part of the solicitor is not a waiver.

Statement.

MOTION by plaintiff that the deposit of certain moneys in the Merchants Bank of Halifax, at Nelson, to the credit of the defendant's solicitor should be considered as equivalent to a payment to the solicitor, within the meaning of an order for payment of costs, dated 24th June, 1898. The motion was argued before WALKEM, J., on 31st August, 1898.

Argument.

W. J. Taylor, for the motion: There was good payment, and in any event the solicitor cannot now object to the mode as he made no objection on being notified that the money was in the bank to his credit. *Polglass* v. *Oliver*, 2 C. & J. 14.

Barnard, contra: There was no tender. Silence

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without any act done to lead the party making the tender to suppose that production of the money was waived is no waiver. See *Thompson* v. *Hamilton*, U.C.R., 5 O.S. p. 111; *Thomas* v. *Evans*, 10 East 101; *Leatherdale* v. *Sweepstone*, 3 C. & P. 342; *Matheson* v. *Kelly*, 24 U.C.C.P. 598; and *Kraus* v. *Arnold*, 7 Moore, 59.

Cur. adv. vult.

WALKEM, J.: In this action an order, dated the 24th June, 1898, was made that certain costs due to the defendants in a former action between the same parties, should be paid within one week after service of the order, or, in default, that the present action should stand dismissed with costs. The order having been served on the plaintiff's solicitor on the 27th June last, the week necessarily expired on the 4th July following. A cheque for $279.41—the amount of the costs—was sent on the 30th June by Messrs. *Eberts & Taylor*, of Victoria, agents for Mr. *Galt*, the plaintiff's solicitor, of Rossland, to Messrs. *McPhillips*, *Wootton & Barnard*, in this city, as agents for the defendant's solicitor, Mr. *John Elliot*, of Nelson; but the latter firm returned the cheque immediately, on the ground of their having had no instructions to receive it. Thereupon Messrs. *Eberts & Taylor* got the Merchants Bank of Halifax here to telegraph to its branch office at Nelson, a credit in favour of Mr. *Elliot*, for the $279.41. Mr. Kydd, the manager of the branch office, says that about 4 p.m. of the same day he received the telegram, and within the next hour he called at Mr. *Elliot's* office, and, finding he was engaged, informed his brother, who was also his partner, that the money was in the bank at Mr. *Elliot's* disposal. He also says, that on the 4th July the bank formally credited Mr. *Elliot* with the amount, although he did not keep his banking account with them, and that four or five

Judgment.

days afterwards he asked Mr. *Elliot* if he intended to "draw" the money, and that the latter said he did not. Mr. *Elliot* states that this conversation occurred on the 9th July—"the day of the Provincial elections"—and I am inclined to regard this statement as being more conclusive than Mr. Kydd's general statement as to "four or five days." Besides, a tender on the fifth day, even if properly made, would have been too late. In any event, in view of the above facts, no tender was made; consequently the contention of Mr. *Taylor* that payment ought to be implied is out of the question. To constitute a proper tender "the actual production of the money due is necessary unless the creditor dispense with the production of it at the time, or do anything which is equivalent to a dispensation." Rosc. N.P. Ev. 678, 16th Ed. In *Dickinson* v. *Shee*, 4 Esp. 67, the debtor went to the creditor's attorney and said that he was ready to pay the balance of the account—£5 5s.—and the attorney said that he could not take that sum, the claim being above £8. This was held to be no tender, because the money had not been produced, and the defendant had not dispensed with its production. In his judgment, Lord KENYON said that "the plaintiff, by objecting to the quantum, might dispense with the tender of the actual, or of any specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly by saying that the defendant need not produce the money, as he would not accept it; for though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept it." In *Leatherdale* v. *Sweepstone*, 3 C. & P. 342, the defendant offered to pay the plaintiff, and put his hand into his pocket to get the money to do so, but before he got it, the plaintiff had left the room. Lord TENTERDEN held that this was no tender.

Judgment.

In the present case no money was produced, nor was its production dispensed with; nor was anything done by Mr.

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Elliot which could be construed as a waiver of a formal tender. Hence, the motion on behalf of the plaintiff to the effect that the deposit of the money in the bank at Nelson should be considered as equivalent to a payment, within the meaning of the order of the 24th June last, or "in the alternative that the plaintiff be at liberty to pay the said amount into Court to the credit of this action and the payment be held to have been made as on the 30th June, 1898," must be dismissed with costs.

Motion dismissed with costs.

WALKEM, J.
[In Chambers].
1898.
June 3.

E. & N. RAILWAY CO. v. NEW VANCOUVER COAL COMPANY.

Practice—Pleading—Embarrassing statement of claim—General allegation of plaintiffs' title—Rule 181.

E. & N. RY. CO.
v.
NEW VANCOUVER COAL CO

In an action by plaintiffs who have never been in possession to recover certain coal seams,

Held, That the statement of claim should state particulars of the title under which the plaintiffs claim.

SUMMONS to strike out the following paragraph of the plaintiffs' statement of claim as embarrassing:

Statement.

"3. The plaintiffs are the owners and occupiers of certain lands known as Newcastle Townsite, and of the foreshore rights in respect thereof situate on Vancou[illegible] and are the owners of the coal under the foreshore and sea opposite the said lands, and of the exclusive right of mining

and keeping for its own use all coal and minerals under the said foreshore and sea opposite the said lands." There were no other allegations in the claim to shew how the plaintiffs claimed title.

WALKEM, J. [In Chambers]. 1898. June 3.

E. & N. RY. CO. v. NEW VANCOUVER COAL CO

Hunter, for the defendants: Particulars of the plaintiffs' title had been asked for and refused. We are entitled to full particulars of the title under which the plaintiffs claim. *Phillips* v. *Phillips*, 4 Q.B.D. 127.

Bodwell, contra: Where the whole interest is in the parties they need not shew from whom they derived title, but if it is a lesser estate such as a lease or an estate in tail it may be necessary to shew from whom the estate is derived. See Odgers on Pleading, 3rd Ed. p. 108, and Bullen & Leake's Precedents, 4th Ed. p. 538. *Phillips* v. *Phillips* is distinguishable as there the plaintiff shewed different lines of descent and then claimed generally that he was entitled to the land.

Argument.

Hunter, in reply.

WALKEM, J.: If it were not for *Phillips* v. *Phillips* I would coincide with Mr. *Bodwell's* view, as the allegation follows the form given in Bullen & Leake; but I am bound by the judgment in *Phillips* v. *Phillips* and must order that the plaintiffs amend by giving particulars within five weeks. I think it is a proper case for making the costs costs in the cause.

Judgment.

Order accordingly.

DRAKE, J.

1898.

July 6.

BROWN v. GRADY.

Statute of frauds—Purchase of land for use of partnership—Parol agreement respecting.

BROWN v. GRADY

Plaintiff alleged that defendant being his partner, bought land for the use of the partnership: *Held*, on the evidence that there was not sufficient proof of such partnership to enable the Court to declare the defendant a trustee for the partnership.

ACTION (tried at Kamloops) for a declaration that plaintiff and defendant were partners, and that certain lands were bought by the defendant for the purposes of the partnership, and that the defendant was a trustee of the said lands for the partnership. The facts appear in the judgment.

Statement.

White, *Q. C.*, for plaintiff.

Wilson, *Q.C.*, and *Whittaker*, for defendant.

Cur. adv. vult.

July 6th, 1898

DRAKE, J.: From the evidence it appears that the plaintiff, a resident of Revelstoke, pre-empted the land on which are the St. Lein Hot Springs, in the year 1892, but nothing further was done and the record lapsed. Subsequently the plaintiff met the defendant, who was an old mining partner of his, and discussed the advisability of opening up these springs as a pleasure resort, and as a result of this interview the plaintiff alleges that the defendant agreed to go into equal partnership and take up the land on Arrowhead Lake and at the Springs, but in order to do this it was necessary to pre-empt the two sections by different persons.

Judgment.

The defendant, it is alleged, stated he could not attend to the matter himself, but would get his nephew to pre-empt the land at the Springs. The plaintiff, on his part, pre-empted lot 1139, which is on the lake, and Smith, the nephew of the defendant, pre-empted lot 1138, which contains the Springs in question. Subsequently the Crown grants for these lots were issued to the different pre-emptors, and lot 1138 was subsequently conveyed by Smith to the defendant for an alleged consideration of $2,000.00. As soon as the conveyance was completed, the defendant repudiated any partnership.

The evidence of the defendant is unsatisfactory; he denies a partnership agreement of any sort, although the fact that he always referred to the plaintiff as his partner, in conversation with strangers, and referred an offer of purchase of the Springs to him—yet what the terms of the partnership were to be, its duration and object were left undefined, and we are left to the plaintiff's account of the terms. There is no written memorandum of any sort from which an agreement can be deduced; the only thing in writing is a pencil note with reference to the cash price of the Springs; and it is impossible to say from that unsigned memorandum that the facts which the plaintiff must shew before he can establish his case, are made out. Neither is it possible to establish part performance, the work done by the plaintiff in assisting to make the road, and some little work done on the buildings do not necessarily have reference to any alleged contract and are quite consistent with there being no contract, such as that alleged. Neither party have ever furnished accounts to the other, or in fact kept any accounts of expenditure or claimed any payment in respect of the work thus done and money expended. The defendant relies on the Statute of Frauds and *Caddick* v. *Skidmore*, 2 DeG. & J. 52 seems to me conclusive; the very object of the statute would be avoided if a parol agreement such as this was admitted. In the language of

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the Lord Chancellor the Act is to prevent parol evidence being gone into to elucidate that which the parties have failed to make distinct by reducing it into writing. I therefore dismiss this action with costs.

Judgment for defendant.

GREEN v. STUSSI.

WALKEM, J.

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GREEN v. STUSSI

Judgment in vacation– Pending trial—Rule 736 (d).

Where a trial was called before vacation but not proceeded with, and was adjourned to a day in vacation and then proceeded with in the defendant's absence, the judgment may be set aside, as the trial was not "pending" within the meaning of Rule 736 *(d)*, and so could not be heard in vacation.

MOTION by defendant to set aside a judgment pronounced in favour of plaintiff on 8th August, 1898. The action was set down for trial in Victoria on 30th July, 1898, and on that day, as there was no Judge available to try the case, it was adjourned to 4th August, and further adjourned to 8th August, when evidence was given and judgment pronounced by WALKEM, J., in favour of the plaintiff. The defendant did not appear on any of the trial days. Statement.

Duff, for the defendant: The judgment must be set aside, as the trial was not "pending" within the meaning of Rule 736 (*d*). Argument.

Mills, contra : The trial was pending on 30th July, when the plaintiff was present in Court with his witnesses and ready to proceed.

WALKEM, J. : The trial was not pending within the meaning of Rule 736 (*d*), and I had no jurisdiction to hear it in vacation, and the judgment must be set aside, but without costs. Judgment.

Judgment set aside, costs in cause.

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E. & N. RY. CO. v. NEW VANCOUVER COAL CO

E. & N. RAILWAY CO. v. NEW VANCOUVER COAL COMPANY.

Practice—Coal mines—Inspection of—When ordered—Rule 417.

Plaintiffs claiming title to certain coal fields which were being worked by the defendants, applied before pleading for an order for inspection of the defendants' workings. Defendants admitted working within the area claimed by the plaintiffs.

Held, by WALKEM, J.: That the plaintiffs were entitled to have inspection, and by their own agents.

Held, on appeal (1) The chief ground on which such an order is made is to enable the plaintiff to get on with his case; (2) Under special circumstances, as where there is danger of flood, the order may be made to preserve the evidence; (3) That the inspection should be by indifferent persons who should not reveal any information without the sanction of the Court.

APPEAL to the Full Court by the defendants from an order of WALKEM, J., allowing the plaintiffs to inspect before the delivery of pleadings all the workings of the defendants under the sea in Nanaimo Harbour. The plaintiffs' claim was for trespass and taking their coal from under the sea opposite their lands at Newcastle Townsite, Nanaimo District, and for inspection of the defendants' workings under the sea opposite said lands, through the pits and works of the defendants in their colliery at Nanaimo, in order to ascertain how far the defendants have worked into the plaintiffs' coal, and the quantity of coal gotten by them.

Statement.

Plaintiffs moved for an order for inspection of the defendants' workings in order to ascertain how far they had worked into the plaintiffs' coal and the quantity of coal

gotten out by them. The motion was argued before WALKEM, J., on 2nd February, 1898.

Pooley, Q.C., and *Bodwell*, for the motion.

Helmcken, Q.C., and *Hunter, contra.*

Cur. adv. vult.

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February 3rd, 1898.

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WALKEM, J.: The plaintiff Company claims to be the owner under Dominion and local legislation known as the "Settlement Acts," and under a Crown patent issued conformably to these Acts, of all the coal beneath Nanaimo Harbour. There is no dispute between the plaintiff Company and the defendant Company as to the place under the harbour from which the latter Company is now taking out coal, but the plaintiffs ask for an order for inspection, having commenced legal process against the defendant Company for the purpose of asserting its title to the coal lands in question. I think, in view of the case of *Bennitt* v. *Whitehouse*, 29 L.J., Ch. 326, the plaintiff Company is entitled to the order asked for. The mere admission of the defendant Company that the work is now going on, is not in my opinion sufficient reason for refusing the order, because the plaintiff Company is entitled to know the extent of the work which has been done, and the manner in which it is being done, for coal companies may have, economically speaking, different views with regard to the method of working their mines. The order can do the defendant Company no harm beyond what can be compensated for by the plaintiffs' counsel undertaking to pay any damages that may be suffered by reason of the order being made. The order might follow the terms of the order in the case cited, but the number of surveyors and other persons to make the inspection ought to be limited, and this can be done on settling the minutes of the order. Mr. *Pooley* has asked for the privilege of using eight (8) persons for making the inspection. There ought to be also a provision, either as a

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term of the order or an undertaking of counsel, that none of the information acquired by the inspection will be used except for the purposes of this action. Of course the plaintiff Company must pay their own inspection expenses and the expenses of any men from the defendant Company's works who are either made use of in course of the inspection or thrown out of work while the inspection is being made.

The minutes of the order made were as follows:

Statement.

"And the plaintiffs by their counsel undertaking to abide by any order this Court may make as to damages in case this Court should hereafter be of the opinion that the defendants have sustained any by reason of this order or anything done thereunder by the plaintiffs which the plaintiffs ought to pay, and the plaintiffs, by counsel aforesaid, further undertaking that any information obtained by them in the course of the inspection hereinafter referred to shall be used by them for the purposes of this action only: *Ordered*, That the plaintiffs shall be at liberty, on giving twenty-four hours' notice to the defendants, to go down into the defendants' mine and without doing any injury to inspect all the workings under the sea in Nanaimo Harbour, within the boundaries indicated by the dotted lines on the blue print marked Exhibit "C" to the said affidavit of William G. Pinder, and for that purpose to take such surveyors, assistants and persons as the plaintiffs may choose, not to exceed eight in number, with liberty of measuring, latching and dialling the mine within the limits aforesaid, and of making plans of the workings of the defendants therein; and with liberty also to make such measurements and observations as may be necessary to indicate the locality of the said workings with reference to the surface of the harbour within the said limits: and for all or any of the purposes aforesaid the plaintiffs and their surveyors and assistants as aforesaid may enter the defendants' mine at such place as they shall deem most convenient, and shall also have the right to use the machinery of the defendants for descending and ascending to and from the said mine and workings."

From this order the defendants appealed to the Full Court on the grounds that the order was unnecessary, the defendants having admitted mining for coal within the area claimed by the plaintiffs; that the plaintiffs were not entitled at this stage to know more than the *situs* of the defendants' workings within the said area; and that if the plaintiffs failed in the action irremediable injury would be done the defendants by reason of the information as to the

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business of the defendants which the plaintiffs would be able to obtain by reason of the order appealed from.

An application was made to stay proceedings pending an appeal, which was refused, and as no regular sittings of the Full Court would take place before the time named for inspection, an order for a special sitting of the Full Court was made on application to the Chief Justice.

The appeal was argued 7th February, 1898, before DAVIE, C.J., and DRAKE and IRVING, JJ.

Helmcken, Q.C., and *Hunter*, for the appellants: The cases where inspection has been allowed are all cases in which the *locus in quo* of the working was in dispute, but not cases in which the title was in dispute as here.

The plaintiffs should first establish their title, and then they may be entitled to inspect the amount of coal got out; otherwise if they fail the parties will have been put to useless expense, and gross injustice may be done the defendants by allowing the plaintiffs to inspect their property. An order for inspection at this stage is not necessary, as the defendants admit working at the point indicated on the plan, but deny title of plaintiffs to property. Assuming however that the Court considers it necessary for the purposes of justice that it should have this information at this stage, it ought to procure it through the medium of an indifferent responsible person who should give an undertaking not to reveal any information to any person without the authority of the Court. He referred to *Batley* v. *Kynock*, 19 Eq. 90; *Bennitt* v. *Whitehouse*, 29 L.J., Ch. 326; *Ennor* v. *Barwell*, 1 DeG. F. & J. 529.

Argument

Pooley, Q.C., and *Duff*, for the respondents: There is absolutely no limit to the power of the Court under Rule 514, and by Rule 517 an order for inspection may be made at any time after issue of writ: *Smith* v. *Peters*, 20 Eq. 511.

The plaintiffs want to ascertain the quantity of coal extracted, and if inspection is not allowed at once the sea may break in, and thus all means of ascertaining how much

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coal has been taken out would be gone: *Lewis* v. *Marsh*, 8 Hare 97; *East India Co.* v. *Kynaston* 3 Bligh O.S. 153; *Earl of Lonsdale* v. *Curwen*, 3 Bligh O.S. 168; *The Attorney-General* v. *Chambers*, 12 Beav. 159.

Where the boundary is in dispute inspection is ordered as a matter of course: *Cooper* v. *Ince Hall Company*, W.N. (1876) 24.

It is not necessary to shew a *prima facie* case of title, but only that evidence necessary to prove the plaintiffs' case at the trial may be lost unless inspection is ordered: *Velati* v. *Braham*, 46 L.J.,C.P. 415.

The judgment of the Court was delivered orally by

Judgment.

DAVIE, C.J.: The Court is unanimously of the opinion that the plaintiffs are entitled to have inspection made of the defendants' workings, but the terms on which the inspection will be made will be varied so that the defendants' interests will be better safeguarded. The parties will have one week to arrive at terms on which the inspection should be made, and if they cannot then agree the Court will settle it. We are inclined to adopt the argument and cases cited by Mr. *Hunter*, shewing that inspection is only granted when necessary to forward the plaintiffs' case, but from the special circumstances of this case we think this inspection is warranted, as without any fault on either side the evidence may be entirely lost and destroyed, such as by the accidental flooding of the mine, unless the inspection is made at once. Every precaution must be taken so that no injury will result to the defendants. If the Protection Island shaft is open, the inspection should be made from that way.

Order varied.

The minutes of the order as finally settled by the Court, were as follows:

"And the plaintiffs, by their counsel aforesaid, further undertaking

that any information obtained by them through or by reason of this order or of said inspection, shall not be used or disclosed by them except for the purposes of this action only. *Ordered*, That the said order be discharged; that the plaintiffs are entitled to have inspection made of that portion of the defendants' mine under the sea, in the harbour of the City of Nanaimo, within the boundaries indicated by the dotted lines in the blue printed plan fyled with the Registrar of this Court and marked Exhibit "C" to the affidavit of W. G. Pinder, sworn the 2nd of February, 1898, and duly fyled; and to have the said portion of the said mine measured and dialled, and to have a plan or plans made of the workings of the said portion of the said mine, and to ascertain the amount of coal removed from the disputed area;

"That the persons to make said inspection, measurements, dialling and plans, shall be the following and no others, namely: Joseph Hunter, of the City of Victoria, Civil Engineer; F. C. Gamble, of the said City, Civil Engineer; and in case either of the above gentlemen are unable to act, Mr. H. P. Bell, Civil Engineer, shall supply the vacancy;

"That for the purposes aforesaid the said Engineers shall be at liberty to appoint and employ such assistants and chainmen as may be necessary, except such persons whose names have been objected to by the defendants and whose names have been handed in to the Court;

"That such inspection shall commence on or after the 1st of March next, between the hours of 10 p.m. and 6 a.m., and shall be continued for as many days as may be necessary during said hours;

"That the defendants shall be at liberty to have their fire bosses accompany all or any of the persons aforesaid during the said inspection for the purpose of protecting such persons from endangering either themselves or the said mine, and for such purposes the said persons shall obey all directions of such fire bosses in this behalf;

"That the said Engineers may be accompanied by a fireman to be nominated by the plaintiffs, who shall be satisfactory to the defendants;

"That the said inspection shall be had by way of Protection Island shaft, and shall be had without doing any injury to the defendants' mine, with liberty to use the defendants' machinery for the purposes of descending and ascending into the said mine;

"That the said Engineers do make one or more reports in duplicate, of such inspection, measurement and dialling of the said portion of the said mine, and also a plan or plans thereof in duplicate, and do deliver one of such duplicate reports and plans to the plaintiffs, and the other to the defendants, and do also report the quantity of coal taken from the disputed area by the defendant Company;

"That subject to the further order of a Judge or Judges of this Court, no information whatever, other than is herein permitted, shall be disclosed by the said Engineers, assistants, chainmen, fire bosses or firemen, or any of them, to any person or persons whatever;

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"That the costs of and incidental to such inspection, measurement reports and plans, together with the costs of and incidental to the said order be borne by the plaintiffs, except as to the remuneration of the Engineers, which are to be paid in the first instance by the plaintiffs and to be eventually borne by such party as the Trial Judge or a Court of Appeal may direct.

"That the costs of the motion and appeal be costs in the cause, etc."

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DUNSMUIR v. THE KLONDIKE & COLUMBIAN GOLD FIELDS LTD., *ET AL.*

Practice—Affidavit—Sworn before ante litem solicitor—Whether sufficient—Rule 417.

Replevin bond—Requirements as to sureties—Ship whether repleviable—C.S.B.C. 1888, Cap. 101.

The affidavit of a party to a suit sworn before an *ante litem* solicitor in his employ, acquainted with the facts of the case, although not the solicitor on the record, is insufficient under Rule 417.

Per DRAKE, J.: It is not necessary under the Replevin Act, C.S.B.C. 1888, Cap, 101, that the sureties on a replevin bond should be worth the amount of the bond, or that there should be sureties at all, but only that there shall be a bond in double the value, etc.. to the satisfaction of the sheriff.

A ship is repleviable.

Statement.

APPEAL to the Full Court from an order of DRAKE, J., dismissing defendants' motion to set aside a writ of replevin, and the seizure thereunder of the tug Czar, a vessel on the British Registry. The plaintiff had a time charter of the vessel, and while in his possession the defendants purchased her from the registered owner and got delivery of her.

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The plaintiff replevied. The affidavit of the plaintiff on which the writ was issued was sworn before a solicitor in the employ of the plaintiff, and who, although not the solicitor on the record in the suit had, as solicitor for the plaintiff, written under the instructions of the plaintiff, before issue of the writ, a letter to the registered owner of the vessel, stating that plaintiff would resist any attempt to get the vessel out of his possession. The defendants moved to set aside the writ of replevin and all proceedings thereunder, and the motion was argued before DRAKE, J., on 26th February, 1898.

The grounds relied on by defendants were *inter alia*, that the affidavit of the plaintiff on which the writ was issued was bad and insufficient because sworn before a solicitor in the employ of the plaintiff; that a ship is not repleviable; and that the bond given to the sheriff was illusory and the sureties not worth the amount for which they had become bound.

Statement.

Hunter, for the motion.
Pooley, Q.C., contra.

Cur. adv. vult.

1st March, 1898.

Judgment of DRAKE, J.

DRAKE, J.: The plaintiff has a time charter in the steam tug Czar, a vessel on the British Registry. The vessel was in possession of the plaintiff under the charter, and was taken out of his possession without his knowledge or consent. The defendants purchased the tug from the registered owner, and by some undisclosed means she was delivered to the defendants by the owner.

The plaintiff replevied and the defendants now move to set the writ of replevin aside on various grounds: (1) That the affidavit on which the writ was obtained was sworn

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before a commissioner to take affidavits, who is a clerk in the employ of the plaintiff.

Rule 417 says no affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor. The gentleman who administered the oath is a solicitor of the Court, but he is not the solicitor on the record, nor an agent of such solicitor. The case of the *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777, goes further than any other case; there the plaintiffs had a country solicitor and a town solicitor; the town solicitors were the solicitors on the record and employed the country solicitors to obtain evidence, and an affidavit proposed to be used was sworn before one of the latter. HALL, V.C., refused to admit it, but he said that point thus decided went beyond any previous actual decision. What I am asked to do will carry the rule still further and make it apply to persons who are not acting as solicitors for the parties at all. Here the solicitor is not the agent of the solicitor on the record, and being an employee of the plaintiff will not bring him within the rule.

Judgment of DRAKE, J.

The next point taken was that there was no entry of the plaintiff's right as charterer, in the Custom House. The Merchant Shipping Act, 1894, does not require it, and there are no means of doing it.

The next objection is that the bond given to the sheriff is illusory, and the sureties are not worth the amount for which they have become bound. It is laid down in Co. Lit. 145 (*b*) that if the sheriff take insufficient pledges he shall answer according to the statute, and see Comyn's Digest, Title Replevin, p. 269. It is apparent from the authorities there cited that the sheriff is responsible if the pledges are insufficient: *Yea* v. *Lethbridge*, 4 Term Rep. 433. There is no language in the Replevin Act that makes it necessary to take sureties at all; the sheriff is to take a bond in double the value of the property to be replevied,

and a bond without sureties fulfils the language of the Act; if the term sureties, or sufficient sureties, were used in the Act, then Mr. *Hunter's* contention would require consideration.

The fourth objection is that the property mentioned in the writ of replevin is not repleviable. On this point there are but few English authorities, the Court of Admiralty Jurisdiction covering as it does disputes as to ownership of vessels, has rendered the proceedings by replevin almost obsolete. It is laid down in Bacon's Abridgment that replevin lies for a ship. Our Statute C.S.B.C. 1888, Cap. 101, after enumerating the articles which may be replevied, uses the general terms "or other personal property," "or other effects," and proceeds thus: "The owner or other person or corporation capable of maintaining an action of trespass or trover for personal property, may bring an action of replevin." A vessel is a chattel, and is personal property, and for wrongful detention of a vessel an action of trespass will lie, therefore a writ of replevin will lie in the present case. The distinction between an action of trespass and one of replevin is that in the former case the plaintiff seeks to recover damages for the wrongs complained of; in the latter he seeks to recover the actual chattel. The fact that a ship has special legislation regulating its transfer, ownership, etc., does not divest it of its original character as a personal chattel, but merely points out the mode which the statute requires it shall be dealt with in certain cases. The case cited by Mr. *Hunter*, *Galloway* v. *Bird*, 12 Moore 547, only decides that replevin does not lie for goods delivered under a contract of carriage or hire. If the plaintiff had delivered this vessel to the defendants, he could not have replevied her. The delivery by the prior owner to the defendant in pursuance of his contract of sale, would prevent such prior owner from obtaining a writ of replevin, but it has no bearing on the present case when the alleged wrongful possession arises from some one taking the vessel

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out of the custody of the plaintiff and delivering it to the defendants. The case of *Luffman* v. *Luffman*, cited in the Canadian Law Times of February, 1898, p. 50, may be a valuable authority for the defendants at the trial, but on the point I have to decide, whether replevin lies and whether the proceedings are in accordance with the statute, it is no help.

I am of the opinion that the motion must be refused with costs to the plaintiff in any event.

From this judgment the defendants appealed to the Full Court, and the appeal was argued on 1st April, 1898, before WALKEM, MCCOLL and IRVING, JJ.

(Pending the appeal the solicitor before whom the affidavit was sworn was examined before the Registrar, and on his examination he admitted he knew the facts of the case at the time he took the affidavit, and that he was naturally desirous that the plaintiff should succeed in the action).

Statement.

Hunter, for the appellants: Under Rule 417 the affidavit sworn before the solicitor is bad. He is in the regular employ of the plaintiff in his mercantile office, and was acquainted with all the facts of the case. The rule is not confined to the solicitor on the record, but extends to an *ante litem* solicitor: *Re Gray*, 21 L.J.,Q.B. 380; see also *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777.

Argument.

Then as to the sureties. The statute evidently requires good and sufficient sureties, as otherwise a pauper could replevy and take away a valuable property. The Interpretation Act expressly enacts that sureties means good and sufficient sureties: See *Norman* v. *Hope*, 14 O.R. 287.

Pooley, Q.C., for the respondent: Rule 417 is confined to the solicitor on the record, his agent or correspondent, and does not refer to a solicitor who happens to be employed in the office of one of the parties to a suit. The affidavit was not prepared by the commissioner. See judgment of

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Lord ROMILY, M.R., *In re Gregg*, L.R. 9 Eq., at p. 144; *Foster* v. *Harvey*, 3 N.R. 98. As to the sureties: The defendants are not hurt as the plaintiff is admittedly responsible.

Per curiam: We say nothing about the other points in this case, as in our opinion the affidavit is clearly insufficient. The rule is that a solicitor who is in the employ of the party and acquainted with the facts of the case must not administer the oath as the interests of justice require that the officer be indifferent.

Appeal allowed with costs.

POPE v. COLE.

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Contract—Title—Misrepresentation—Want of consideration.

If A shews B a mineral claim, stating that he is the owner, and B thereupon buys, takes conveyance, and pays the price, B may recover back the price if it turns out that A has no title, even though there is no covenant for title in the deed and no wilful misrepresentation.

THE plaintiff purchased from the defendant an undivided half interest in a mineral claim, and paid $5,250.00 therefor. Prior to the purchase the defendant took the plaintiff's agent to the ground, pointed out to him a tunnel and a quantity of ore on the dump, and stated that was the property he owned. It subsequently transpired that a third vendor was the registered owner of the property and that the defendant had no interest in it. The plaintiff brought

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an action for a return of the purchase money, on the ground of misrepresentation, and want of consideration. The action was tried before McCOLL, J., without a jury, at Nelson, on 22nd of April, 1897.

Hamilton, for plaintiff.
Clute, for defendant.

Cur. adv. vult.

June 18th, 1897.

Judgment of McCOLL, J.

McCOLL, J. : This action is brought to recover $5,250.00, being the price paid by the plaintiff to the defendant for an undivided one-half interest in the "Eldorado" mineral claim, bought by the plaintiff from the defendant, and assigned by the latter to the former by two several deeds, dated the 4th June, 1896, of one-eighth and three-eighths interests respectively.

It appears that a portion—more than two-thirds of the ground comprised within the limits of this claim—was, at the time of its location, occupied by the "Mascot" and "Reba" mineral claims under prior locations, and that in consequence thereof the plaintiff took no steps to perfect the title to the "Eldorado" claim, and gave notice to the defendant that he would not do so, but that the defendant must protect the title. It is not alleged that the defendant knew of either of the prior locations till after the completion of the sale, and there is no reason to doubt his denial of such knowledge. Neither of the deeds contains any covenant for title.

Mr. *Hamilton*, for the plaintiff, expressly disclaimed any imputation against the defendant of fraud or wilful misrepresentation. He contended, however, that a mineral claim is, under the Mining Acts, a chattel, and that the

plaintiff is entitled to recover because of the general rule in the case of a sale of a chattel giving to the purchaser the right to recover back the price for want of title in the vendor. He also urged that there was not really any such mineral claim as the "Eldorado" in existence, because of the validity of the title of the holders of the "Mascot" and "Reba" mineral claims. But this reasoning seems to me to be fallacious. The locator of the "Eldorado" had located upon the ground and obtained a record for that claim. If the title of the holders of the other claims had been invalid for want of compliance with the provisions of the Mining Acts, the title to the "Eldorado" would have been good. It does not appear how the "Eldorado" came to be located and recorded in view of the prior locations and records referred to, but it appears that it was in fact located upon the ground and a record obtained in the usual way, whether in ignorance of such prior locations, or under the supposition that they were invalid, can only be a matter of conjecture, and, as I think, of no importance in the present case. The question, as I understand it, really is as to the title of the defendant to the "Eldorado," and his liability to the plaintiff for want of title.

Probably in agreeing to sell goods, a seller under the existing authorities does impliedly warrant that he has the right to do so in the absence of circumstances negativing such warranty, although I am not aware that the case of *Morley* v. *Attenborough*, 3 Ex. 500, has been expressly overruled. But the present case is one of a sale of a chattel real.

If regard could be had to the probable intention of the parties, it, or at least the intention of the vendor, was not, I think, likely to have been that any such warranty should be understood, in view of the nature of the property sold, and the way in which such property is commonly bought and sold. But the sale has been completed and I do not see anything in the circumstances of this case to take it out of the ordinary rule that a purchaser has no

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rights against the vendor except such as are given to him by the deed which he has accepted.

It is not as if the defendant had taken the plaintiff, though innocently, to a place outside the limits of the claim. If he had done so, the law as laid down by the House of Lords in *Bloomenthall* v. *Ford* (1897), A.C. 156, would perhaps enable the plaintiff to recover, though in that case the mis-statement of fact appeared on the face of the certificate there in question. But there is no suggestion that in the course of any remarks which may have been made by the defendant on the occasion of the visit to the place he intended, or was understood by the plaintiff to refer to any question of title; and there cannot, I think, be any pretence that the question of the defendant's right to sell the particular property looked at was ever in the mind of either of the parties at the time.

Judgment of McCOLL, J.

Judgment for defendant.

From this judgment the plaintiff appealed to the Full Court, and the appeal was argued before DAVIE, C.J., WALKEM and DRAKE, JJ., on 26th January, 1898.

Herbert Robertson, for the appellant: There was a total failure of consideration and the defendant had nothing to sell. The evidence shews that two-thirds of the land belonging to the so-called "Eldorado" claim was taken up by the "Mascot," "Reba," and other claims. No such claim as the "Eldorado" ever existed, because the discovery post and posts one and two were on prior locations. The effect of this being that by virtue of the Mineral Act and the Amendment Acts, the claim was not properly located and therefore had no existence. The stakes of a legal location must be upon waste land of the Crown; see judgment of DRAKE, J., in *Atkins* v. *Coy*, 5 B.C. 6, at p. 18; see

Argument.

also judgment of CREASE, J., in *Granger* v. *Fotheringham*, 3 B.C. 590, at p. 597.

The vendor having nothing to sell the purchaser paid his money under a mistake and is entitled to recover: See *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Hitchcock* v. *Giddings*, 4 Price, 135; *Hart* v. *Swaine*, 7 Ch. D. 42, in which the vendor having sold and conveyed the land as freehold, and received the purchase money, and the land being copyhold, it was held, assuming the representation was *bona fide* made, that the vendor committed a legal fraud and the sale must be set aside and the purchase money repaid with interest. The plaintiff is entitled to recover on the ground of misrepresentation and mistake. The defendant shewed the plaintiff a tunnel and dump, which he said was his property, which turned out to be the property of other claim holders. See judgment of TURNER, L.J., p. 316, in *Rawlins* v. *Wickham*, 3 DeG. & J. 304; *Redgrave* v. *Hurd*, 20 Ch. D. 1. He was stopped, and the Court called on the respondent's counsel.

Argument.

Duff, for the respondent: The plaintiff having accepted a conveyance without covenants, and fraud having been disclaimed, there is no remedy against the respondent in respect of the transaction of sale. The rule *caveat emptor*, applied to sales of realty, is clearly applicable. "After conveyance there is no equity to relief unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived." *Per* Lord SELBORNE, *Brownlie* v. *Campbell*, 5 App. Cas. 925, at p. 937; *per* Lord CAMPBELL, *Wilde* v. *Gibson*, 1 H.L. Cas. at p. 632.

What is the use of covenants for title, and what is the use of limiting covenants for title, if whenever any purchaser who has taken a conveyance is ejected, he can come to the vendor and say, "Take back the estate for what it is worth and give me back my money?": *Soper* v. *Arnold*, 37 Ch. D. at p. 102, *per* COTTON, L.J. Innocent misrepre-

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sentation is not, after conveyance, ground for rescission: *Brownlie* v. *Campbell*, and *Wilde* v. *Gibson*, *supra*; nor for compensation: *Joliffe* v. *Baker*, 11 Q.B.D. 255. Nor can the purchase money be recovered back on the ground of failure of consideration: *Clare* v. *Lamb*, L.R. 10 C.P. 334.

The defendant sold and the plaintiff bought only the rights which were conferred by the location and record referred to in the bills of sale by which the claim was conveyed.

The boundaries of mineral claims are not accurately ascertained until (usually long after location) an application is about to be made for a Crown grant, and a survey is therefore required. Until then they are always subject to reduction in size, by reason of the grounds within the limits of the location being embraced within the area of prior locations. The Mineral Act (Section 27) provides that, subject to the validity of the record itself, prior location gives priority of title.

Argument.

The assumption is that mineral claims (prior to the issue of a Certificate of Improvements) are sold and bought subject to this contingency of reduction by reason of conflict with prior locations of which the parties are not aware. The vendor sells and the purchaser buys an interest in a physically existing location and record described in the conveyance. There is no assumption or implication that the vendor's rights are indefeasible. A similar rule has been applied in the case of an assignment of timber limits; *Ducondu* v. *Dupuy*, 9 App. Cas. 150, reversing 6 S.C.R. 425; and in the case of assignment of a patent of invention: *Vermilyea* v. *Canniff*, 12 O.R. 164.

The holders of the "Eldorado" had, on 18th December, 1895, obtained and recorded a certificate of work. I submit that this certificate of work, having been recorded within the year, perfected the title of the holders of the "Eldorado," and that, up to the date of that record, the title to the claim must be considered perfect: See Mineral Act (Section 28).

The effect of this section is to put the holder of a mineral claim who has performed and recorded his assessment work within the proper time, beyond the reach of attack upon the title to his claim, except by the Attorney-General for fraud. It is not suggested that the claim does not remain subject to reduction by reason of conflict with prior locations, whose holders have been equally diligent in performing and recording their work, (see section 27) but within the lines of his location the holder of a duly recorded certificate of work is entitled to all ground not lawfully occupied under a valid and subsisting prior location. Therefore the holders of the "Eldorado" were clearly entitled to that portion of the "Reba" mineral claim included within the "Eldorado" lines, as well as all ground not embraced in any prior locations.

There was no sufficient evidence establishing the superior title of the "Mascot." Strict proof of this is required: *Dupuy* v. *Ducondu*, 6 S.C.R. 479, 480 and 481. Defendant is not bound by plaintiff's act of waiver in failing to adverse "Mascot" application: *Ex-parte Young*, 17 Ch. D. 668. Argument.

On the sale of a mineral claim the validity of the location (at all events where the location and record are not physically non-existent), is a question of title, just as on the sale of a mortgage, or lease, the execution of the deed or the existence of any prior subsisting lease is a question of title; and as on the sale of land by a vendor claiming title under the Statute of Limitations, the nature and duration of his occupation is a question of title. In any of these cases, if the vendee be evicted by reason of the vendor's want of title (*e. g.* forgery of the lease) it is clear that in the absence of fraud and of covenants, the purchaser has no remedy after accepting a conveyance: See *Bell* v. *Macklin*, 15 S.C.R. 576; *Bree* v. *Holbech*, 2 Doug. 654; *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Cripps* v. *Reade*, 6 Term Rep. 606, and a full discussion of the earlier cases in *Clare* v. *Lamb*, L.R. 10 C.P. 334.

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Robertson, in reply: The evidence shews that the "Mascot" had been Crown granted, and there is no suggestion by the defence that that was not the case. *Clare* v. *Lamb*, L.R. 10 C.P. 334, is to be distinguished as it was a case of an agreement only, and this is a case of an executed contract.

Cur. adv. vult.

Judgment of WALKEM, J.

WALKEM, J.: This is an appeal from a judgment given by Mr. Justice McCOLL. The plaintiff's action is one to recover $5,250.00 paid by him to the defendant for an undivided half interest in a mineral claim called the "Eldorado," on the grounds of misrepresentation and want of consideration, as the "Eldorado" had no existence except in name. The evidence is to that effect, for the ground located as the "Eldorado" had, except as to ten or fifteen acres, been previously located as the "Mascot." The "Mascot" was a valid location, for, as the evidence shews, its owners obtained a Crown grant for it after publication of the usual statutory advertisements as to adverse claimants. In other words, the locators of the "Eldorado" either did not oppose the application for the grant, or if they did they were overruled. There is no evidence one way or the other on this point, but the Crown grant, as a matter of law, extinguished any claim of the "Eldorado" to ground within the boundaries of the "Mascot." As to the surplusage of ten or fifteen acres, it is asserted and not denied, in the evidence given at the trial, that they had been located before the "Eldorado" was located, so that, in the language of one of the witnesses, "there was nothing left for the 'Eldorado;'" hence, the location of the "Eldorado" having been made on land already taken up, the title to which was unquestioned, was not, in a legal sense, a mining location. The

owners of the so-called "Eldorado" had, therefore, nothing to sell. The evidence of the defendant tends, in my opinion, to confirm this, for his answers to questions referring to his titles are very evasive, and, in substance, are to the effect, "I sold what I bought." More than this, he was clearly guilty of misrepresentation, for he took Laberee, the plaintiff's agent, who negotiated the purchase on the plaintiff's behalf to what turned out to be the "Mascot" tunnel and deposit of ore, and told him that both tunnel and ore belonged to the "Eldorado." He also took Laberee in a northwesterly direction from the tunnel and shewed him, as he stated, the western boundary of the "Eldorado." He denies this, but without having had the advantage of the learned Trial Judge of hearing and seeing the witness, I am compelled to say, in view of the defendant's evidence as a whole, that Laberee's evidence is much more to be relied upon than his. Mining claims, as a matter of common knowledge, are not like farms or city property, bought and sold by the inch, foot or acre. Their value is gauged by the mineral found in "place," at what is called the "discovery post," and the more or less development of that discovery by open cuts, shafts or tunnels as the case may be. Acreage is not very important, save where it happens to include the trend of a ledge; hence the tunnel and ore which the defendant shewed the plaintiff as being part of the "Eldorado," were really what was bought and sold; and as this tunnel and ore belonged, incontestably, to the "Mascot," the defendant sold what did not belong to him. I have had the advantage of reading my brother Drake's judgment. He finds as I do that "the property sold was different in substance from what it was represented to be," and that there was "a failure of consideration." On page 113 of Story's Eq. Jurisprudence, 2nd Ed., the doctrine is laid down by that eminent authority that a bargain founded upon a false representation, such, for instance, as the defendant made, even if innocently made, will be avoided.

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The decision of the Trial Judge should, in my opinion, be set aside for the above reasons, and judgment entered for the plaintiff for $5,250.00 and costs in the Court below, together with the costs of this appeal.

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DRAKE, J.: This is an appeal from Mr. Justice McCOLL, who tried the action without a jury, and gave a judgment for the defendant. The facts as found by the learned Judge show that the plaintiff purchased of the defendant an undivided one-half of a claim called the "Eldorado" which had been located and recorded on the ground that was already lawfully occupied for mining purposes. The deeds executed by the defendant to the plaintiff contain no covenants for title.

Judgment of DRAKE, J.

The action is brought to recover back the purchase money, or in the alternative damages for misrepresentation. The plaintiff at the trial disclaimed any imputation of fraud or wilful misrepresentation, and the learned Trial Judge held that there were no circumstances which took the case out of the ordinary rule that a purchaser has no rights against the vendor except such as are given to him by the deed he has accepted.

I think that the evidence discloses circumstances which amount to misrepresentation; the defendant took the agent of the purchaser on to the ground, pointed out to him the tunnel and a quantity of ore on the dump, and stated that was the property he owned. This was a misrepresentation of an existing fact, possibly innocently made, but as stated in *Derry* v. *Peek*, 14 App. Cas. 359: "If there is misrepresentation, however honestly made, and however free from blame the person may be who made it, the contract cannot stand;" and in *Redgrave* v. *Hurd*, 20 Ch. D. 1, it was held that although the defendant made a cursory and incomplete inquiry into the facts, if a material representation was made to him he must be taken to have entered into the contract on the faith of it, and in order to take away his right to

have it rescinded if untrue, it must be shewn that he had knowledge of facts which shewed it to be untrue, or that he did not rely on the representation. I think the evidence here clearly shews that the plaintiff relied on the representation of the defendant. The defendant urged that the principles which governed contracts or agreements relative to patents or patent rights, should be applied. The analogy would be worth considering if it was not for the misrepresentation which is complained of, and I think proved in this case.

The equitable doctrine of misrepresentation avoiding a contract, was laid down perhaps too broadly in *Rawlins* v. *Wickham*, 3 DeG. & J., at p. 317. Turner, L.J., says "if one of the parties to a contract makes a representation materially affecting the subject matter, he cannot be allowed to retain any benefit which he has derived if the representation proves to be untrue, however innocently the representation may have been made; a contrary doctrine would strike at the root of fair dealing." And Story lays down the doctrine thus: "Nothing is clearer in equity than the doctrine that a bargain founded upon false representation made by the seller, although made by innocent mistake, will be avoided." In my opinion the property sold was so different in substance from what it was represented to be, that it amounts to a failure of consideration. The representation here made amounts to this, that the property sold was a half interest in a mining claim which had had a sufficient amount of development work done upon it as to prove its value as a mine. There are numerous authorities shewing that in cases of far slighter misrepresentation it has been held that they amount to failure of consideration. See *Robinson* v. *Musgrove*, 2 M. & Rob., at p. 94, where Tindal, C.J., says: "If any substantial part of the property purporting to be sold turns out to have no existence or cannot anywhere be found, that circumstance in my opinion entitled the plaintiff to rescind the contract

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in toto, even if the defendant was not guilty of fraudulent misrepresentation."

I think the appeal should be allowed with costs here and in the Court below, and judgment entered for the plaintiff for $5,250.00, with interest at six per cent. from date of payment.

DAVIE, C.J. : I think the appeal should be allowed.

Appeal allowed.

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WAKEFIELD v. TURNER.

Practice—Receivership order—R.S.B.C. Cap. 56, Sec. 14—Rules 517 and 1,075.

Receivership orders must be made by the Court and cannot be made by a Judge sitting in Chambers.

Statement.

MOTION to set aside an order made by His Honour, Judge SPINKS, sitting, or purporting to sit, as a Local Judge of the Supreme Court, at Rossland, on August 3rd, 1898, whereby he appointed, on the *ex parte* application of plaintiffs, William A. Carlyle, to be receiver, and to take possession of, manage and in every way control, the Le Roi mine at Rossland, and also restraining the defendants until August 13th, 1898, from in any way interfering with the management and control of the mine, and from extracting, or removing, or otherwise in any way disposing of, any ores

of the mine, or attempting to exercise any control over the operation of the mine. The operative part of the order ran, "it is ordered, etc., and concluded as follows:

"By the Court, "WM. WARD SPINKS,
SEAL "J. Schofield, "Local Judge of the
"Registrar." Supreme Court."

Bodwell and *J. A. Macdonald*, for the motion: The Local Judge had no jurisdiction to make the order for the receiver, which is, on its face, a Court order. Rule 1,075 S.C. Rules authorizes him to dispose of those matters which can be dealt with at Chambers.

Argument.

[IRVING, J.: The order may be read either as a Chamber order or a Court order. If the order can be supported as a Chamber and not a Court order, I must so regard it, and *vice versa*. I think it is my duty to read it in such a way as to uphold the order if possible.] Then if it is a Chamber order the Judge had clearly no jurisdiction, as Rule 517, by reason of the inadvertance of the rule-making authority, refers to the wrong section of the Act, so that the only jurisdiction which exists to make such a Receivership order, is that given by the Supreme Court Act, Sec. 14, which shews that the order is made "by the Court," and not a Judge.

Daly, Q.C., contra: The order was a Chamber order; the affixing of the seal was a mistake of the clerk in taking out the order. It would be absurd to say that an application for a Receivership order, which is often urgent, could be made in Kootenay only when a Judge of the Supreme Court happened to be in that district. In England, Receivership orders are made in Q.B.D. in Chambers.

IRVING, J.: At the beginning of this argument Mr. *Bodwell* contended that the form of the order shewed on its

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face that it was a Court order, and that therefore it was beyond the jurisdiction of a Local Judge.

Under section 22, Supreme Court Act, and Rule 1,075 the jurisdiction of the Local Judge of Kootenay is limited to such matters as may, under the Rules of Court or by statute, be dealt with at Chambers. There being no Judge resident there or usually discharging his duties within that district, the proviso authorizing the Local Judge to hear "Court motions" has no application to Kootenay, I felt that as the order was ambiguous on the face of it, and could be read as a Chamber order, I ought so to read it if it could be supported as a Chamber order and I so held during the course of the argument. Thereupon we had to turn to section 14 of the Supreme Court Act, which says that a receiver may be appointed by an interlocutory order of the Court. Apart from the difference between our rules and the English rules to which I shall presently refer, it is laid down (Kerr on Receivers, p. 112) that "if the application is in a cause, and it is the first application in the cause for the appointment of a receiver in the place of a person already in possession, it must be made in open Court, and cannot be made in Chambers." Then there is the point mentioned in argument, the English rules (O.L., R. 6) contain a provision that the power to appoint a receiver may be exercised by the Court or a Judge. The Judge has not been given that power by the corresponding British Columbia rule. Owing apparently to a mistake in the B.C. Rules of Court, the power which is given to the Court or Judge by the English rules must, under our rules, be exercised by the Court and not by a Judge. So, whether the order in question is a Court order or a Chamber order, it could not be made by a Local Judge under Rule 1,075. The order will have to be discharged.

Judgment.

Order set aside with costs.

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WALKEM, J.

1898.

Sept. 3.

BARNES v. GRAY

Practice—Agents—Service on.

Where the general agents in Victoria of a firm of country solicitors have never acted as agents in a particular suit, the service on them of a summons in that suit is insufficient.

SUMMONS by defendant to set aside, on various grounds, a writ of *fi. fa.* issued by plaintiff. The writ was issued from the Nelson Registry, and the summons was issued from the Victoria Registry and served on Messrs. *Bodwell & Duff*, the general agents for Messrs. *Macdonald & Johnson*, of Nelson, the solicitors for the plaintiff. It appeared that Messrs. *Bodwell & Duff* had never acted in this particular suit as agents for Messrs. *Macdonald & Johnson*, except that they had entered an order drawn up in Victoria by Mr. *Johnson*, who attended on the application on which the order was made. Statement.

Barnard, for the summons.

Duff, contra, objected that the service was insufficient.

WALKEM, J.: The service is insufficient, but I will amend the summons by extending the return day to enable the defendant to serve the summons on plaintiff's solicitors. The defendant must pay the costs of the attendance of Messrs. *Bodwell & Duff*. Judgment.

Order accordingly.

MARTIN, J.
1898.
Oct. 5.

JARDINE
v.
BULLEN

JARDINE v. BULLEN — ESQUIMALT ELECTION CASE.

Election petition—Practice—Case stated—R.S.B.C., Cap. 67, Sec. 231, Sub-Sec. 8.

Where the case raised by an election petition embraces several distinct grounds of complaint, the Court has no power to state only one part of the case.

SUMMONS by petitioners that that portion of the case raised by the petition which alleged that the Returning Officer erroneously received certain ballot papers as votes for the respondent which were not marked according to law, and erroneously rejected certain ballot papers properly marked according to law as votes for David William Higgins, and which further alleged that the said David William Higgins was duly elected, be stated as a special case. Numerous charges of bribery and corruption were also set forth in the petition.

Statement.

Duff, for the summons.
Hunter, *contra*.

October 5th, 1898.

MARTIN, J.: This is an application by the petitioners under the Provincial Elections Act, R.S.B.C., Cap. 67, Sec. 231, Sub-Sec. 8, for the Court to state a special case. The application, as stated in the summons, and made by Mr. *Duff*, is not that the whole case raised by the petition be stated, but that a portion of the case raised be so stated, *i.e.*, that portion of it which complains of the actions of the Returning Officer; and if the application is successful, the effect of it is to obtain a recount.

Judgment.

It is objected, on behalf of the respondent, that the Court is not empowered under the section to do otherwise than to state the whole case. The case raised by the petition embraces, roughly, three groups of charges or grounds of complaint: (1) Improper reception and rejection of votes by the Returning Officer; (2) Bribery, personation, and corrupt practices generally on behalf of the respondent by agents; (3) and bribery and corrupt practices generally by the respondent personally.

If the case be stated, the section provides in its last paragraph, that "the decision of the Court shall be final; and the Court shall certify to the Speaker its determination in reference to such special case."

With every disposition to give a wide construction to this clause of the Election Act, particularly in view of the fact that such Act contains no provision for a recount before a Judge, it would appear that the words, "the case raised," taken in conjunction with the paragraph last quoted, contemplate the final disposal of the whole case raised, and not a disposal of a portion of it at one time, and the later disposal, or perhaps no disposal at all, of its other portions. Holding this view, the application must be dismissed with costs to the respondent in any event.

Judgment.

Summons dismissed with costs.

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1898.
Oct. 19.

NEW VANCOUVER COAL CO. v. E. & N. RY. CO.

NEW VANCOUVER COAL COMPANY v. E. & N. RAILWAY COMPANY.

Practice—Interlocutory injunction—Undertaking as to damages.

An undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made *ex parte*, but even when it is made upon hearing both sides.

MOTION for an order for an injunction restraining the defendants, their servants, workmen and agents from proceeding under the arbitration provisions of the Coal Mines Act, R.S.B.C., Cap. 137, for the purpose of acquiring the right of way through the property of the plaintiffs in Nanaimo District, and for an injunction restraining the defendants, their servants, etc., from trespassing on the said property of the plaintiffs under colour of the said Act or otherwise.

Statement.

On 3rd October an interlocutory injunction was granted until the hearing, but as counsel for defendants asked that the plaintiffs should give an undertaking as to damages and counsel for the plaintiffs submitting that it was not the practice of the Court to require such undertaking in cases where the interlocutory injunction had been obtained on notice, but only when *ex parte*, and further that in any event the Court should exercise its discretion and dispense with the undertaking in the present case, the point was reserved for further argument.

Helmcken, Q. C., for plaintiffs.
Luxton, for defendants.

Judgment.

MARTIN, J.: On the 3rd of October inst., on motion, an interlocutory injunction was granted herein till the hearing.

Mr. *Luxton*, on behalf of the defendants, asked that the plaintiffs should give an undertaking as to damages. This point was reserved for further argument, Mr. *Helmcken* submitting that it was not the practice of the Court to require such undertaking in cases where the interlocutory injunction had been obtained on notice, but only when *ex parte*, and further that in any event the Court should exercise its discretion, and dispense with the undertaking in the present case.

If I could satisfy myself that the point reserved is open to my discretion, I should without hesitation accede to Mr. *Helmcken's* request, and not require the undertaking, for the position of the plaintiffs is strong and exceptional, and is based on admitted legal rights, subject to the powers conferred on third parties in proper cases by section 13 of the Coal Mines Act, R.S.B.C. Cap. 137.

Judgment.

The point is one of importance, and counsel have referred me to the following cases: *Graham* v. *Campbell*, 7 Ch. D. 490; *Smith* v. *Day*, 21 Ch. D. 421: *Newson* v. *Pender*, 27 Ch. D. 43, 63; *Fenner* v. *Wilson* (1893), 2 Ch. 656; *Griffith* v. *Blake*, 27 Ch. D. 474; *Blakemore* v. *Glamorganshire Canal Co.*, 1 M. & K. at 162; *Attorney-General* v. *Albany Hotel Co.* (1896), 2 Ch. at 696; *Adamson* v. *Wilson*, 3 New R. 368. These I have consulted, and others, including the cases referred to in Seton on Decrees, 1,455, and in Daniel's Chancery Practice, Vol. I., at pp. 1,611 and 1,616, where the rule is laid down that "whenever an interlocutory injunction is granted the plaintiff should be required to give an undertaking to pay any sum which the Court may direct, by way of damages, to the defendants, by reason of the injunction having been granted."

In the case of *The Teign Valley Railway Co.* v. *Southwood* (1871), 19 W.R. 690, it was held by JAMES and MELLISH, L.JJ., that an undertaking as to damages must be given in an interlocutory injunction "in any case," *i.e.*, not only when the order is made *ex parte*, but even when it

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is made upon hearing both sides. But earlier still, Vice-Chancellor KINDERSLEY, in the case of *Wakefield* v. *Duke of Buccleugh* (1865), 12 L.T.N.S. at p. 629, held that it was "the settled practice that not only on *ex parte* applications, but upon injunctions granted upon motion by notice, the plaintiff should give an undertaking as to damages," and proceeded to say that "the rule was the more satisfactory as it aided the Court in doing that which was its great object, viz., abstaining from expressing any opinion upon the merits of the case until the hearing." It might also be noted that counsel for the plaintiff in that case, as in the present, contended that "he had a strong case, and that where that was so, an undertaking could not be required."

In 1880, JESSEL, M.R., in the case of *The Secretary of State for War* v. *Chubb*, 43 L.T.N.S. 83, said that it was the "common and universal practice" to require the undertaking; later (1890), LINDLEY, L.J., in *Tucker* v. *New Brunswick Trading Co.*, 44 Ch. D. at p. 253, laid it down that "an undertaking is the price of an injunction, and if a man gets an injunction he must pay the price;" and finally (1893), KEKEWICH, J., in *Pike* v. *Cave*, 68 L.T.N.S., at p. 651, stated that "the settled practice is that any plaintiff asking for an injunction (interlocutory) to which the Court holds him to be entitled, is bound to give by his counsel an undertaking in damages."

Judgment.

Assuming that the practice in this Court has not been invariably, or even in the majority of instances, to require an undertaking, I am forced to the conclusion, in view of the cases above quoted, that the attention of the Court cannot have been drawn to the growth of the practice in England, and (it would appear in Ontario): *Featherstone* v. *Smith*, 20 Gr., 474; *Hessin* v. *Coppin*, 21 Gr., 253; Holm. & Lang. Judicature Act, pp. 59, 872.

The result of the decisions being in my opinion practically to deprive me of any discretion, the undertaking will, con-

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sequently, be embodied in the order, as interlined in the draft submitted for my approval.

The draft contains also an undertaking that the plaintiffs will prosecute the action with due diligence. I understand that Mr. *Luxton* does not press for this clause in view of the fact that the plaintiffs have already delivered a statement of claim. But if the point is urged, I cannot now give effect to it, for it was not a term of the order as pronounced by me at the close of the argument on the motion: *Hendrie* v. *Beatty*, 29 Gr. 423.

Order accordingly.

TOWNE v. BRIGHOUSE.

IRVING, J.

1898.

Sept. 14.

TOWNE *v.* BRIGHOUSE

Practice—Agreement for sale—Lis pendens—Cancellation of—R.S.B.C., Cap. 111, Sec 85.

An order will not be made cancelling a *lis pendens* under section 85 of the Land Registry Act in a case where damages would not be a complete compensation.

Statement.

ACTION for specific performance of an agreement for sale of land. The plaintiff entered into an agreement with an alleged agent of defendant for purchase of certain land belonging to defendant, who repudiated the agreement. Another agent of defendant then made a sale of the same property, and as the conveyance was about to be completed the plaintiff commenced his action for specific performance and fyled a *lis pendens* against the property. The defendant

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then applied under the provisions of R.S.B.C., Cap. 111, Sec. 85, to have the *lis pendens* cancelled.

Martin, A.-G., for defendant.
C. B. Macneill, for plaintiff.

September 14th, 1898.

IRVING, J.: Action for specific performance. The defendant now applies to cancel a *lis pendens*, under section 85 of the Land Registry Act.

I have come to be of opinion that these sections were only intended to meet those cases of hardship in which damages would be a complete compensation.

They seem to have been drafted with a good deal of care in providing: (1) For the cancellation of a *lis pendens* in those cases where that relief would be proper; and (2) For the giving of security for damages in those cases of hardship where the cancellation of the registration of the *lis pendens* would be fatal to the plaintiff's case.

Judgment.

In my opinion the powers conferred by these sections should be exercised with very great caution indeed, when the granting of relief would amount to a hearing of the case on the merits, but with more freedom in any case in which damages would be a complete compensation.

To cancel the registration of the *lis pendens* would be to turn this application into a motion for judgment, at least to this extent that it would in the result amount to a declaration of refusal of specific performance.

I do not think that a point of that importance should be decided on an interlocutory application if it can be avoided, and then only under peculiar circumstances.

I cannot therefore accede to the defendant's request, but as I have doubts as to plaintiff's ultimate success, and as the Act gives me a wide discretion, I shall require the plaintiff to give an undertaking to abide by any order the

Court or Judge may make as to damages, should the Court or Judge hereafter be of opinion that the defendant has incurred any by reason of the registration of such *lis pendens*.

The plaintiff must within five days give security, to be approved by Registrar, in the sum of $800.00—this sum was fixed by plaintiff as a fair security in case the *lis pendens* was set aside—conditioned for the fulfilment of such undertaking.

Plaintiff must speed the cause, delivering his statement of claim on the 3rd October, and set the action down for trial within ten days after the receipt by him of statement of defence.

The order will provide for discovery of documents and examination of parties at any time after delivery of statement of defence.

Costs of this application costs in the cause.

Judgment.

Plaintiff, neglecting to give undertaking and security within time limited, defendant may apply on twelve hours' notice to have *lis pendens* cancelled.

Order accordingly.

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1897.

HOBBS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY.

June 29.

FULL COURT
1898.

Contract for sale of land—Reservation of minerals—Unilateral mistake—Principal and agent—Ratification—Specific performance—Damages.

March 10.

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An agreement for a sale of lands containing no reservation of the minerals thereunder, issued by the Land Agent of a Railway Company to an intending purchaser, accompanied by a deposit does not bind the Company to convey the minerals if the agent had instructions to reserve them, on the ground that there was a unilateral mistake against which the Court will relieve.

ACTION for specific performance of contract entered into by the Land Commissioner of the defendant Company for the sale to the plaintiff of certain lands of the Company.

Statement. The plaintiff, on 28th November, 1889, then being unaware that the defendant Company were selling their lands subject to a reservation of mines and minerals, called on Mr. John Trutch, the Company's Land Commissioner, and handed him a document as follows :—

28th November, 1889.

The description of a piece of land I wish to pre-empt or purchase. A piece of dry land and swamp situated in or about two miles west of Stark's place, Harewood Lake, Cranberry District, commencing at the top of a ridge, running west to Berkeley's Creek, thence south down Berkeley's Creek to a corner post at a swamp, then east, then north to the top of the ridge at the place of commencement.

It is on or about two miles west of Lower Hayward Lake and about a mile or a mile and a half or two miles from Donahue's claim, and contains on or about 160 acres, it was formerly claimed by Mr. Stamp.

(Sgd.) FRANK VICKER HOBBS.

Mr. Trutch thereupon issued to the plaintiff the following document :—

ESQUIMALT AND NANAIMO RAILWAY CO.—LAND DEPARTMENT.

Victoria, B.C., November 28th, 1889.

Received of Frank Vicker Hobbs, the sum of one hundred and twenty dollars ($120.00), being a first payment on account of his purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars ($3.00) an acre. Commencing at a point about two (2) miles west of Louis Stark's Crown grant in Cranberry District, thence running west 40 chains to Berkeley Creek, thence south 40 chains, thence east 40 chains, thence north 40 chains to place of commencement; the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre at the expiration of one, two and three years from date, with interest at the rate of 6 per cent. per annum.

(Sgd.) JOHN TRUTCH,
Land Commissioner.

Statement.

The plaintiff was put in possession after payment of the first instalment and built a log house on the property. In June, 1893, and in February, 1894, the defendants' Land Commissioner wrote plaintiff calling his attention to non-payment of instalments and interest and requesting payment. Soon after this the Company discovered coal in the immediate vicinity of the land. In November, 1895, the plaintiff applied to complete the purchase, but the then Land Commissioner, Mr. Solly, claimed that the agreement was forfeited owing to the lapse of time and the neglect of the plaintiff to pay any attention to the letters of June, 1893, and February, 1894, demanding payment.

Afterwards the Company concluded to allow plaintiff to complete his purchase and on March 2nd, 1896, Mr. Solly wrote the plaintiff that he was instructed to inform him "that the Company are now prepared to issue a conveyance

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to you of the land you agreed to purchase in Douglas District providing that within two months from date you have the land surveyed and the notes sent in to this office, and also pay up the overdue charges on the same," amounting to $499.60, which included interest $120.60, and title fee $10.00.

The plaintiff accordingly had the land surveyed and the survey was accepted by the Company on April 11th.

On 28th April, 1896, the plaintiff sent to the Company a marked cheque for $499.60, balance due, and on 8th May, the Company sent to plaintiff a conveyance dated 1st May, purporting to convey to plaintiff section 6, Douglas District, containing 160 acres more or less—saving and reserving to the Company the right to enter upon the land and cut and carry away timber for railway purposes without compensation, and also reserving rights of way for their railway and the right to take lands for stations and workshops without compensation, and also reserving all minerals with liberty to enter, search for and carry away the same and to make pits and erect engines and open roads and appropriate the surface for dumping ground, but in such case they were to pay compensation. On 9th May, plaintiff returned the deed claiming that there were no reservations when he made the agreement to buy. The Company kept plaintiff's cheque until September 3rd, and then returned it. On 23rd December, 1896, the plaintiff tendered to the Company for execution a deed to himself of the land without any reservations, other than the reservations, etc., expressed in the original grant from the Crown, the deed which he considered he was entitled to, and on the Company refusing to execute this deed, he brought this action for specific performance, and for an injunction restraining the Company from mining for coal on the land.

The Company are the freeholders of over two million acres, the minerals and timber whereof are their chief and in most cases their only commercial value.

The defendants pleaded that they had no intention of parting with the minerals or of conveying anything beyond bare surface rights and that Mr. Trutch had no authority to sell land except subject to the reservations of their usual printed form of conveyance, which was the form tendered the plaintiff in this case, and that a contract for anything else proceeded wholly upon mistake. The plaintiff at the trial swore positively that when he paid the first instalment of the purchase money and received the receipt in question, no intimation was given that the minerals were not intended to pass, and Mr. Trutch says that he made a point of so informing all purchasers but could not speak as to particularly informing the plaintiff.

The action was tried before DAVIE, C.J., on 17th, 18th and 19th June, 1897.

A. E. McPhillips, for plaintiff.
Pooley, Q.C., for defendants.

Cur. adv. vult.

29th June, 1897.

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DAVIE, C.J., [after setting out the contract printed *supra* proceeded]: It is not denied that the receipt, if otherwise binding, constitutes by virtue of payment of the instalments (although after time) and the bringing of suit to enforce it, a mutual agreement for sale of the land (section 470, Fry on Specific Performance, 3rd Ed., and cases collected in Canadian Law Times, 1894, p. 312), and that its *prima facie* effect would be an express contract for sale of the minerals and all defendants' interest in the land (*Bower* v. *Cooper*, 2 Hare 408), "*a caelo usque ad centrum.*" On the 6th April, 1892, the defendants' Land Commissioner, Mr. Gore, replying to plaintiff's letter asking the defendants to name a person to survey the land and to give certain information for the purpose of the survey, wrote to the plaintiff intimating the Company's approval of Mr Priest as surveyor and

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enclosing a tracing which described in red the plaintiff's land, as taken from the description furnished by the plaintiff upon his application to purchase. In June, 1893, and on 15th February, 1894, the defendants' Commissioner wrote plaintiff, calling his attention to non-payment of instalments and interest and requesting payment. Soon after this the Company discovered coal under or in the immediate vicinity of the land now in question. In November, 1895, the plaintiff applied to complete the purchase, but the then Land Commissioner, Mr. Solly, after consulting with Mr. James Dunsmuir, the Vice-President, claimed that the agreement was forfeited owing to the lapse of time and the neglect of the plaintiff to pay any attention to the letters of June, 1893, and 15th February, 1894, demanding payment. Afterwards, however, the defendants concluded to allow plaintiff to complete his purchase, and on 2nd March, 1896, Mr. Solly wrote the plaintiff that he was instructed to inform the plaintiff "that the Company are now prepared to issue a conveyance to you of the land you agreed to purchase in Douglas District providing that within two months from date you have the land surveyed and the notes sent in to this office, and also pay up the overdue charges on the same," amounting to $499.60, which included interest $129.60, and title fee $10.00. The plaintiff accordingly had the land surveyed by Mr. Priest, the survey was accepted by the Company on the 11th of April, and the required moneys were duly paid within the time mentioned in Mr. Solly's letter. There is a variation between the description of the land in Mr. Trutch's receipt and as finally surveyed, the one being described as in Bright District, whereas the survey and the subsequent instructions of the defendants' Commissioner place the land partly in Douglas and partly in Cranberry Districts. It would seem that the first description would locate the land within timber limits already disposed of by the defendants. However, there is no dispute

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on the score of location, and I think the variation is immaterial, plaintiff having from the first located on the land now in question and having built a cabin there and made some other trifling improvements. The only question now raised is as to the coal and minerals under the land; facilities for extracting them, and the cutting of timber for railway purposes. The defendants have tendered Mr. Hobbs a conveyance which reserves the mineral and other privileges, and this conveyance the plaintiff has refused to accept. The defendants say that they had no intention of parting with the minerals or of conveying anything beyond bare surface rights, and, moreover, that Mr. Trutch had no authority to sell land except subject to the reservations of their usual printed form of conveyance, which was the form tendered to the plaintiff in this case, and that a contract for anything else proceeded wholly upon mistake.

The Court will not assist a plaintiff in taking advantage of the plain mistake of another, and as the mistake cannot be established without evidence, a defendant is permitted in a suit for specific performance to support his defence by evidence dehors the agreement; *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638. This at once disposes of the objection of the plaintiff's counsel against evidence of what is termed the in-door management of the Company. In *Manser* v. *Back*, 6 Hare 443, premises were advertised to be sold according to certain printed particulars and conditions of sale. Just before the sale took place the vendor determined to reserve a right of way to other premises, and so notified the auctioneer by handing him a copy of the printed conditions, altered so as to make the reservation. In selling, the auctioneer read the altered conditions, but the party who became the purchaser did not hear, or observe the alteration, nor had he observed any of the amended particulars, some of which were distributed in the auction room. The purchaser and the auctioneer (the latter inadvertently) signed the contract for sale, minus the reservation; the

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purchase money was paid and possession given. The purchaser having brought suit for specific performance of the contract without reservation of right of way, the bill was dismissed on the ground that the auctioneer's authority to sell without the reservation had been revoked, and that it was competent for the defendant to insist on such revocation, and to adduce parol evidence of such revocation although uncommunicated to the plaintiff. *Barnard* v. *Cave*, 26 Beav. 253, was the case of an agreement between a brewer and a publican for a fourteen years' lease, nothing being said about taking the brewer's beer, or that it was to be what is termed a "brewer's lease," yet the Court being satisfied of the brewer's intention to grant only a "brewer's lease," refused specific performance except on terms of a covenant to take the defendant's beer. In *Helsham* v. *Langley*, 1 Y. & C. 175, on a bill for specific performance of an agreement by which A, as agent for B, contracted to let C a piece of ground for a term of years at a yearly rent, it appearing from the evidence that B intended to let the ground for the building of houses of a peculiar class, and that in authorizing A to act as agent in the letting of the ground he had told him the purpose for which it was to be let, it was held by Vice-Chancellor SHADWELL, that as the agreement did not contain any reference to building nor any covenant to build, it was not, under the circumstances, such an agreement as ought to be performed. It becomes necessary, therefore, to enquire into the facts connected with the defendants' real intention respecting sales of their property, and as to Mr. Trutch's authority as land agent with reference thereto. It appears that the late Robert Dunsmuir owned and operated extensive collieries in the neighbouring district of the land in question. So as to shut out opposition and the opening of competing mines, he contracted with the Dominion Government to build and operate a railway from Wellington to Victoria in consideration, among other things, of an extensive grant of

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public land, expressly including all coal and base minerals thereunder, and comprising the present land and all Crown land within many miles of his collieries. He formed the defendant Company, taking himself one half of the capital stock thereof, and so arranging affairs with the other shareholders as to retain himself a controlling interest upon the directorate. Under the terms of the Government grant, *bona fide* squatters were entitled, subject to certain limitations, notwithstanding the Company's grant, to a conveyance of the freehold of the surface rights of the squatted land to the extent of 160 acres to each squatter at the rate of $1.00 an acre, and it was also provided that the land to be conveyed to the Company should, except as to coal and other minerals, and also except as to timber lands as thereinafter mentioned, be open for four years to actual settlers for agricultural purposes at the same rate of $1.00 an acre to each actual settler, and that in any grants to settlers the right to cut timber for railway purposes, etc., should be reserved. Apart from the agreement now in question, the Company have only once made any sale of mineral rights, and that was to Mr. Dunsmuir himself, who paid the Company therefor at the rate of $100.00 per acre. The transaction with the plaintiff was after expiration of the four years limited for the incoming of settlers, and after the death of Mr. Dunsmuir, whose duties as President of the Company devolved upon his son, Mr. James Dunsmuir, who became Vice-President of the Company. The evidence is clear and uncontradicted that Mr. Trutch's duties as Commissioner were limited to the disposal of surface rights according to the printed form of conveyance in use by the Company, which has never been deviated from, and both Mr. Trutch and Mr. Dunsmuir swore that there was no idea in the plaintiff's case of parting with anything except surface rights. The Company's upset price after the expiration of the four years was $3.00 an acre, and grants were always made on

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the Company's forms. There was clearly, then, a mistake on the part of Mr. Trutch in entering into an agreement the legal effect of which is so startingly at variance with his instructions. In this connection the question of ratification becomes quite immaterial. In ratifying Mr. Trutch's contract, which the Company undoubtedly did (and it must be remembered that their ratification related back to the date of the original contract, see *Bolton Partners* v. *Lambert*, 41 Ch. D. 295, followed in *In re Portuguese Con. Copper Mines, Ltd.*, 45 Ch. D. 16), they fell into the same mistake as to its legal effect which Mr. Trutch did in making it. The ratification can stand on no higher ground than the contract, and having occurred under palpable mistake neither is it to be enforced by action for specific performance, although such mistake is unconnected with the conduct of the party seeking to enforce the contract and proceeds entirely upon the misconception of the party against whom the contract is sought to be enforced: *Mason* v. *Armitage*, 13 Ves. 25; *Day* v. *Wells*, 30 Beav. 224, and Fry on Specific Performance, Sec. 742, 3rd Ed., where the law is thus laid down: "Mistake may be of such a character as in the view of a purely common law court to avoid the contract on the ground of want of consent, or of total failure of consideration. But equity does not confine the defence of mistake to these cases. The principle upon which it proceeds is this, that there must be a contract legally binding, but that is not enough; that to entitle the plaintiff to more than his common law remedy the contract must be more than merely legal; it must not be hard or unconscionable, it must be free from fraud, from surprise and from mistake, for where there is mistake there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire.*" It was urged during the argument that the mistake was one of law only, and that although specific performance is excused where a mistake of fact has arisen, yet everyone is presumed to

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know the law and a mistake of law will not excuse; but this contention is, I think, fallacious. In *Cooper* v. *Phibbs*, L. R. 2 H. L. 170, Lord WESTBURY says: "It is said '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right that maxim has no application;" and in *Earl Beauchamp* v. *Winn*, L.R. 6 H.L. 234, Lord CHELMSFORD says: "The rule *ignorantia*, etc., applies where the alleged ignorance is that of a well known rule of law, but not where there is a matter of law arising upon the doubtful construction of a grant." There are many cases to be found in which equity upon a mere mistake of law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake. As I am of opinion that specific performance in this case must be refused on the ground of mistake, I do not propose to consider the defendants' objection that the plaintiff is disentitled by reason of his laches, further than to say that such laches have probably been condoned by the defendants in receiving the delinquent instalments and permitting the plaintiff to complete. In *Bloomer* v. *Spittle*, L.R. 13 Eq. 427, a case somewhat the converse of this, the defendant had, in a conveyance which should have been of the fee simple, reserved to himself the minerals. The mistake was that of the plaintiff's solicitor, and was not discovered for several years, and the defendant denied the mistake, but died before the hearing. Under the circumstances Lord ROMILLY, M. R., held that there had been a common mistake, but thought that he ought not compulsorily to alter the deed and so force upon the defendant an instrument he had never executed. He therefore, gave the defendant the option of rectifying the deed or of having the whole transaction set aside, and in the latter case the defendant would have to repay the purchase money with

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interest, plaintiff fixed with an occupation rent, and there was an enquiry as to the amount plaintiff was entitled to in respect of repairs and lasting improvements. A decree somewhat of this kind is what I think will meet the justice of this case. The plaintiff is entitled to damages if the contract is set aside, for although the mistake shields the defendants from specific performance, it does not in any way disturb the validity of the contract nor its ratification by the defendant Company, which I think the evidence abundantly establishes. Before the judicature practice this suit would have been dismissed without prejudice to the plaintiff's proceeding at law for recovery of damages. Now it is the duty of the Court to dispose of the whole question at once. In *Tamplin* v. *James*, 15 Ch. D. 215, JAMES, L.J., remarks concurring with BRETT, L.J. "I am also of opinion that where an action is brought for specific performance and specific performance is refused on the sole ground of mistake by defendant, the Court ought to give the same damages as would under the old practice have been given in an action at law." The measure of those damages is that adopted by the M. R. in *Bloomer* v. *Spittle*, *supra*, which complies with the rule laid down in *Rowe* v. *School Board for London*, 36 Ch. D. 622, that where no fraud or bad faith is attributable, the plaintiff can only recover whatever money has been paid by him, with interest and expenses, and nothing in damages for the loss of his bargain : *Bain* v. *Fothergill*, L.R. 7 H.L. 158. The plaintiff has himself committed no act disentitling him to damages as in *Hipgrave* v. *Case*, 28 Ch. D. 356, nor is this a case where the contract has become incapable of specific performance as in *Lavery* v. *Pursell*, 39 Ch. D. 508, or impossible of performance as in *Ferguson* v. *Wilson*, 2 Chy. App. 77. The plaintiff swears that at the time of entering into the agreement he believed and had no reason for disbelieving that the minerals passed. I am not quite sure what would have been the effect if this had been otherwise.

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See *Cato* v. *Thompson*, 9 Q.B.D. 616, but compare *Barnard* v. *Cave*, 36 Beav. 253. The only expenses in this case would seem to be the costs of the buildings erected by the plaintiff, and costs of surveying the land. Decree, therefore: Give plaintiff the option of accepting the conveyance tendered, in which case the action will be dismissed without costs, following the remark of Lord ROMILLY in *Day* v. *Wells*, 30 Beav. 224, I should not think of giving costs in a case where the mistake has been produced by the defendants, or at option of plaintiff, award damages for breach of contract, *i.e.*, return of moneys paid with six per cent. interest from respective dates of payment, also compensation for his expenses, which will include his own time and labour upon the cabins and other improvements and in the survey. Let an inquiry as to those amounts be held by the Registrar, if so desired I will fix them. For the same reason as in *Day* v. *Wells*, *supra*, there will be no costs to either party, either up to and including the hearing. Further costs will be reserved.

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From this judgment the plaintiff appealed to the Full Court, and the appeal was argued before WALKEM, DRAKE and IRVING, JJ., on 18th and 19th January, 1898.

A. E. McPhillips, for appellant: That an agent clothed with the authority which the agent had here should be allowed to say that he supposed an unambiguous writing signed by himself, agreeing to sell land, without mention of reservations, really excepted minerals, is extending the doctrine of mistake to a greater degree than it has ever been heretofore carried. Further, where there has been found, notwithstanding its plain terms, ratification of the agreement on the part of the principal—and ratification could only take place after a full knowledge of its terms—mistake would not avail as a defence. *London & Birmingham Ry. Co.* v. *Winter*, 1 Cr. & Ph. 57; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; *Manser* v. *Back*. 6 Hare 443; *Swaisland* v. *Dearsley*, 29 Beav. 430.

Argument.

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Upon the facts of the present case it is not contended that there is a mistake in the writing as it was only intended that the reservations should be stated to the purchasers, and it was never intended to put it in the writing, so that it is not a case of mistake in the writing; and if it were, it is submitted that it would be inadmissible evidence. It is a settled rule, that where the contract is within the Statute of Frauds the evidence is inadmissible. See Taylor on Evidence, 9th Ed., Sec. 1145; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

Argument.

The objection to the evidence of the verbal instructions to the agent is, that it is not permitted to hold out a person with apparent extensive authority, and privately, and without notification, circumscribe and limit that authority. *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327; *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. at pp. 894, 895, 896; *County of Gloucester Bank* v. *Rudry Merthyr, &c., Colliery Co.* (1895), 1 Ch. at p. 633; *Smith* v. *Hull Glass Co.*, 8 C.B. 668, 11 C.B. 897; *Royal Bank of India's case*, 4 Chy. App. at pp. 261-262; *Beer* v. *London and Paris Hotel Co.*, L.R. 20 Eq. at p. 424; *Canada Central Railway Co.* v. *Murray*, 8 S.C.R. 313; *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. at p. 469, and affirmed on appeal L.R. 4 C.P. 617. As to holding out, see *Watteau* v. *Fenwick* (1893), 1 Q.B. 346; *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248; *Whitehead* v. *Tuckett*, 15 East 400.

Ratification having been found it relates back to the time when the agent made the contract, *Maclean* v. *Dunn* (1828), 4 Bing. 722 (also see DAVIE, C.J., at foot of p. 169 of Case on Appeal). And the ratification need not be in writing. Wright on Principal & Agent, p. 44.

Where a person has made a mistake without reasonable excuse he ought to be held to the contract. *Powell* v. *Smith*, L.R. 14 Eq. 85. Where there has been no misrepresentation and there is no ambiguity in the terms of the contract the defendant cannot be allowed to evade the performance

of it by the simple statement that he has made a mistake. Fry on Specific Performance, 3rd Ed. p. 355; *Tamplin* v. *James*, 15 Ch. D. at p. 217; *Morley* v. *Clavering*, 29 Beav. 84.

The plaintiff is clearly entitled to have his grant include the minerals. See *Canadian Coal & Colonization Co.* v. *The Queen*, 3 Ex. C.R. 157 and 24 S.C.R. 713; see also *Barnes* v. *Wood*, L.R. 8 Eq. 424; *Nason* v. *Armstrong*, 21 A.R. at p. 191; *Bower* v. *Cooper*, 2 Hare 408; *Cato* v. *Thompson*, 9 Q.B.D. 616; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Souter* v. *Drake*, 5 B. & Ad. 992; *In re Terry & White's Contract*, 32 Ch. D. 14.

If specific performance is refused on the ground of mistake by the defendants, the Court ought to give the same damages as would, under the old practice, have been given in an action at law; *Tamplin* v. *James*, *supra*.

As to the principle regarding damages, see Fry on Specific Performance, Secs. 1306-9.

Pooley, *Q.C.*, for respondents: The appellant and respondents were never *ad idem* and therefore there was no contract that could be enforced. Evidence may be given to shew the terms of sale. See *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 637; *Wilding* v. *Sanderson* (1897), 2 Ch. 534; *Hickman* v. *Berens* (1895), 2 Ch. 638; *Preston* v. *Luck*, 27 Ch. D. 497; *McDonell* v. *McDonell*, 21 Gr. 342. See also *Manser* v. *Back*, 6 Hare 443. Argument.

Parol evidence is admissible to shew that the written contract does not contain all the terms agreed upon. See *Barnard* v. *Cave*, 26 Beav. 253; *Helsham* v. *Langley*, 1 Y. & C. 175. As to ratification by a principal of agent's act, see *Bolton Partners* v. *Lambert*, 41 Ch. D. 295, followed by *In re Portuguese Con. Copper Mines, Limited*, 45 Ch. D. 16.

Where there is unilateral mistake, an agreement will not be enforced; the remedy is not rectification but rescission, but the defendant has an option to accept rectification instead. See *Paget* v. *Marshall*, 28 Ch. D. 255.

Where an agent sells without authority, it is no sale.

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Biggs v. *Evans* (1894), 1 Q. B. 88; see also *Wycombe Ry. Co.* v. *Donnington Hospital*, 1 Chy. App. 268; *Morrison* v. *Barrow*, 1 DeG. F. & J. at p. 637.

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As to the maxim *Ignorantia juris haud excusat*, the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application: Per Lord WESTBURY, at p. 170, *Cooper* v. *Phibbs*, L.R. 2 H.L. See also *Earl Beauchamp* v. *Winn*, L.R. 6 H.L., at p. 234.

The agent says in his evidence, "It is my belief that I told plaintiff the minerals were reserved; that was my usual custom." See as to this, *Pattle* v. *Hornibrook* (1897), 1 Ch. 25.

Cur. adv. vult.

March 10th, 1898.

DRAKE, J.: This is an appeal from the Chief Justice refusing the plaintiff specific performance on the ground of the mistake of the vendors—the learned Chief Justice finds certain facts which the appellant does not seek to controvert. The chief finding of importance is that the defendant Company adopted and ratified the acts of Mr. Trutch, their agent, who contracted to sell the land in question to the plaintiff. The mistake alleged is that Mr. Trutch failed to act on the verbal instructions given him by Mr. Dunsmuir, the President of the Company, not to sell the minerals. The plaintiff states positively that when he paid the first instalment of the purchase money and received the receipt in question, no intimation was ever given that the minerals were not intended to pass, and Mr. Trutch says that he made a point of so informing all purchasers, but could not speak as to particularly informing the plaintiff. It is remarkable that Mr. Trutch did not insert the reservation of the minerals in his receipt of the purchase money as the

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chief value of these lands consists in their minerals. The defendant Company are the freeholders of a very large tract of country, over two million acres, the minerals and timber whereof are their chief and in most cases their only commercial value.

Mr. Trutch seems to be under the impression that the use of the term lands merely imported surface rights, but mines and minerals will pass under the term lands: Shep. Touch. 90, *Townley* v. *Gibson*, 2 T.R. 701. However, the contract which is evidenced by the receipt Exhibit "C" has, as the Chief Justice has found, been ratified by the defendant Company, but as I understand the Chief Justice, the ratification mentioned was merely of the act of Mr. Trutch, in giving the receipt, but not of the omission of Mr. Trutch to inform the plaintiff that the surface of the lands was all that was intended to be sold. No intimation was given to the plaintiff that he was not entitled to a conveyance in fee until he had paid his purchase money, and a deed not only reserving the minerals but imposing other onerous burdens on the purchaser was presented.

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The plaintiff was put in possession in 1890, after payment of the first instalment, and built a log house on the property, but has not personally occupied it since. No question is now raised as to the validity of the contract, the main contention being that Mr. Trutch made a mistake, and therefore the defendants are entitled to a rescission of the contract, and specific performance should not be decreed.

A mistake, if mutual, is relieved against by the Court, so in some cases is mistake which is only the mistake of one of the parties to the contract. A mistake has never been defined in a Court of equity; it consists amongst other things in ignorance or forgetfulness, *Kelly* v. *Solari*, 9 M. & W. 54; of a fact passed as in *Willan* v. *Willan*, 16 Ves. 72, or present, *Cocking* v. *Pratt*, 1 Ves. Sen. 400. In 1893 the defendants gave the plaintiff notice that his instalments were due, and again in February, 1894, and in March,

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1896, he was informed that the Company were prepared to issue a deed to him on payment of the balance due. On 28th April, 1896, the plaintiff sent to the defendants a marked cheque for $499.60, balance due, and on 8th May defendants enclosed a conveyance dated 1st May, purporting to convey to plaintiff section 6, Douglas District, containing 160 acres more or less—saving and reserving to the Company the right to enter upon the land and cut and carry away timber for railway purposes without compensation, and also reserving rights of way for their railway, and the right to take lands for stations and workshops without compensation, and also reserving all minerals with liberty to enter, search for, and carry away the same, and to make pits, and erect engines, and open roads, and appropriate the surface for dumping ground, but in such case they were to pay compensation. On 9th May plaintiff returned the deed, claiming that there were no reservations when he made the agreement to buy. The Company kept plaintiff's cheque until September 3rd and then returned it.

The defendants say that Mr. Trutch made a mistake if he did not in fact inform the plaintiff that the minerals did not pass, and acted contrary to his express instructions, and that they were under the impression that such instructions had been carried out. This is not a case of mutual mistake, but of an alleged mistake of the vendors ; the purchaser in no way induced or contributed to the error ; he was paying a slightly higher price for land than was charged by the Provincial Government, which only reserved mines royal and coal. The Court exercises a jurisdiction to relieve when a mistake is proved, even in cases when it is only on one side. The principle referred to in the argument as laid down in Story's Equity, Vol. I., 13th Ed. 147, is that a person cannot have relief unless the party benefited by the mistake is disentitled in equity and conscience from retaining the advantage he has acquired. This broad statement has not been acted on in its entirety in *Wycombe Railway Company* v. *Donnington*

Hospital, L.R. 1 Ch. 273, KNIGHT BRUCE, L.J., says: "It would be contrary to the rules of this Court to enforce specific performance against a defendant swearing and proving that his sense and understanding of the agreement in question was different from that of the purchasers."

Malins v. *Freeman*, 2 Keen 25, and *Manser* v. *Back*, 6 Hare 443, are also cases of mistake arising from neglect of the principal's orders, although such orders were not communicated to the purchaser. In cases of sale at an inadequate value, the Court has refused to enforce performance: *Mortlock* v. *Buller*, 10 Ves. 292. On the other hand in *Stewart* v. *Kennedy*, 16 App. Cas. 72, Lord WATSON says: "Upon general principles one party can never defend himself against specific performance by setting up a misunderstanding on his part of the real meaning of the contract; to permit such a defence would destroy the security of contracts; and in *Powell* v. *Smith*, L.R. 14 Eq. 85, the same doctrine was enunciated and the Master of the Rolls uses this language: "When the defendant by his agent has adopted a certain form of agreement, and then when he finds that it gives certain rights which he did not intend, he wishes to put an end to it, but this Court considers that every one entering into such a contract is bound to know what the law is, and as the defendant entered into it with his eyes open (assuming he is bound by the acts of his agent) he cannot set it aside because he finds the construction of it is against him;" and again, in *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417, the Court held that the mistake of the solicitor in not ascertaining what his client's real position was by examination of the documents in his possession was not such a mistake that equity would relieve against, but none of the Judges denied that the Court had jurisdiction to relieve if they thought fit to exercise their discretion. The general result of the cases is that the Court has jurisdiction in any case of mistake which has been proved, to exercise their discretion and grant equitable

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relief, and taking all the circumstances into consideration I see no reason to differ from the Chief Justice in his view that specific performance should not be decreed, but I think his judgment should be varied on other points, viz.: The reservations contained in the deed other than the right to the minerals, are not alluded to in the evidence, and there is no evidence that these reservations were part of the instructions given to Mr. Trutch by Mr. Dunsmuir. If then the plaintiff is willing to accept a deed simply reserving the minerals, the action will be dismissed without costs. As the plaintiff never amended his claim by an alternative claim for damages and asked for no amendment at the trial, he cannot get his costs in the Court below; see *Hipgrave* v. *Case*, 28 Ch. D. 356. I think there should be no costs of this appeal.

WALKEM, J.: I concur.

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IRVING, J.: The material facts in this case are as follows: The plaintiff on 28th November, 1889, then being unaware that the defendant Company were selling their lands subject to a reservation of mines and minerals, called on Mr. John Trutch, at that time the Company's Land Commissioner, and after some conversation, handed Mr. Trutch a document, Exhibit B, which is as follows: "The description of a piece of land I wish to pre-empt or purchase;" [then follows the description and the plaintiff's signature]. Mr. Trutch issued to him the document, Exhibit C. [For this see statement of facts].

Plaintiff paid his money, entered into possession, and after a slight dispute with the Company as to being allowed to complete his purchase, received a letter (2nd March, 1896), from Mr. Solly, the then Land Commissioner, informing him that the Company would issue to him (the plaintiff) conveyance of the land that he had agreed to purchase, providing the plaintiff had the land surveyed, and paid up the instalments in arrears, with interest.

(Mr. Trutch) that he was only to sell the surface, not the minerals? A. Not the minerals; sell the land, but not the minerals. Q. Sell the land in question, but not the minerals? A. Yes. Q. These instructions were verbal, were they not? A. Verbal, yes. Q. You did not have those instructions formulated in any way, and printed and posted up in the office, or anything of that kind? A. Not necessary, no."

There is more evidence to the same effect. (pages 96 and 135). The learned Chief Justice found with reference to this part of the case as follows:

(Page 169). "The evidence is clear and uncontradicted that Mr. Trutch's duties, as Commissioner, were limited to the disposal of surface rights according to the printed form of conveyance in use by the Company, which form has never been deviated from, and both Mr. Trutch and Mr. Dunsmuir swore that there was no idea in the plaintiff's case of parting with anything except surface rights. And he proceeds: "There was clearly then a mistake on the part of Mr. Trutch, in entering into an agreement, the legal effect of which is so startlingly at variance with his instructions." The Chief Justice refused specific performance on the ground of mistake. But he thought that although the mistake shielded the defendants from specific performance, it did not disturb the validity of the contract. He therefore made the decree refusing specific performance as claimed by the plaintiff, but declaring that the plaintiff was entitled (*a*) to a conveyance containing reservations of the minerals and other usual surface reservations imposed by the Company, or (*b*) a return of all moneys paid, with interest, plus compensation for improvements, etc.—modelling his decree somewhat after the decree pronounced in *Bloomer* v. *Spittle*, L.R. 13 Eq. 427.

The plaintiff, being dissatisfied, appealed.

The first point to be decided is, upon what evidence are we to base our judgment? At the trial the plaintiff's

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counsel objected to the reception of, or to the giving of effect to, any evidence of what he called "secret instructions" given to Mr. Trutch, unless it were shewn that his client was aware of the nature of these instructions (page 101). His contention before us was that the evidence of these instructions to Mr. Trutch was not admissible, and that if this evidence were eliminated there would be no evidence of mistake. The case of *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638, cited by the learned Chief Justice in dealing with the question of admissibility of evidence of the instructions given to the agent seems to have been misunderstood by the plaintiff's counsel. In that case there were two distinct points. The first was as to the construction to be placed on a letter written by the defendant's solicitors: "We are instructed to proceed with the sale to you of these premises, a draft contract is being prepared and will be forwarded."

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It was to this stipulation for a formal contract, that the cases of *Rossiter* v. *Miller*, 3 App. Cas. 1124, and *Winn* v. *Bull*, 7 Ch. D. 29, cited before us, referred.

The other part of the case was this: the Marchioness had purchased a house under such very special conditions of sale that it was impossible for her to sell again with safety unless she sold subject to the same or similar stipulations under which she had purchased; accordingly when she became desirous of selling she instructed her solicitors, Messrs. Lethbridge & Mackrell, to sell the same for £10,000, subject to the same stipulations and conditions under which she had purchased the same.

The giving of these instructions to Messrs. Lethbridge & Mackrell, and the admission thereof as evidence to resist specific performance, were the points which the learned Chief Justice had in his mind when he cited this case, and I think with him that *Chinnock* v. *Marchioness of Ely* at once disposes of plaintiff's objection to the reception of evidence of this character.

All these things the plaintiff did; and the Company sent him a conveyance drawn in the form usually adopted by the Company. This was a conveyance of the surface only; the mines and minerals were reserved, and there were also other very extensive reservations in favour of the Company, *e. g.*, of rights of way, the right to cut timber, to sink shafts and to work the mines. These reservations are hereafter referred to as surface reservations. The plaintiff at once, 9th May, 1896, returned this document to the Company in a letter, in which he stated that the deed was not acceptable, "being full of reservations," but not specifying whether the reservations objected to were the mines and minerals, or merely the surface reservations. Matters remained in abeyance until 3rd September, 1896, when the Company sent to the plaintiff a cheque for $619.60, being, as stated in the covering letter (Exhibit V), the refund of all moneys paid by the plaintiff on the purchase of Lot 6, the conveyance for which he, the plaintiff, had refused to accept from the Company.

On 23rd December, 1896, the plaintiff tendered to the Company for execution a deed to himself of the land, without any reservations (Exhibit X), other than the reservations, etc., expressed in the original grant from the Crown, the deed which he considered he was entitled to under *Bower* v. *Cooper*, 2 Hare, 408; and on the Company refusing to execute this deed, brought this action for specific performance, and for an injunction restraining the Company from mining for coal, coal having been discovered in or under the land in question, in August, 1895.

At the trial which was had before the Chief Justice without a jury, the plaintiff said: "When I bought I set quite a value on the timber which was on the land. I had no idea but what I was entitled to all the timber, and to all that was under the land. I had no idea of any reservations at all; they were not notified to me at any time; nothing called my attention to reservations; and at the time of the

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getting of the agreement there were no reservations mentioned, shewn, or spoken to me, and I had no knowledge of any reservations, as I had only lately arrived in the country; I knew nothing about the Company's lands, or reservations." (Page 26). The plaintiff was cross-examined, but for the purposes of my judgment I accept his statement.

For the defence, evidence was given that Mr. Trutch's authority was limited to the sale of surface rights only. "Q. What were the instructions that were given to you by Mr. Dunsmuir when you were appointed? (This was the late Mr. Robert Dunsmuir, the President of the defendant Company). A. To sell the land for $3.00 an acre, reserving all minerals and coal. Q. Was that the only authority to deal with the railway lands? A. That was the only authority I had. Q. Have you always acted upon that authority? A. Always."

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He always used a form of conveyance to purchasers similar to that sent to the plaintiff in this case; he, in fact, never used any other; he had never sold the coal or minerals during his term of office; (page 102); he usually told people that he sold the surface only; that was his general custom, but he could not say that he had so told this particular plaintiff. (page 105).

The Vice-President of the Company, Mr. James Dunsmuir, said at pp. 131-132, that he was one of the directors of the Company in 1889; that his instructions to the Land Commissioner (Mr. Trutch), were to sell the land and reserve all minerals; that no minerals had been sold by the Commissioner at any time; that the only sale of minerals ever made by the Company had been a sale to the late Robert Dunsmuir, the President of the Company, and the sale in that case was not made by the Land Commissioner, but under a resolution passed at a general meeting of the Company.

And again at page 132, in cross-examination to Mr. *McPhillips*: "Q. You say your instructions were to him

The question of admissibility of this evidence is very fully covered in the cases cited in the notes to section 1140 of Taylor on Evidence, 9th edition.

If any later authority is necessary to dispose of this question, it can be found in *Wilding* v. *Sanderson* (1897), 2 Ch. 534, where on an application to set aside a consent order on the ground of mistake of the plaintiff's counsel, BYRNE, J., gave effect to the evidence of the managing clerk who had instructed counsel, to the evidence of counsel and of the plaintiff. The evidence shews clearly that the Company never contemplated a sale of minerals, and in my opinion sufficient evidence was adduced to justify the conclusion arrived at by the learned Chief Justice, that Mr. Trutch never contemplated that he was selling or agreeing to sell anything but the surface, and that subject to the surface reservations (page 102). But as in my view of the case it is unimportant to decide whether the finding of the Chief Justice as to surface reservations was sustained by the evidence or not, I shall not follow up the subject of surface reservations any further.

From my point of view it is only necessary to arrive at the conclusion that Mr. Trutch in dealing with the plaintiff was addressing his mind to the sale of the surface only, and not to the minerals thereunder. Evidence of the defendants' instructions being admitted, it is established (we are all agreed upon this) that Mr. Trutch upon the one hand was not authorized, and that he never could have intended to enter into any contract for the sale of land *a caelo usque ad centrum*. The plaintiff, on the other hand, was bargaining (see page 26 of Appeal Book) "for the land and all that was on it and under it."

In the case of *McDonell* v. *McDonell* (1874), 21 Gr. 342 —an action for specific performance resisted on the ground of mistake—BLAKE, V. C., at p. 345, points out that the difficulty in these cases is not to apply the law pertinent to them, but to ascertain whether, as a matter of fact, a mis-

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apprehension did exist in the mind of the defendant under which he entered into an agreement which would not have been otherwise concluded by him; and that the utmost caution must be exercised in distinguishing between a case where an actual misunderstanding or misapprehension does exist, and one where the defendant, simply rueing his bargain, seeks to prevent a decree for the performance of the contract being pronounced against him. I am fully sensible of the wisdom of those remarks, and after giving them due weight, have arrived at the conclusion that there was here an actual misunderstanding or misapprehension on the part of Mr. Trutch as to the nature of the estate he was agreeing to sell. How the misunderstanding of the word "land" arose, can easily be understood in this country, where land is frequently granted without the minerals or timber, and it is worth noticing that notwithstanding the plaintiff has—to the knowledge of the defendants, see page 142—brought this action based on the misuse of that word, the word was used at the trial, again and again, by the defendants' officers in its limited sense.

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Where the Court is satisfied that such an actual misunderstanding or misapprehension exists, it is against conscience for a Court of Equity to aid the plaintiff, by enforcing specific performance—see *Wycombe Railway Co.* v. *Donnington*, 1 Chy. App. 268, and other cases cited by BLAKE, V. C., in *McDonell* v. *McDonell*, *supra*.

See also *Omnium Securities Co.* v. *Richardson* (1885), 7 Ont. 182, where specific performance of a contract was refused, as the parties differed in their understanding of it, and Fry on Specific Performance, Sec. 752, 3rd Ed.

In *Paget* v. *Marshall* (1884), 28 Ch. D. 255, we find a unilateral mistake is stated to be a mistake of this kind, *i.e.*, where the true intention of one of the parties is to do one thing and he by mistake has signed an agreement to do another. In such a case the agreement will not be enforced against him, but the parties will be restored to their original

position and the agreement will be treated as if it had never been entered into. From the same case a definition of a common mistake can be gathered, *i.e.*, where two persons have really agreed to one and the same thing (that is, they are *ad idem*), but in endeavouring to set down their agreement in writing have set down another thing, and executed the agreement on that wrong footing, that is a common mistake, and the Court will in such a case rectify the deed.

In my opinion the mistake in this agreement falls within the class called unilateral mistake, and the only part of the judgment appealed from in which I do not agree with, is that portion which gave the plaintiff an option to take a conveyance as if the agreement had been rectified. In *Hickman* v. *Berens* (1895), 2 Ch. 638, we have an instance of mistake. There the mistake was that of counsel consenting to a compromise; but it seems to me in ascertaining the principle upon which the Court should now proceed, it makes no difference whether the mistake was of counsel or of any other kind of agent. There, as here, the written agreement contained all that one party to the action desired. As the judgment of RIGBY, L. J., so accurately and so concisely expresses my views of this case, I adapt his language to the action before us. If this were an attempt to get rid of a sale because it turned out to be onerous to the defendants, I think it ought not to be entertained, or at any rate it ought not to succeed. But I do not look at the case in that light at all. I consider that the defendants' agent, in signing the document of 28th November, 1889, had not present to his mind that it was intended to cover the sale of land *usque ad centrum*, but that he thought and intended to deal with the land in the limited sense used in the Land Department of the Company. If that was the real state of his mind—and I am satisfied that it was—then the agreement was thought by the plaintiff to be more extensive than the defendants intended

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it to be; that is to say they were not agreed upon the subject matter. In that case I conceive it is right that the agreement of 28th November, 1889, should be dealt with as if it never existed. In my opinion there can be no rectification of this agreement, and the course pursued in *Olley* v. *Fisher*, 34 Ch. D. 367, is not applicable.

For the above reasons I think the decree pronounced by the learned Chief Justice gave the plaintiff more than he was entitled to.

Mr. *McPhillips* wanted us to decide this case upon the line of law adopted by LORD ROMILLY in *Powell* v. *Smith* (1872), L.R. 14 Eq. 85—viz., that it is not a question of mistake, but a question upon the construction of the agreement, agreed to by everybody concerned. But that is not the whole question, there is something back of that; a mistake as to the meaning of the words used may be accompanied by another mistake, *i.e.*, a fundamental mistake a to the subject matter dealt with by the contract.

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The defendants to an action for specific performance might set up two defences: (1) That the words of the agreement would not bear the meaning contended for. (2) Even if it were held that the words bore the meaning for which the plaintiff contended, then in that case the defendant never addressed his mind to the subject matter the plaintiff had in contemplation. The two actions out of which the appeals (*Stewart* v. *Kennedy*) arose, illustrate what I have in my mind, viz., the difference between (*a*) a mistake between the words used in drawing up the agreement, and (*b*) a mistake as to the subject matter of the contract.

Hickman v. *Berens*, already mentioned, is another instance. That was an application for relief on the ground of mistake, and, as explained in *Wilding* v. *Sanderson* (1897), 2 Ch. 534, there was the two-fold mistake I have mentioned; a mistake as to the meaning of the words u[illegible] accompanied by another mistake as to the subject matter dealt with by the contract.

As I have said, Mr. *McPhillips* wants us to decide this case on the construction of the exhibits; that is, he wants to confine us to the first of the two defences I have alluded to. Should we select his point of view we would shut out the second defence, which, according to my opinion, is the real ground of defence, namely, that there never was an agreement in respect of the subject matter with which they were dealing. Mr. Trutch could not sell the land (in the full legal sense of that word)—the plaintiff wanted that and nothing else. There being no agreement on this fundamental point, there was no contract—there can be no contract unless the parties are *ad idem*. I rest my judgment on the single point that the parties were never *ad idem*, and on the principles enunciated in *Wilding* v. *Sanderson* (1897), 2 Ch. 534, *Hickman* v. *Berens* (1895), 2 Ch. 638, and *McDonell* v. *McDonell*, 21 Gr. 342.

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Specific performance being impossible (in this case, by reason of the absence of consensus), there can be no damages. Compare *In re Northumberland Avenue Hotel Company*, 33 Ch. D. 16, and *Lavery* v *Pursell*, 39 Ch. D. 508. All we can do is to see that the parties are restored to their original position, as if the agreement had never been entered into, unless, of course, the defendants consent to a rectification. See *Paget* v. *Marshall*, 28 Ch. D. 255.

As to the so-called ratification by the Company, the acts of the defendants constituting the so-called ratification were acts proceeding on the erroneous assumption that they, the defendants, had, in fact, made a contract with the plaintiff, and can stand on no higher ground than the original agreement. See *Dibbins* v. *Dibbins* (1896), 2 Ch. 348; *Marsh* v. *Joseph* (1897), 1 Ch. 246, and *In re Northumberland Avenue Hotel Company*, 33 Ch. D. 16.

As to the defendants' laches, Mr. *McPhillips* contends that as the plaintiff returned the Company's deed on 9th May, 1896, as not acceptable to him, and that as the Company retained the purchase money until 9th September,

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1896, the Company thereby lost its right to set up this defence. In considering this point there are two circumstances to be regarded, the length of delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other so far as it relates to remedy. See *Rouchefoucauld* v. *Boustead* (1897), 1 Ch. 211. It is not only time, but the conduct of the parties to be considered, and as there is nothing to shew that the plaintiff's position was in any way altered, I do not think the holding by the defendants of the purchase money for four months should deprive them of this defence. The delay of four months is easy to account for, when we remember that the plaintiff's solicitor did not in the correspondence call the Company's attention to the fact that the plaintiff claimed the minerals, but merely objected to the "reservations." The Company's officers, according to my view of the case, would regard these as objections to surface reservations.

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In my opinion the judgment appealed from should be varied by striking out that portion under which the plaintiff is entitled to an option to a conveyance of the land subject to mineral and surface reservations. But I do not think that the plaintiff, because he has succeeded in shewing that the judgment gave him something more than he is entitled to, ought to have the costs of this appeal.

Judgment varied.

McLELLAN v. HARRIS, *ET AL.*

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McLellan v. Harris

Practice—Affidavit—Sworn before solicitor's agent resident outside Province—Whether sufficient—Rule 417.

An affidavit sworn before a Notary Public in Manitoba, who had been acting as agent for defendants' solicitor, is insufficient under Rule 417.

SUMMONS by defendants to set aside an order for service of *ex juris* writ. It appeared that several affidavits sought to be used in support of the summons were sworn before T. H. Phippen, a Notary Public of Manitoba, who was the agent or correspondent of the solicitor for the defendants, but was not a solicitor of this Court.

Statement.

Gilmour, for the summons.

Hagel, Q.C., contra, took the preliminary objection that the affidavits were insufficient.

McColl, C.J.: Rule 417 applies to agents or correspondents without as well as within the Province.

Judgment.

Summons dismissed.

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McGREGOR v. McGREGOR.

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Practice—Replevin—Costs—R.S.B.C., Cap. 165.

The Court procedure and practice existing under the old Replevin Act are still in force, although the new Act contains no reference to pleading or practice other than to enable them to be dealt with by Rules of Court to be made.

SUMMONS to set aside writ of summons in a replevin action for want of jurisdiction. No affidavit had been fyled before issue of the writ.

Statement.

Gilmour, for the summons.
E. J. Deacon, contra.

McCOLL, C.J.: The contention is that, inasmuch as the present Replevin Act, R.S.B.C., Cap. 165, contains no reference to pleading or practice, other than to enable them to be dealt with by Rules of Court to be made, and because no rules have been made the proceeding is unauthorized.

By Rule 1,068, it is provided that "where no other provision is made by these rules, the present procedure and practice remain in force," etc.

Judgment.

By the Supreme Court Act, R.S.B.C., Cap. 56, Sec. 94, it is provided that all the rules, including the one mentioned, shall be valid and binding. Both these Acts were brought into force by the same Statute, Cap. 40 of 1898. This action is in the Supreme Court, and the duty of the Court is, if possible, to prevent the result that while a right is given there are no means of enforcing it. Here the Legislature, while eliminating the provisions regarding pleading and practice contained in C.S.B.C., 1888, Cap. 101, from the Replevin Act, has, at the same time, in effect declared that

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the then existing Court procedure and practice should continue subject to the rules theretofore made, and of course, to any rules which might be made under the Replevin Act or otherwise.

I think I ought to hold, in the circumstances, that the pleading and practice in force at the time when both these acts were brought into force regulating proceedings in replevin remained in force, not the less that they were embodied in enactments not specifically re-enacted by the Replevin Act until altered by Order-in-Council.

It appeared during the argument that no affidavit had been fyled before issue of writ, which must therefore be set aside, but without costs, as this ground was not taken in the summons.

Writ set aside without costs.

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McNERHANIE v. ARCHIBALD

McNERHANIE v. ARCHIBALD.

Mineral claim—Right of partner who has allowed his license to expire to share in proceeds of sale of—Mineral Act of 1896, Secs. 9, 34, 50, 80–92.

If a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale merely because his free miner's certificate was allowed to lapse after the making of the agreement.

ACTION for a declaration of partnership in a mineral claim, and for an order that plaintiff was entitled to share in the proceeds of the sale thereof by his partner.

Statement.

The defendant denied any partnership agreement, and set up as a defence that the plaintiff had permitted his free miner's certificate to expire, and under the Mineral Act, 1896 (the benefit of which the defendant claimed), the plaintiff had lost his right, if any, in the claim. At the trial leave was given defendant to plead the Statute of Frauds, and sections 50 and 51 of the Mineral Act, 1896.

The action was tried at Vancouver, before IRVING, J., and a common jury, on 11th, 12th, 15th and 16th February, 1898. The jury found there was a partnership. The facts are fully stated in the judgment of IRVING, J.

Macdonell and *E. J. Deacon*, for plaintiff.
Davis, Q.C., and *Harris*, for defendant.

Cur. adv. vult.

26th April, 1898.

IRVING, J.: In the summer of 1895, the plaintiff and

the defendant struck up an acquaintanceship which resulted in the plaintiff inviting the defendant and one Murchie to go up to Phillips Arm, where they lived together for some months, and there they prospected for some mineral claims. After the plaintiff had shewn the defendant some ledges, it was agreed that the three should stake out some mineral claims for themselves, and the plaintiff proposed that they should be interested in everything that they staked, to which the defendant and Murchie agreed. The three then staked a number of claims, some for themselves in their several names. These they sold, and no dispute has arisen concerning those so staked; but in addition to those claims they located a number of claims for other persons—outsiders—in particular the defendant Archibald (June 21st, 1896) staked a claim, known as the Dorothy Morton; he says it was staked on the understanding that he was to have a one-half non-assessable interest for staking it, and that the other half was to belong to Chick and Moody, by whom the fees were to be paid. On the other hand, the plaintiff, McNerhanie, claims that he, under the original agreement, was entitled to a one-third in the half coming to Archibald, and it was in consequence of this dispute that this action was commenced on October 8th, 1897. It was tried before me at Vancouver, before a common jury, who found that the conversation relied upon by McNerhanie as establishing a partnership, actually took place, and that the partnership agreement then arrived at applied to the Dorothy Morton. On April 10th, 1897, Chick, in whose name the Dorothy Morton was recorded, conveyed to Archibald a one-half interest in the claim, and by a document, dated July 19th, 1897, Chick, Moody and Archibald entered into an agreement with Messrs. Ryan & Lang for the sale to them of the Dorothy Morton, for the sum of $20,000.00, payable as follows: $1,000.00 on the deposit in escrow of the Crown grant, and a conveyance of the mineral claim; this was paid on January 7th, 1898; $8,000.00 on January 19th,

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1898; $8,000.00 on April 19th, and the balance on June 19th, 1898. This agreement was recorded on July 25th, 1897. McNerhanie who was a free miner at the time the original agreement was formed, and at the time the Dorothy Morton was staked, permitted his certificate to expire in July, 1897, and did not take out a free miner's license until about August 7th, 1898. In this action the plaintiff seeks to have it declared (1) that he is a partner with the defendant in the location of the Dorothy Morton; (2) that he is entitled to one-third of the undivided half of the Dorothy Morton, standing in Archibald's name; (3) that he is entitled to a one-sixteenth part or share of the unpaid moneys in the hands of Messrs. Ryan & Lang. The defendant in his defence, after denying that there was any partnership agreement, and further, that if there was, the Dorothy Morton was not staked under it, set up as a defence that the plaintiff had, on July 25th, 1897, permitted his certificate to expire, and that under the Mineral Act, 1896, (the benefit of which the defendant claimed) the plaintiff had lost his right, if any, in the Dorothy Morton. After the jury had retired I gave the defendant leave to amend by pleading the Statute of Frauds, and the Mineral Act (*Williams* v. *Leonard*, 16 P.R. 544 and 17 P.R. 73,) on the terms that the defendant should indemnify the plaintiff against any additional costs, which he had rendered necessary in consequence of his not having put forward his defence at the proper time (*Cargill* v. *Bower*, 4 Ch. D. 81). The plaintiff, on July 26th, 1897, had permitted his free miner's certificate to expire, and the defendant, on motion for judgment, pursuant to leave reserved, asked for a non-suit, on the ground that sections 9 and 84 of the Mineral Act prevent the plaintiff from maintaining this action. Mr. *Macdonell* contended that these sections relate merely to revenue, and are not intended to cover a case of this kind—that is, where the plaintiff claims a share in the proceeds, and not an interest in the

Judgment of IRVING, J.

mine, citing *Stuart* v. *Mott*, 23 S.C.R. 384, to point out his distinction. He bases his claim on the proceeds on the fact that the defendant was a trustee for plaintiff at the time of the making of the agreement for sale. Section 9 declares that, subject to the proviso thereinafter contained (there are some three or four), no person shall be recognized; that means, I presume, recognized by everybody, including the Court, as having any right or interest in, or to, any mineral claims, unless he shall have a free miner's certificate unexpired. That part of the section may be said to be merely for revenue purposes, but I do not think so. In my opinion, the existence of an unexpired free miner's certificate is a limitation, or rather, a conditional limitation (see *In re Machu*, 21 Ch. D. 838), providing for the termination of the miner's estate, or for its abridgment by operation of law. But the act does not stop there. It goes on to declare that the defaulting person's rights and interests in or to any mineral claim shall be absolutely forfeited, that is, to the Crown; provided, however, in the case of co-partnership (s. 9), or, in the case of partnership (s. 84), the failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner, or the partner making default, shall, *ipso facto*, be and become vested in the continuing co-owner or partner. This seems to me to amount to an absolute statutory declaration that, on July 26th, 1897, the plaintiff forfeited to the Crown his right to the claim, and that thereupon the claim became vested in the defendant, or, perhaps, in the purchaser Chick and the defendant. That part of the question is, however, immaterial. The foundation of the plaintiff's claim in this action is that some property, or interest in property, to which he was entitled, had been taken away or withheld from him. The jury have found in his favour that a partnership agreement with reference to this claim was made in July, 1895; but the failure of the plaintiff to renew his license in July, 1897, took away from

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him his interest in the claim, and unless he had an interest in the claim, I do not see how he can demand the proceeds which represent that interest. If at the very last hour of the day upon which the certificate expired the plaintiff had executed a conveyance in favour of the defendant of all his interest in the mine, it could not be suggested that he would be entitled to a portion of the proceeds arising from the sale of the claim. The plaintiff, by letting his license expire, put section 9 into operation, and that section conveyed to the defendant all the plaintiff's interests. In *James* v. *The Queen*, 5 Ch. D. 153, it is pointed out that considerations of hardship, or supposed hardship, cannot enable the Court to enlarge an Act of Parliament, or enable the Court to give in favour of a person who has nothing but a mere statutory right an equitable right where the Act has merely given a legal right. The Mineral Act must be taken as it stands, in favour of each partner or co-partner, who continues to be a free miner. There must be judgment of non-suit.

Judgment of IRVING, J.

Action dismissed with costs.

From this judgment the plaintiff appealed to the Full Court, and the appeal was argued 8th November, 1898, before McCOLL, C.J., and WALKEM and MARTIN, JJ.

Martin, A.-G., for the appellant: The plaintiff's mining license expired on 27th July, 1897, but the agreement for sale was made on 19th July, 1897, and on that day plaintiff became entitled to a share in the proceeds of the sale. The Mineral Act applies only to persons whose names appear in the mining records and not to trusts; it applies to mineral claims or interests therein, and does not extend to the proceeds of the sale of a claim. Even if the statute went so far as to say that trustees would have to have a miner's

Argument.

license, here this would be of no avail because the property passed on 19th July, the date of the agreement for sale. See Benjamin, 4th Ed. 273, 278; Perry on Trusts, 4th Ed. 231; Lewin on Trusts, Blackstone Ed. 237; *Shaw* v. *Foster*, L.R. 5 H.L. 337. As to the distinction between a claim or land and the proceeds, see *Stuart* v. *Mott*, 23 S.C.R. 153.

Davis, Q. C., for respondent: The interest of a vendor in land which he has agreed to sell is an equitable interest. *Lysaght* v. *Edwards*, 2 Ch. D. 506-7. In *Stuart* v. *Mott* the agreement was as to proceeds, but here the agreement was for the sale of the mineral claim.

The license is virtually a tax, and the penalty for the non-payment thereof is a forfeiture of all interest, whether legal or equitable.

The proviso as to shareholders not being required to take out a miner's license shews that the Legislature intended that everything else should be comprised in it.

Argument.

As to the Statute of Frauds, the prospecting agreement entered into between the parties, contains none of the elements of a partnership agreement—at most it is only an agreement to be co-owners in real estate, and such an agreement is within the Statute of Frauds.

For authority that a mineral claim is real estate see *Stussi* v. *Brown*, 5 B.C. 380; *Wells* v. *Petty*, *ibi.* 353; *Pope* v. *Cole*, 6 B.C. 205.

It can only be a mining partnership under sections 80-92 of the Act, and unless there are other and written articles these sections apply.

See on the question of parol evidence. *Forster* v. *Hale*, 5 Ves. 309, 314; *Dale* v. *Hamilton*, 5 Hare 381, 384; *Caddick* v. *Skidmore*, 2 DeG. & J. 52.

As to what a partnership in lands means, see *Kay* v. *Johnston*, 21 Beav. at p. 537.

The Court must give effect to sections 34 and 50 of the Act.

Martin, A.-G., in reply: The plaintiff does not now

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claim an interest in a mineral claim, but he does claim a right to the proceeds.

The miner's license tax is not for purposes of revenue—it is a franchise.

Cur. adv. vult.

November 10th, 1898.

McCOLL, C.J.: In July, 1895, the plaintiff, the defendant and one Murchie agreed together to prospect, locate and deal with mineral claims for their joint profit.

On 25th June, 1896, a mineral claim was, in pursuance of the said agreement, located by the plaintiff by the name of the Blanch Lamont, but subsequently the parties decided to allow the location to lapse, that it might be re-located by the name of the Dorothy Morton. This was afterwards done, accordingly, in the name of one Chick, who assigned one undivided half-interest in the claim to the defendant, to be held by him under the agreement. On 19th July, 1897, the defendant and the other owners of the claim entered into an agreement to sell it for the sum of $20,000.00 and the sale having been completed, the plaintiff now seeks to recover his share of the purchase money in respect of his one-sixth interest in the claim. The defendant resists payment on the ground that the plaintiff having, after the agreement for sale, allowed his free miner's certificate to expire on 26th July, 1897, the effect of section 9 of the Mineral Act was to then vest in him the interest of the plaintiff in the mineral claim, and with it his share of the purchase money.

Judgment of McCOLL, C.J.

At the trial the defendant was allowed to amend so as to raise the further defences of the Statute of Frauds and sections 50 and 51 of the Mineral Act.

For the plaintiff it was contended that section 9 only

applies to a legal estate held by a free miner in a claim, or share of a claim, and reliance was placed on the definition given to a "full interest" in the Mineral Act. For the defendant it was urged that the section applies to all rights and interests, legal or equitable, of any kind. In my opinion the section in question has no application to the present case.

The exact point to be determined is whether the enactment in question is so worded as to deprive the plaintiff of his share of the purchase money paid under the agreement of sale, made before the expiration of the plaintiff's free miner's certificate, the money having been paid subsequently.

If the defendant had executed an assignment to the purchaser at the time the agreement was made, and had taken from him his promise to pay the purchase money, the defendant would not, I think, seriously contend that the plaintiff must forfeit his share of the purchase money because he allowed his free miner's certificate to expire before the money was paid. Then if not, for what reason would the plaintiff lose his right to enforce payment personally against the purchaser in case of his failure to pay the purchase money? Or why must the plaintiff now forfeit his share of the purchase money, it having been paid according to the terms of the agreement of sale, merely because of his failure to renew his certificate?

I think that there is a plain distinction between the purchase money and the claim itself. No doubt the claim not having been assigned to the purchaser until after the payment of the purchase money, was a security for its payment, and assuming, for I desire to be understood as expressing no opinion upon this point, that the plaintiff would by force of the statute lose the benefit of his interest in the security, it does not I think follow that his share of the purchase money is to be treated as also forfeited.

The money itself and the security for its payment are

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two separate things. All that the enactment professes to do is to vest the interest in the mineral claim in the co-owners.

What the plaintiff is seeking in the present action is merely the payment of his share of the purchase money received by the defendant, in respect of the interest held by him in trust for the plaintiff, and sold by the defendant for the plaintiff, while his free miner's certificate was in force, and to this claim section 9, giving the words their ordinary meaning, affords, I think, no defence.

This view seems to me to be strengthened by considering what the result would have been if the entire claim had been vested in the plaintiff. Would it in such a case have been contended that the effect of the Act was to forfeit the claim to the Crown? Would not the purchaser have been entitled to it under his purchase if himself the holder of a free miner's certificate? Then could it be well contended that the purchase money, if unpaid, would have become forfeited to the Crown?

Judgment of McColl, C.J.

The enactment ought, I think, to receive the same construction in either case.

With reference to the defences of the Statute of Frauds and sections 50 and 51 of the Mineral Act, I think it is only necessary to repeat that no interest in the mineral claim is now in question. See *Stuart* v. *Mott*, 23 S.C.R. 384.

I think that the appeal should be allowed with costs.

Walkem and Martin, JJ., concurred with McColl, C.J.

Appeal allowed with costs.

DROSDOWITZ v. MANCHESTER FIRE ASSURANCE COMPANY.

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DROSDOWITZ v. MANCHESTER FIRE ASSURANCE COMPANY

Practice—Judgment debtor—Examination of where judgment for costs only—R.S.B.C., Cap. 10, Sec. 19 and Rule 486.

A person against whom a judgment has been recovered for costs only, is examinable as a judgment debtor under Rule 486, but not under R.S.B.C., Cap 10, Sec. 19. *Griffiths* v. *Canonica*, 5 B.C. 48 followed.

THIS was a summons by defendants for an order for the examination of the plaintiff as a judgment debtor under section 19 of the Arrest and Imprisonment for Debt Act, or alternatively under Rule 486.

The facts sufficiently appear in the judgment.

Morphy, for the summons.

Anderson (McPhillips, Wootton & Barnard), *contra*.

MARTIN, J.: After defence, the plaintiff served a notice of discontinuance, and under Rule 239 the defendants, on October 26th last, obtained a judgment for the costs of the action, and a writ of *fi. fa.* issued, and was returned by the sheriff *nulla bona*.

Judgment.

The defendants now apply to examine the plaintiff as a judgment debtor under section 19 of the Arrest and Imprisonment for Debt Act, or alternatively, under Rule 486.

That the examination cannot be held under said section 19 is decided in *Griffiths* v. *Canonica*, 5 B.C. 49.

But I am of the opinion that Rule 486, which is much wider in effect than the said section 19, or the corresponding Rule 366 in Ontario, under which the cases quoted in *Griffiths* v. *Canonica* (*Meyers* v. *Kendrick*, 9 P.R. 363, and *Troutman* v. *Fisken*, 13 P R. 153), were decided, is wide

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enough to support the application ; in fact a careful consideration of *Meyers* v. *Kendrick* shews that case supports this view. The rule places no restriction on the nature of, or rights under the judgment, and as was said in *McLean* v. *Bruce*, 14 P.R. 190, distinguishing *Troutman* v. *Fisken*, "one dollar is very like another dollar" when money is ordered to be paid.

Order accordingly.

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Summary conviction— Appeal from—By-law ultra vires—Estoppel from setting up because objection not taken in Court below—Plea of guilty—No appeal after—Discretion of Magistrate—R.S.B.C., Cap. 176, Secs. 70–85.

A defendant convicted on summary conviction of an infraction of a City By-law, is estopped from contending on appeal that the By-law is *ultra vires* unless the objection was taken before the Magistrate. He is estopped from appealing on the merits if he pleaded guilty before the Magistrate.

APPEAL from a conviction of the defendant by the Police Magistrate of the City of Victoria, for an infraction of a City By-law. The facts fully appear in the judgment. Statement.

Bradburn, for the appellant.
Higgins, contra.

MARTIN, J.: This is an appeal, under the provisions of the Summary Convictions Act, R.S.B.C., Cap. 176, Sec. 70 *et seq.*, from the conviction of the appellant, William Gile Bowman, hackman, on 25th August last, by His Worship the Police Magistrate of the City of Victoria, for an infraction of section 22 of the Street By-law of the City of Victoria, in that the defendant did, to quote the summons and conviction, " while driving a hack along Birdcage Walk, towards town, keep to his right hand side, he then and there not passing another horse and vehicle going in the same direction or standing still." Judgment.

Section 22 of the said By-law is as follows:

" Every person riding or driving along any street shall keep to his left hand side, except when passing another horse or vehicle, which is going in the same direction or standing still."

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The accused pleaded guilty and was fined $50.00 and $2.00 costs.

Mr. *Bradburn*, on the hearing of the appeal, proceeded to argue that the By-law was *ultra vires*, and quoted cases in support of his contention. Whereupon Mr. *Higgins*, for the respondent, took the objection that under section 75 of the said Act, the point as to whether the By-law was *ultra vires* or not, could not be raised on this appeal, because it was not raised before the Magistrate. Section 75 provides, that no judgment shall be given in favour of the appellant if the appeal is based on any objection for any defect in the proceedings "in substance or in form . . . . unless it is proved before the Court hearing the appeal that such objection was made before the Justice before whom the case was tried and by whom such conviction, judgment or decision was given. . . . ."

Judgment.

It is admitted that the objection was not taken before the Magistrate.

In England, under the Summary Jurisdiction Acts, the appellant must, in his notice of appeal to general or quarter sessions, give the general grounds of his appeal. Stone's Justices Manual (1897), p. 88—Article "Summary Jurisdiction Appeal."

In Ontario, by Cap. 92, section 6 (R.S.O.) of the Act respecting the procedure on Appeals to the Judge of a County Court from Summary Convictions, such Judge may, if he is of the opinion that the conviction may be erroneous, grant a summons to shew cause why the conviction should not be quashed.

Under our Act, however, the appellant is not required to give any grounds of appeal, and there is no procedure similar to the application for the summons in Ontario, the consequence being that unless objections are taken before the Magistrate, the respondent here would be surprised and placed at a disadvantage by having objections advanced against his proceedings without warning of their nature.

It seems to me that this section 75, which goes much further than the corresponding section 15 of the said Ontario Act, or the English Summary Jurisdiction Act, 1848 (11 and 12 Vic., Cap. 43, Sec. 1), is designed to compel all objections to be taken before the Magistrate, thus giving him an opportunity to rule on them, and so, in many cases, prevent fruitless litigation. To construe the section otherwise would enable a defendant to conceal his real defence at the trial, and afterwards have the prospect of obtaining a reversal of the judgment recorded against him, together with the costs of his successful appeal.

This section 75 is the same as section 882 of the Criminal Code, but I have not been referred to any decision on that latter section, and have, at the limited time at my disposal, been unable to find one, if it exists. All objections, however, to legal proceedings must, it seems to me, be either to substance or to form. Here the objection is not a matter of form, so it must be one of substance; there can be no more substantial objection to a conviction than the ground that the By-law on which that conviction is based is *ultra vires*. The case of *Regina* v. *Cavanagh*, 27 U.C.C.P. 537, seems to contemplate that under a statute not so strong as this, the appellant might be precluded from raising objections in the manner sought to be done here. In *Rodgers* v. *Richards* (1892), 1 Q.B. 555, the inclusion of two offences in one information was held to be a "defect in substance," under the Summary Jurisdiction Act, 1848; see also *Regina* v. *Hazen*, 20 A.R. 633. As to waiving objections generally by appearing and pleading, see *Regina* v. *Vrooman*, 3 Man. 509; and that the objection of *res judicata* cannot be urged upon *certiorari* if not taken before the Magistrate, see *Re Bibby*, 6 Man. 472, and the same rule has been stated to apply even to an objection to the jurisdiction. *Regina* v. *Starkey*, 7 Man. 489.

Judgment.

It is urged by appellant's counsel that it will work a hardship on his client if he is not permitted on the appeal

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to raise the point as to the invalidity of the By-law, owing to his neglecting to raise it before the Magistrate, where he was not represented by counsel. However desirable it might be to settle now the question of the validity of the By-law, and whatever my own inclination might be, my duty is plain, and it is, that in cases like the present, where I am not given any discretion, I have to decide the question not by inclination, but by statute. It follows then that the appellant is on this appeal precluded by said section 75 from raising the question of the validity of the By-law.

On application I shall fix a day for the hearing of any further points of the appeal.

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On the appeal coming on this day for further hearing, Mr. *Bradburn* applied to have the case re-opened, and witnesses called as to the merits.

Judgment.

Mr. *Higgins*, for the respondent, contended that the appellant having pleaded "guilty," there were no merits to dispose of.

To open up the matter at this stage would be tantamount to allowing the defendant to withdraw his plea of "guilty," after he was convicted on that plea. This I have no power to do; the appeal came before the Court on admissions, so to speak, and the effect of the proposed course would be to introduce in the appeal a conflict of facts where none existed before.

It was then urged that I should inquire into the amount of the fine imposed, which was the limit allowed by the By-law. It is admitted that I have no power to review the discretion of the Magistrate in ordinary cases, but it is suggested here that the Magistrate acted improperly, or irregularly, in the way in which he asked questions of the prosecutor and others regarding the existence of malice in the defendant's mind, so as to arrive at the extent of the fine he thought fit to impose. After hearing counsel at con-

siderable length, I cannot see that the Magistrate prevented the defendant from rebutting the inference of malice, or otherwise acted oppressively, and though the fine imposed may be greater than I would have imposed if I had been dealing with the matter, still that is not sufficient to warrant me in interfering with the Magistrate's exercise of the discretion conferred upon him.

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Appeal dismissed with costs.

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IN RE JOHN JOSEPH BLAKE

IN RE JOHN JOSEPH BLAKE.

Barrister and solicitor—Striking off rolls—Appeal from decision of Benchers—Reinstatement—R.S.B.C., Cap. 24, Secs. 42 and 48.

B, a barrister and solicitor was suspended from practice for six months by the Benchers in 1894, for wrongfully retaining moneys of a client. On the expiration of the period of suspension, the client not having yet received her money from B, again complained to the Law Society, and on the hearing of the complaint in 1896, B was disbarred and struck off the roll of solicitors.

Held, on appeal to the Judges of the Supreme Court, as visitors of the Law Society:

(1) That B was not obliged to apply to the Benchers for reinstatement under section 48 of the Legal Professions Act before bringing his appeal;

(2) That the Benchers by suspending B in 1894, had not exhausted their powers, but that they had power to disbar and strike B off the rolls if they found that he was still wrongfully retaining his client's money, and not a fit and proper person to remain on the roll;

(3) That the Judges will not allow an appeal which would have the effect of reinstating a barrister or solicitor while still in default in respect to the transaction for which he was disbarred or struck off.

Statement.

APPEAL under section 42 of the Legal Professions Act by John Joseph Blake to the Judges of the Supreme Court as visitors of the Law Society, from a resolution of the Benchers of the Law Society of 8th April, 1896, by which the said Blake was disbarred and disqualified as a barrister, and suspended from practice and struck off the roll as a solicitor of the Supreme Court of British Columbia.

In 1894, Blake, who was then a practising barrister and solicitor in Vancouver, was employed by one Leona Izen, a young woman, to collect some money due her. Blake collected the money and received out of Court $200.48, but failed to pay it over to his client, a difference arising as to the amount payable, as the solicitor claimed that a sum of $50.00 paid him at the commencement of the proceedings

was a retainer, and that he was entitled to his regular costs in addition to the $50.00. Blake delivered his bill of costs, amounting to $88.01 (in which the sum of $50.00 was not mentioned) and on 11th August, 1894, on the application of Leona Izen, WALKEM, J., made the following order:

"It is ordered that the said bill of fees, charges and disbursements delivered to the applicant by the above named solicitor, J. J. Blake, be referred to A. E. Beck, District Registrar of the Supreme Court at Vancouver, to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant; and that he refund what if anything he may as a result of such taxation appear to have been overpaid;

"And it is further ordered that the said A. E. Beck will tax the costs of the reference, and certify what shall be found due to or from either party in respect to said bill and of the costs of the reference to be charged (if payable) according to the event of the taxation pursuant to the statute;

Statement.

"And it is further ordered that the costs of this application and order be costs to the successful party, according to the event of said taxation pursuant to the statutes."

The bill was taxed by consent by Mr. Beck, at $58.00, but he never certified what was due to or from either party in respect of said bill, and the sum of $50.00 was never taken into account.

On Miss Izen complaining to the Law Society, the Benchers summoned both Blake and Miss Izen to appear before them on 29th October, 1894. On that date Miss Izen appeared and made a statement, but Blake did not appear but sent a statutory declaration. Blake was then summoned to attend at a meeting on 5th November, and shew cause why he should not be disbarred and struck off the roll, and he was sent a copy of Miss Izen's evidence taken before the Benchers on 29th October.

On 5th November Blake appeared, gave evidence and

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was cross-examined by the Benchers, his evidence being taken down in shorthand by the official stenographer. The Benchers thereupon passed the following resolution suspending him from practice for six months:

"Upon reading the complaint of Leona Izen, dated the 16th day of July, 1894, against the above named John Joseph Blake, a barrister-at-law and solicitor of the Supreme Court of British Columbia, and her declaration in support of the said complaint dated the 29th day of October, 1894, and the exhibits therein referred to, and upon reading the declaration of the said John Joseph Blake, dated the 27th day of October, 1894, and upon hearing upon the 5th day of November, 1894, his statement in regard to the matters in said complaint and declaration referred to:

"Be it resolved that the said John Joseph Blake be, and he is hereby suspended from practice as a barrister-at-law and solicitor of the Supreme Court of British Columbia, for a period of six months from this 5th day of November, and that copies of this resolution, under the seal of the Society, be forwarded to the said John Joseph Blake, and the Registrar, and District Registrars of the Supreme Court of British Columbia, and the Registrars of the several County Courts."

Statement.

Miss Izen then complained again to the Law Society, and in October, 1895, Blake sent the Secretary a cheque for $20.00, his annual fee. The cheque was held but no certificate was issued, pending a Benchers' meeting which was held on 16th October, when the Benchers directed their Secretary to ascertain the amount due Miss Izen from Blake, and to issue Blake's certificate on his paying the amount. No notice of this was given to Blake, but the Secretary proceeded to ascertain the amount from the evidence fyled with him, and on 23rd October he wrote to Blake as follows:

"At the recent meeting of the Benchers on the 16th instant, a resolution was passed directing me, as Secretary of the Society, to ascertain the amount due from you to Miss Izen, and to issue your certificate to you in the event

of the money being paid either to Miss Izen or to me as Secretary. In accordance with the said resolution I have gone carefully over all the evidence taken by the Benchers and find that $207.48 is the amount you should pay Miss Leona Izen.

The amount is made up in this way :

Money received in cash by you from Miss Izen..	$ 65.00
Money paid into Court and received by you or your agents.....	200.48
	$ 265.48

From this sum you are entitled to deduct only $58.00, your taxed costs. The balance, as I have said before, is $207.48, and on your paying this sum to me or satisfying me that it has been paid to Miss Izen, I am directed to issue your certificate."

Statement.

The Secretary received no reply to the above letter, and he so reported to the Benchers at their meeting of 20th January, 1896, and they then ordered that Blake be summoned to appear at their April meeting and shew cause why he should not be disbarred and disqualified as a solicitor.

On 8th April, 1896, Blake appeared before the Benchers pursuant to notice, and explained that through his solicitor, Mr. R. W. Armstrong, he had offered Miss Izen $134.00 in full settlement, and he denied that he owed her more than that amount. He disputed the authority of the Benchers to interfere with the order of the Court, which he claimed he had followed. He cited Supreme Court Rule 800. The Benchers then passed the following resolution :

" Upon reading the complaint of Leona Izen, dated the 16th day of July, 1894, against John Joseph Blake, of the City of Vancouver, a barrister and solicitor of the Supreme Court of British Columbia, and her declaration in support of the said complaint dated the 29th day of October, 1894, and the exhibit therein referred to, and upon reading the

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declaration of the said John Joseph Blake, dated the 27th day of October, 1894, and upon reading the evidence of the said John Joseph Blake and the exhibits therein referred to, taken before the Benchers of this Society on the 5th day of November, 1894, in regard to the matters in said complaint and declarations referred to, and upon reading the notice dated the 11th day of March, 1896, calling upon the said John Joseph Blake to shew cause why he should not be disbarred, disqualified, suspended from practice or struck off the rolls, both as a barrister and solicitor of the Supreme Court of British Columbia, all of which papers and documents are fyled with the Secretary of this Society, and upon reading the resolution passed by the Benchers of this Society on the 5th day of November, 1894, suspending the said John Joseph Blake from practising as a barrister and solicitor of the Supreme Court of British Columbia for a period of six months from the said 5th day of November, 1894, and upon hearing the said John Joseph Blake and it appearing by his own statement that the said John Joseph Blake has not obeyed the directions of the Benchers conveyed to him by the Secretary's letter of the 23rd day of October, 1895, and the said John Joseph Blake giving no satisfactory reason for his default in that behalf, Be it resolved, that the said John Joseph Blake be and he is hereby disbarred and disqualified as a barrister, and suspended from practice and struck off the roll as a solicitor of the Supreme Court of British Columbia."

Statement.

This resolution was not put into operation at once, as Blake, desiring to put in some fresh evidence, applied for another meeting to reconsider the resolution. Accordingly another meeting was held on 20th April, at which Blake and his wife appeared, and after the Treasurer had told them that their evidence was being taken without prejudice, they made statements in reference to the matter. Statutory declarations by Miss Izen, Blake, Mr. Armstrong and one Shoebotham were read, shewing that in June,

1895, Mr. R. W. Armstrong, acting on behalf of Blake, tendered Miss Izen $134.50, and subsequently, in the same month, Shoebotham, a clerk in Mr. Armstrong's employ, tendered her $134.50. Miss Izen said each of the offers was made with the condition that the amount so offered was to be in full satisfaction of her claim against Blake. Both Mr. Armstrong and Shoebotham said the offer made by each was unconditional.

On the morning of 20th April, Mrs. Blake handed the Secretary $207.48 for the use of Miss Izen, but the Secretary refused to give her a receipt therefor, and she took back the money.

Statement.

The Benchers then decided to let the matter stand until their July meeting, when the matter was dropped, and the Secretary then published the resolution of 8th April, and from that resolution Blake appealed in February, 1898. The appeal came on for argument before WALKEM, DRAKE and IRVING, JJ., on 7th May, 1898.

Joseph Martin, for the appellant.

Hunter, for the Law Society, took the preliminary objection that the appeal was brought after an unreasonably long time and should not now be heard, and further, that as under section 48 of the Act the appellant had the right to apply to the Benchers for reinstatement at any time after the expiration of one year from the date of his being disbarred and disqualified, he should now apply for reinstatement before appealing.

Argument.

Their Lordships overruled both objections, and then adjourned without having heard argument on the main question.

The appeal was brought on again on 21st November, 1898, before WALKEM, IRVING and MARTIN, JJ.

Martin, A.-G., for the appellant: The Benchers had no right to determine the amount due by the appellant to Leona Izen, it appearing by the proceeding set forth in the petition that there was a *bona fide* dispute between the petitioner

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and the said Leona Izen as to the amount due. The statutes give the Benchers no authority to determine such a question, nor to delegate the determination of such a question to their Secretary as was done in this case.

The order of the 5th November, 1894, suspending the appellant from practice for six months, exhausted the power and authority of the Benchers in the premises, and they had no power to pass the resolution of 8th April, 1896.

Hunter, for the Law Society: Sitting as visitors their Lordships would not interfere with a resolution so long as it appeared that the rules of natural justice had been followed. See Pollock on Torts, 4th Ed., pp. 110–111. The Benchers, in exercising their jurisdiction, had decided that Mr. Blake was no longer a fit and proper person to remain on the roll, and that was the question to be decided in all these cases. He referred to *Hands* v. *Law Society of Upper Canada*, 16 Ont. 625; 17 Ont. 300; 17 A.R. 41; *Re Blake*, 3 E. & E. 34; *Stephens* v. *Hill*, 10 M. & W. at p. 34; *In re Chandler*, 25 L.J., Ch. 396; *Re Hill*, L.R. 3 Q.B. 543; *Thompson* v. *Finch*, 25 L.J., Ch. 681; *Osgood* v. *Nelson*, L.R. 5 H.L. 636; *In re Weare* (1893), 2 Q.B. 439.

Argument.

At any rate, Mr. Blake had not yet paid the money, and he should not be reinstated until he made restitution.

WALKEM, J.: I am of opinion that the appeal should be dismissed. Looking at the object of the Act it is obvious that it is a remedial statute intended to protect clients from being plundered by a privileged class—hence to protect the public and not the solicitor. It consequently entrusts the Law Society with large disciplinary powers; and for the purpose of a complete investigation of a case, according to the rules of natural justice, the Judges of this Court are made a sort of appellate body with power to review what the Benchers have done. The action of the Benchers ought not, in my opinion, to be lightly interfered with. It would, I think, not be proper for us to reverse the action of the

Judgment of WALKEM, J.

Benchers on the ground taken in this case, namely, that the Benchers had exhausted their powers in ordering a suspension in the first instance. The question, as in all such cases is—have the Benchers done anything contrary to natural justice? and in view of all the facts we must decide that they have not. Were we to decide otherwise, we should be reinstating the appellant, and thus virtually declaring him to be a fit person to be a member of an honourable profession, although he had failed to pay his client what was due to her.

IRVING, J.: I concur.

MARTIN, J.: I agree that the appeal should be dismissed. The Benchers are not bound by strict rules of procedure as in criminal matters, and so long as the rules of natural justice are followed, I do not think we should interfere with what they have done. In case Mr. Blake pays Miss Izen the money he owes her, and then applies to the Benchers for reinstatement, I assume from what their counsel has said that they will grant his request, for his punishment has been severe. I may add that in the Law Times for August 8th, 1896, Vol. 101, at p. 344, will be found a very useful guide, based on a consideration of recent cases, for the course to be pursued on an application for reinstatement.

Judgment of MARTIN, J.

Appeal dismissed.

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Chattel mortgage—Bidding in at sale by mortgagee—Accounts—Good-will of business—Practice as to varying decree.

Mortgagees put up stock in trade of a butcher business for sale under their mortgages, bid it in and took possession with the assent of the mortgagor, paid off arrears of wages and rent, and carried on the business with the mortgagor in their employ for some months. In an action by the mortgagor to avoid the sale, held by DRAKE, J.:

1. That it was void and the property could be redeemed;
2. That in the taking of accounts mortgagor could not be charged with arrears of wages paid by the mortgagees, this payment not having been expressly assented to by the mortgagor.

Held, further, on appeal from judgment of DRAKE, J. (on motion to vary the Registrar's certificate):

1. That a sum stated by the mortgagees to be the value of the good-will for the purposes of an amalgamation scheme between them and another Company, could not be charged against them in the accounts;
2. If it appears on the taking of accounts that the decree is not drawn in such a way as to include all proper subjects, the proper practice is to apply to the Court to direct further and other accounts to be taken;
3. On a motion to vary a certificate the parties are confined to the decree.

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Statement.

ACTION to avoid mortgagees' sale of a butcher business and for redemption; and appeal from judgment of DRAKE, J., on motion to vary the Registrar's certificate made on the taking of accounts.

The facts appear very fully in the judgment of IRVING, J., *infra*.

The trial took place on 12th and 13th August, 1895, before DRAKE, J.:

Mills, for plaintiff.

A. E. McPhillips, for defendants.

The following oral judgment was delivered by

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DRAKE, J.: In this case the facts, which are more or less disputed, are shortly these: On 3rd March, 1894, the plaintiff borrowed from the British Columbia Land & Investment Agency as the representative or financial agent of the Western Canadian Ranching Company which are the defendants here, the sum of $5,000.00; that $5,000.00 was a sum not paid down, but to be paid in advances as they were required from time to time. And in order to secure that sum he gave a mortgage, not only on certain chattels and effects in his butcher shop, but also on certain real estate and other property which was in his possession at the time. The plaintiff says that he informed the defendants that the sum going to be borrowed was being secured by a second mortgage; but the evidence of Mr. Holland and Mr. Prentice on that matter clearly to my mind is much more likely to be correct than that of the plaintiff. I think his imagination is possibly stronger than his memory; because, as Mr. Holland puts it, he would not have lent the sum of $5,000.00 on property which he valued in *toto* not exceeding $4,000.00, if he knew there was a mortgage upon it of some $3,000.00. The mortgage having been executed, the British Columbia Land & Investment Agency executed a transfer, I suppose more for the purpose of book-keeping than anything else, to the defendants; no money passed between them, and, as Mr. Prentice puts it, they were simply the agents of the defendants.

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And it appears that about that time it was discovered that there was this second mortgage, which seems to have not unduly annoyed the gentlemen who had the management of the defendants' business; and they put in force their powers of sale under the bill of sale. Then we come to another strong conflict of testimony here. Mr. Prentice and Mr. Holland both assert that before that bill of sale was put in force for the purposes of the sale, Mr. Van Volkenburg practically arranged with them that if the

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property was not sold, or if it was bid in and they got it, he was to have an option to repurchase, that is to say, to get his business back again. With regard to that I think it is clear, and he himself admits that that conversation did take place, but he says no time limit was fixed, but it was left open that he might buy it back at any time. Now that is unreasonable, to begin with. It is not probable that any such open arrangement that might not be fulfilled in twelve months or more, would under any circumstances exist; therefore I am inclined to take the evidence of Mr. Prentice as being the statement of what actually did take place, and that was that he was to have a couple of months, and if in the course of two months he was able to make arrangements to obtain his business back again by paying the debts off, he was at liberty to do so. And I think, moreover, that it is clear also from the evidence, that that was a consideration which was working on the defendants' minds, and also on the plaintiff's when the plaintiff agreed that they should run the business in the old place where he was running the shop before, and also at the North Dairy Farm, so as to give an opportunity to the plaintiff, if he was able to raise the money, to take back the whole place as it then existed. And it was further alleged, and I do not think it was denied, that he was to have the furniture of his house, that it should not be dealt with at that time at all events; and that was a sort of consideration for the arrangement made. And I think that that was really the actual fact that took place at that time. It was arranged if he could raise the money in two months' time and pay off all that was due, he could have the property back again. Under these circumstances we come to the question of the sale. Now the sale, to my mind, was void in equity. The property was merely put up for sale; it did not go beyond that, because it was bought in by the mortgagees. It is a principle of law and equity that a mortgagee cannot be vendor and purchaser at the same time. And under those

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circumstances, what took place on 24th October was not an absolute sale. But the effect of it was that defendants went into possession; and I think they went into possession with the consent of the plaintiff. They went into possession and continued the business there until a subsequent period, when they made a transfer of the whole property in May. And under the circumstances, and on the face of the pleadings, I shall hold that that sale in May was the proper exercise of the powers which they had under their bill of sale. The point that Mr. *Mills* has been discussing with regard to that sale has not been raised on the pleadings, and I do not think it is proper that it should be raised without an amendment made at an earlier period, and opportunity given defendants to meet that issue with evidence; they have not had that opportunity, and I cannot give effect to an allegation that does not appear on the pleadings at all.

Now the plaintiff claims that he did not part with the goodwill. The goodwill certainly was not sold by the bill of sale; it was not mortgaged by the bill of sale. But the evidence is clear to my mind that he authorized and sanctioned the defendants keeping on the business at that shop, and for the reason I have already given. He was present almost daily in the shop; he was doing work for them, and he received payment from them for work that he did do.

We have Mr. Prentice's evidence that in the May following, which was some six or seven months after the 24th October, he offered the plaintiff another opportunity to pay the money that was due and take back the whole of the business, and he was unable to do so and did not do it. Therefore under these circumstances, I do not think that the plaintiff has made out that the defendants have wrongfully taken and retained possession of the goodwill of his shop. The goodwill of the business was not sold, but all that the defendants had if they relied simply upon their

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deed, was the goods and chattels mentioned in that deed, and they had no title to anything else. But supposing that the goodwill had been wrongfully taken possession of, what is the value of it? I cannot say that there is any value in the good will of a business of that sort. It is not as if the mortgagees were taking any advantage by taking possession; I do not see that they have benefited themselves in the least by taking possession of the place; the business has not been a profitable one; and the premises are not the plaintiff's, he was simply a tenant of them, and the rent which seems to have been paid appears to have been the ordinary reasonable rent for premises of that character. It was alleged, but it certainly was not proved, that he had a reduction in the rent in consequence of certain improvements he made; the landlord was not called to prove what arrangements would have been made had he not made the improvements, but it simply appears that the agent who was first approached, asked $100.00 a month, and the plaintiff afterward dealt with another person who then had charge of the place, and got it for $60.00, and I do not think there was any value to it in respect of the rental having been reduced at all.

Judgment of DRAKE, J.

Then, under these circumstances, what benefit, I may say, can the plaintiff possibly derive from the fact that the defendants were mortgagees in possession? A mortgagee in possession has got certain duties to perform; that is to say, that he is liable to account for all moneys which he has received and which but for his wilful default he ought to have received. In a business of this kind there is nothing of the sort. There is no money for them to receive from the estate which they have not gone into possession of, and they cannot make default of something that does not exist. On the other hand, if the accounts were taken strictly, then I should say again *cui bono*, because the plaintiff would be liable for the taxes, he would be liable for the rent, he would be liable for any necessary repairs. And

against that what could he do? He would set off a rent which the other side might reasonably have to pay in respect of the premises; and take the one against the other, I do not think there is much advantage to be gained on either side by going into an elaborate account as to what is due on either side. But as they ask for it, they will have to have it.

Therefore, under the circumstances, I think the usual decree, with right of redemption, must be made. The plaintiff is entitled to redeem the whole of the property. He is not entitled to redeem any portion of it, he must redeem the whole; and he also in equity is bound to redeem in respect of the whole of the liabilities, that is to say, in respect of both mortgages. He cannot redeem with respect to one mortgage, but with respect to both. Therefore the account would be an account for what is due for principal, interest and costs, in the first place, in respect to both mortgages. And in that account the defendants will have to shew all the moneys that they have received in respect of the plaintiff, and moneys which they allege they have paid in respect of the plaintiff. I must point out that there was no authority or jurisdiction for the defendants to pay the wages which were unpaid at the time they went into possession—they had no request to do it; of course if they had been requested to do it, it would have been another thing; but simply because for the purpose of enabling them to carry on the business, they have paid Mr. Van Volkenburg's debts, I do not see how they can recover for it. It is one of those cases in which they have been a great deal too liberal. Then after taking that account, there will have to be further application, which will be for further consideration. The plaintiff will have to pay the costs.

Judgment of DRAKE, J.

The minutes of the decree made were as follows:

" . . . . declare that the defendant Company were mortgagees in possession of the plaintiff's goods, chattels and effects comprised in the chattel mortgage dated the 3rd day of March, 1894, in the pleadings mentioned, from the

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24th day of October, 1894, up to the 1st day of June, 1895: " . . . . ordered that the following accounts be taken, that is to say:

1. An account of what is due to the defendants under and by virtue of the bill of sale dated the 14th day of November, 1893, and assigned to the defendants on the 24th day of October, 1894, and the chattel mortgage dated the 3rd day of March, 1894, assigned to the defendants on the 11th day of October, 1894, in the pleadings mentioned.

2. An account of the proceeds of the goods, chattels and effects received by the defendants, or by any person or persons by the order or for the use of the defendants, or which, without the wilful default of the defendants might have been so received. And that the defendants in such account are to be charged with the amount realized from the carcasses and meats of a butcher which were in and upon the plaintiff's premises in the pleadings mentioned, on the said 24th day of October, 1894, and with the live stock of the plaintiff in and upon the North Dairy Farm on the said 24th day of October, 1894. The plaintiff to be charged with all taxes and insurance due and paid in respect of the mortgaged property prior to the 24th day of October, 1894, and also with all costs, charges and expenses, properly incurred, of and in connection with the preparation and registration of the said chattel mortgages, and also costs, charges and expenses of and incidental to the sale and attempted sale of the said goods and chattels.

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3. An account of moneys received in respect of the plaintiff's book debts in the pleadings mentioned collected by the defendants.

4. An account for all moneys received by the defendants from the sale of the said goods, chattels and effects to the British Columbia Market Company, Limited.

And that what shall appear to be due on taking such accounts is to be deducted from what shall appear to be due to the defendants in respect of their said mortgages and let

what shall appear to be due on the said account be applied first in discharging the costs and interest and then in discharging the principal money secured by the said mortgages. And that upon the plaintiff paying to the defendants what shall be certified to be due to the defendants after such deduction as aforesaid within one month after the date of such certificate, the defendants re-convey and re-assign clear of and from all incumbrances done by the defendants, all the hereditaments, if any, goods, chattels and effects not sold and disposed of, held by way of collateral security, and deliver up all deeds of the said mortgaged hereditaments, and also the goods, chattels and effects to the plaintiff.

But in default of the plaintiff paying to the defendants what shall be certified to be due to the defendants after such deduction as aforesaid at the time aforesaid, that this action from henceforth stand dismissed out of this Honourable Court. But if it shall appear on taking the accounts that there is nothing due to the defendants, then the defendants shall within twenty-one days after the date of the certificate, convey the said mortgaged hereditaments, and re-surrender and re-assign the said goods, chattels and effects save such as may have been sold or disposed of as aforesaid, free and clear from all incumbrances done by the defendants or any person claiming by, from or under the defendants, and deliver up all deeds of the said mortgaged hereditaments, goods, chattels and effects to the plaintiff.

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And that the defendants do within the time aforesaid, pay to the plaintiff the amount, if any, which shall be certified to be due from the defendants in excess of the amount due them from the plaintiff, such excess to be certified.

And that the costs and further directions be reserved.

And any of the parties are to be at liberty to apply to this Court as they shall be advised.

The Registrar took the account pursuant to the decree

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and gave his certificate, and the plaintiff, being dissatisfied, moved to vary the certificate and for further directions.

The motion was argued before DRAKE, J., on 31st March, 1898.

Mills, for plaintiff.

Barnard, for defendants.

Cur. adv. vult.

6th April, 1898.

DRAKE, J.: This is a motion on further directions, and to vary the Registrar's certificate.

The Registrar has found that there is due by the plaintiff to the defendants $5,264.68, after giving credit for the chattels and charging interest up to 14th December, 1897.

No objection is taken to the accounts, but the plaintiff claims he is entitled to be credited with a sum of $7,407.68, a bonus received by the defendants in addition to the value of the chattels, $2,998.00, thus making $9,405.68 received by the defendants, as against $7,372.87 due on the mortgage, the Registrar not having allowed any part of the bonus. These figures are subject to correction on the interest being calculated afresh.

Judgment of DRAKE, J.

In addition to the facts which were brought out in evidence at the trial of the action, it appears, on investigating the accounts before the Registrar, an agreement was made by the defendants, dated 4th May, 1895, between the B. C. Cattle Company, Limited, of the first part, and the Western Canadian Ranching Company, Limited, of the second part. The Cattle Company agreed to sell to the Ranching Company an undivided half interest in certain real estate and butchering business, for $15,297.16, and the Ranching Company agreed to sell to the Cattle Company an undivided half of the butchering business carried on in Victoria, and the goodwill, stock in trade, tolls, fixtures, and machinery, for $4,702.84. This is the business which the defendants were in possession of under the bills of sale.

The plaintiff claims that if the half interest sold to the B.C. Cattle Company was worth $4,702.84, the whole must be worth $9,405.68, and that he ought to have credit for this sum in taking the accounts.

The agreement then goes on to provide for the incorporation of a Company to acquire the said businesses, goodwill, stock and fixtures, with a capital of $50,000.00 in $100.00 shares, the Company to be called the B.C. Market Company, Limited. Each party was to pay in $5,000.00 for working capital, and thereupon each Company was to have $25,000.00 in fully paid up shares. In pursuance of this agreement a Company was formed on 1st June, 1895, and the objects of the Company, so far as they are important, were to acquire *inter alia* the business of butchers carried on in Victoria by the defendants and the machinery and stock in trade of the defendants, and further to give effect to the agreement of 4th May, 1895.

It is now stated that the agreement does not shew the true state of affairs. That the true state of affairs was this, that the actual assets which the defendant Company handled belonging to the plaintiff was only $2,998.00, that the sum of $4,702.84, alleged to be half the value of the assets, was made up by adding bonus shares in the proposed new Company which each Company were to take, amounting to $6,407.68, and that sum added to the $2,998.00, the actual value of the assets, made up the $9,405.68.

In my opinion the Ranching Company were under the impression that they were entitled to sell the business and chattels assigned to them by the plaintiff on any terms they thought fit, consistent with the powers vested in them; and this is true, for a mortgagee may pursue all his remedies at one and the same time.

Now the defendants contend that the Ranching Company were entitled to the bonus stock to the amount of $6,407.68, and should not be called upon to account. What is the bonus stock? It is a premium received for selling the

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business of which they were the mortgagees, and if the bonus stock more than paid the mortgagees their principal, interest and costs, the mortgagor is entitled to the surplus, but the defendants say that as they paid $10,594.00 in cash in order to equalize their assets with those of the Cattle Company, they are entitled to the bonus stock free from any claim of the plaintiff.

The agreement of 4th May, 1895, contains no recitals, no history of the reasons for the deed, and no account of the way in which it was to be carried out. The Market Company when journalizing the entries to shew how the capital of $50,000.00 stood, represents the goodwill of the business as bought by this bonus stock, and this I think is the true explanation. The result is that as mortgagees the defendants are bound to account for any profits or bonus made over and above the principal, interest and costs. *Barrett* v. *Hartley*, L.R. 2 Eq. 789.

Judgment of DRAKE, J.

The mortgagees having received this bonus in shares must after deducting the amount due to themselves on 1st June, 1895, hold the remainder of the shares for the plaintiff. As the bonus was not a cash payment, I think the plaintiff cannot claim that he should be paid in cash at par value of shares, he is only entitled to the shares, there being no market for that class of securities. I do not see how the actual value can be ascertained, and I therefore shall order that the balance, whatever it is, be paid over in shares.

When this action was commenced on 10th May, 1895, there was a very considerable balance due to the defendants, and this has a material bearing on the question of costs, especially as the action was brought chiefly for damages for taking possession of the chattels mortgaged, the question of redemption being only subsidiary. The rule as to costs is, that where the incumbrancer comes to deliver the estate from the incumbrance which he himself has put upon it, the person holding the mortgage is not to be put to expense

with regard to that proceeding, and as long as he acts reasonably, he, to that extent ought to be indemnified, and this rule is only liable to exception when the mortgagee has been guilty of misconduct with reference to the suit.

In *Cotterell* v. *Stratton*, 9 Chy. App. 514, the Lord Chancellor in dealing with the question of costs of a mortgagee against whom an action has been brought for redemption, states that the right of a mortgagee to costs in such a case is a matter that does not rest on the discretion of the Judge, and such right can only be controverted by such inequitable conduct on the part of the mortgagee as may amount to a violation, or culpable neglect of duty on the part of the defendants. See also, *Little* v. *Brunker*, 28 Gr. 191.

Here they carried out the sale after the action was commenced, and in so doing the plaintiff has been benefited, but the facts should have been disclosed by amendment of the pleadings. I therefore give the defendants their costs up to and including their defence; the subsequent costs will be borne by each party, the defendants' costs to be added to their debt.

Judgment of DRAKE, J.

In order to save the expenses of a further reference, I find that there was due to the defendants on 1st June, 1895:

On general account	$4,601.81
Turpel and Stelly Mortgage	2,563.78
Int. from 24th October, 1894, to 1st June, 1895	205.04
Costs and expenses	487.20
	$7,857.83
They subsequently collected on book accounts	188.46
	$7,669.37
The total amount of chattels and bonus received by defendants	9,405.68
	7,669.37
Balance due plaintiff on shares	$1,736.31

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The defendants appealed to the Full Court and the appeal was argued on 13th July, 1898, before WALKEM, MCCOLL and IRVING, JJ.

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Bodwell and *A. E. McPhillips*, for appellants.
Mills, for respondent.

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Cur. adv. vult.

November 7th, 1898.

IRVING, J.: This is an appeal by the defendants from the decision of DRAKE, J., varying the certificate of the Registrar. The action was brought by the plaintiff, who is a well known butcher, under the following circumstances:

On 3rd March, 1894, the defendants, an up-country Ranching Company, obtained from the plaintiff a bill of sale of (*inter alia*) certain goods and chattels used by the plaintiff in his butchering establishment at 72 Yates street, known as the Dominion Market, the premises consisting of a shop leased at $60.00 a month. The bill of sale was given to secure the repayment of $5,000.00 advanced or to be advanced by defendants.

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Money, or money's worth was accordingly advanced to the plaintiff by the defendants to the above amount and upwards.

In or about October, 1894, the defendants obtained judgment against the plaintiff on the covenant in the bill of sale, and in consequence of their having placed a writ of *fi. fa.* in the sheriff's hands, they became aware that the above mentioned property had been included in a prior mortgage dated 14th November, 1893, given by the plaintiff to Messrs. Turpel & Stelly, upon which prior mortgage there was due some $2,500.00.

The defendants took an assignment of this mortgage, and then, acting under the power of sale contained in their mortgage of 3rd March, 1894, put up the goods and chattels

above referred to for sale, the auctioneer announcing that the Turpel-Stelly mortgage could be satisfied by the payment of $1,000.00, and that the sale was subject to that mortgage. He also announced that the sale was a sale of the chattels only, and not of the business of the plaintiff. The defendants had the property knocked down to them. For a very similar transaction, see *Henderson* v. *Astwood* (1894), A.C. 158.

Before as well as after this ostensible sale to themselves, both plaintiff and defendants had a hope, or an expectation that the plaintiff might in the course of a month or so be in a position to re-purchase or redeem his property. The existence of this hope or expectation accounts for the subsequent course of events.

The defendants promptly moved into the Dominion Market, paid the plaintiff's employees their arrears of wages, paid up the arrears of rent due from the plaintiff in respect of the premises, employed the plaintiff in connection with the business, and generally carried on the establishment at 72 Yates Street, as if they had bought out the plaintiff's business as a going concern. This state of things continued for some nine months, that is, until May, 1895, when the defendants, who were apparently not making money, decided to amalgamate under one management, the Dominion Market with two similar establishments, conducted, one in Victoria, the other in Vancouver, by another up-country Cattle Company, called the B.C. Cattle Company.

The plaintiff, who always hoped to be in a position to resume business, objected that the sale in October, 1894, was invalid, and immediately after the completion of the amalgamation scheme, brought this action, in which he asked that the sale of 24th October, 1894, be set aside, that he should be allowed to redeem the said goods, chattels and effects, and that the defendants be declared mortgagees in possession, and that they should be charged with the rents and profits of the business; and, in the alternative, he claimed damages from the defendants for wrongfully

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taking possession of his business, and carrying on the same for their own use and benefit, and special damages for destroying the goodwill of the business.

This action was tried before DRAKE, J., who declared that the ostensible sale of October, 1894, was invalid, but that the amalgamation scheme was in effect a sale by the mortgagees, and he made a decree accordingly, and directed the accounts to be taken on the footing that the defendants were mortgagees in possession from 24th October, 1894, to 1st June, 1895. The alternative claim for damages was ignored in the judgment. The Registrar certified that the amount received by the defendants from the sale of the plaintiff's goods, chattels and effects, was $2,998.00, and that the balance due to the defendants was $5,323.29.

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On the taking of the accounts it transpired that the defendants and the Cattle Company with whom they had entered into this amalgamation scheme, had formed a joint-stock Company, with a capital of $50,000.00, to carry on the amalgamation business, but as the assets and contributions of the two amalgamating concerns only amounted to $37,184.64, they had decided to divide the balance of the shares—some $12,814.36—equally between them. They accordingly did so, and the Company issued to the defendants shares to the amount of $6,407.68. It is as to this amount that the present appeal is brought. The plaintiff claimed before the Registrar that the defendants should be charged with having received these shares on account of his mortgage. If the defendants were so charged, the Registrar's certificate would shew that defendants had obtained the sum of $9,405.68, instead of the sum of $2,998.00 as therein stated, and that the balance would be in favour of the plaintiff.

The learned Judge varied the certificate by stating that the amount received by the defendants from the sale of the plaintiff's goods, chattels and effects, (including the business) to the B.C. Market Company, was $9,405.68, in shares

in the said B.C. Market Company. And the learned Judge then declared that the plaintiff was entitled to receive from the defendants $1,369.69, in paid up shares of the Company. The defendants now appeal from his decision.

It is necessary, for a right understanding of this judgment, to know exactly what was done between the defendants and the Cattle Company.

The arrangement was that each should buy an undivided one-half interest in the business of the other, and then turn the whole over to a new Company. The Cattle Company's assets amounted to $24,186.64, the defendants' to $2,998.00; each was to contribute $5,000.00 cash. These brought the total assets, to be turned over to the new Company, up to $37,184.64. But the capital of the new Company had been fixed at $50,000.00, in fully paid up non-assessable shares. In order then, to make it appear in the Company's books that the vendors were actually contributing a full $50,000.00, in money, or money's worth, and to swell this $37,184.64 to $50,000.00, the vendors put in the "goodwill" of their respective establishments at $6,407.68 each. This was settled between themselves as the division of the stock of the new Company, and the defendants, having paid their associates $10,594.32 to equalize their assets with those of the Cattle Company, the agreement of 4th May, 1895, was drawn up and executed. Mr. *Mills* claims it was an illegal transaction. Assuming that it was, it was not so far as the plaintiff was concerned. He contends by that agreement the defendants sold the plaintiff's half interest at a sum equal to one-half of $2,998,00, plus one-half of the fictitious $6,407.68, or $4,702.84. I think there is more than one fallacy underlying this argument. The defendants could only sell that which they, by the power of sale, were authorized to sell, viz: the goods and chattels. These were valued by the plaintiff himself at $2,998.00.

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In the next place the $6,407.68, shares, were not received as a bonus for selling the business, or goodwill of the

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plaintiff's business. The shares were turned over to the defendants, simply to even up the division of the stock of the new Company. See page 235 of the Appeal Book.

There were two separate and distinct things, the sale of the goods of the plaintiff, covered by the bill of sale at $2,998.00, and the division of the shares of the new Company. The valuation of the goods is not complained of. How is the plaintiff injured by the defendants and their associates in the new Company watering their stock? A mortgagee in possession may sell to a Company, (in which he is a shareholder) although formed for the purpose of purchasing the property, (see *Farrar* v. *Farrars, Limited*, 40 Ch. D. 395), if the sale is thoroughly honest and fair. The subsequent agreement to divide the stock of the Company on an inflated and improper valuation, does not concern the mortgagor. Mr. *Mills* relied on the decision of the C.A. *In re Wragg* (1897), 1 Ch. at p. 831, where it is said that the value received by the Company is measured by the price at which the Company agreed to buy. That decision, binding as between the Company and its liquidator on the one hand, and a shareholder selling to it, on the other, has no application to this case, in which the Company purchasing is not concerned.

The goodwill of the business carried on at 72 Yates Street, was not included in the bill of sale to the defendants. The evidence at the trial discloses that the goodwill was not put up for sale in October, 1894, and during the trial a very great deal of evidence was given as to the circumstances under which the defendants continued to carry on for nine months the business of butchering, on the premises formerly occupied by plaintiff. The decree directed the Registrar to take an account of moneys received from the sale of the goods, chattels and effects, but not of the goodwill. The Registrar reported that sum at $2,998.00, but the learned Judge varied the Registrar's certificate by stating the amount received from the sale of plaintiff's goods and

chattels (including the business, to the B.C. Market Company, Limited Liability) was $9,405.68. The introduction of the price paid for the sale of the business as distinguished from the goods mentioned in the mortgage, seems to me to be altogether foreign to the matter referred to the Registrar by the decree.

Where, during the taking of accounts, it appears that the decree is not drawn in such a way as to include all proper subjects, the practice is to apply to the Court to direct further and other accounts to be taken. (See *In re Symons, Luke* v. *Tonkin*, 21 Ch. D. 757, at p. 760, and *Edmonds* v. *Robinson*, 29 Ch. D. 170). To make a new decree, inconsistent with the original decree, on an application to vary the Registrar's certificate, is to introduce an inconvenient practice. One only appreciates that inconvenience when he has to deal with the appeal from the decision on the application to vary the certificate, because he then finds that instead of starting with the decree as a basis, and discussing the question whether the Registrar was right or wrong in working out that decree, he must go back and settle whether the decree should or should not have been altered. But slips in practice must not be allowed to defeat the merits of the case: *South African Territories* v. *Wallington* (1898), A.C. 313; and I think that if it were possible to give a decision on this application without sending the parties back to do that which ought to have been done in the usual course, we ought to give such decision. But before discussing that, I think it right to point out that in any application to alter the decree, the plaintiff would have found himself very much hampered by the following remarks of the learned trial Judge in giving judgment, at page 169 of the Appeal Book: "I do not think that the plaintiff has made out that the defendants have wrongfully taken possession of the goodwill of his shop." "The goodwill certainly was not sold. It was not mortgaged by the bill of sale."

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Mr. *Mills*, in his argument, referred us to many decisions, most of them are collected and explained in *Carruthers* v. *Hamilton Provident & Loan Society*, 12 Man. 60 and *Biggs* v. *Hoddinott* (1898), 2 Ch. 307, but they refer to cases where the mortgagee has sacrificed the property, or has not accounted for what he has received on a sale of the property included in the mortgage, or has done something which occasioned a loss to the mortgagor, or the mortgagee has taken some unfair advantage of the mortgagor, whereas in this case, the plaintiff is seeking to make the defendants account to him for something over which they had not acquired control as his mortgagees. This case differs in that respect from the cases cited to us by plaintiff's counsel. Turn and twist this transaction in any way you can, the same view will present itself. The defendants in dealing with the property had no power to sell anything except that which was included in their mortgage. In this case the relationship upon which the plaintiff's claim is founded was brought about by the defendants continuing to occupy the premises in which the plaintiff formerly carried on business. On their taking possession they were at liberty to remove the goods and chattels from the leasehold premises and to sell them. Their powers under the mortgage, or bill of sale, stopped there. But there was a permission or license from the plaintiff to continue in possession, founded, as I have already said, on an expectation that he would some day, sooner or later, be able to resume his old business. As to the chattels, the defendants were mortgagees in possession, but as to the leased premises, I doubt if their occupation was as mortgagees. It is true that their position was taken up and maintained by them for nine months, under a misapprehension as to their rights, but the learned trial Judge finds, and I agree with him, that this was done at plaintiff's request, or at any rate with his approval. They, in my opinion, were not liable to him for any compensation, allowance, or damages in respect of

their remaining in possession of his leasehold, and continuing to carry on their business similar to that which he had carried on. The shares which they received were not in payment of the property mortgaged to them, but were obtained in respect of a collateral matter. The mere fact that the defendants were enabled to do that which they did do, by virtue of their position as mortgagees, is not sufficient to support the plaintiff's contention.

In *White* v. *City of London Brewery Company*, 42 Ch. D. 237, we find a case not unlike this in some respects. It was an appeal by the plaintiff from a decision on an application to vary a certificate. The plaintiff, a brewer, borrowed money on mortgage from brewers, who took possession, and let the premises with a restriction that the tenant should take his supply of beer entirely from them, and after some ten years sold the property. The decree directed an account—"an account of the rents and profits of the mortgaged premises." The plaintiff before the chief clerk brought in a surcharge for £1,991, profits received by the defendants on beer supplied by them to the mortgaged premises during the period they had leased it as a tied house. The chief clerk refused to allow this claim, and NORTH, J., upheld him (39 Ch. D. 559). Then came the appeal (42 Ch. D. 237.) Lord ESHER, M.R., says: "The defendants are bound to account to him after the sale, for the proceeds of the sale, for any rents which they have received, or, but for their wilful neglect or default, they might have received from the property while they were in possession, and for any profits which, during that period, they made out of and by the mortgaged property. They have not to account for anything more. . . . . But the plaintiff says: "No, you must account to me for the profits which you have made upon beer which you have supplied to the house as being part of the rents and profits which you have got out of the mortgaged property." "Can these profits," the M. R. asks, "on beer

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supplied to the house, be said to be profits by and out of the premises? Such an idea seems to me to be simply preposterous, and we cannot entertain it." COTTON, L.J., and FRY, J., agreed, and both they, and the Judge appealed from, drew attention to the point I have already alluded to, viz., that on a motion to vary a certificate, the parties are confined to the decree.

The appeal should be allowed with costs of this appeal, the order of the 6th April, 1898, discharged, the Registrar's certificate restored, and the matter referred back to be dealt with on further consideration.

The other Judges concurred.

Appeal allowed.

GORDON v. ROADLEY.

WALKEM, J.

[In Chambers].

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Jan. 28.

GORDON v. ROADLEY

Practice—Irregular appearance—Judgment signed as in default—Setting aside.

Where an irregular appearance has been entered, the plaintiff cannot treat it as a nullity and sign judgment as in default, but must move to set it aside.

APPLICATION to set aside an interlocutory judgment, signed by the plaintiff as in default of defence. The action was for slander. The defendant entered an appearance in person, and gave notice to the plaintiff, but through ignorance of the practice of the Court, omitted to state any address, and the plaintiff treating the appearance as a nullity, signed judgment. The application was also for leave to appear by a solicitor.

Statement.

Langley, for the application: There is no authority for signing judgment when the appearance is irregular. The appearance precludes such a step and must first be removed.

Duff, contra: The appearance entered not complying with the rules, is really no appearance at all, and the plaintiff was not prevented by it from signing judgment.

WALKEM, J.: The judgment was improperly entered, and should be set aside. While the appearance is on the files of the Court, the plaintiff cannot because it is irregular, treat it as a nullity, but must move to set it aside. The defendant may now appear by a solicitor.

Judgment.

Order accordingly.

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E. & N. RY. CO. v. NEW VANCOUVER COAL CO.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. NEW VANCOUVER COAL COMPANY.

Practice—Pleading—Embarrassing statement of defence—General allegation of defendants' title—Rule 210.

Statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence.

Held, that the defendants were not bound to set forth their title in their statement of defence, but that particulars of the alleged laches ought to be stated.

SUMMONS to strike out as embarrassing paragraphs six and seven of statement of defence, which were :

Statement.

6. "The defendants further say that the plaintiffs neither own, nor are they entitled to mine for, any coal under the sea, either opposite the lands known as Newcastle Townsite as alleged or elsewhere at or near the City of Nanaimo, and the defendants further say that all coals heretofore mined by them or now being mined by them were and are the property of the defendants and not the property of the plaintiffs.

7. "The defendants further say that if the plaintiffs ever had any right to the coal in question in this action (which the defendants deny) that the plaintiffs ought not to be allowed to assert any claim thereto by reason of the plaintiffs' laches."

Bodwell, (*Luxton* with him) for plaintiffs, cited *Phillips* v. *Phillips* (1878), 4 Q.B.D. 127, and argued that particulars of the plea of laches should be given.

Hunter, (*Helmcken*, *Q. C.*, with him) for defendants : Order XXI., Rule 21, renders *Phillips* v. *Phillips* inapplicable. As to the laches, particulars ought to be asked in the usual way at a later stage.

IRVING, J.: I think the sixth paragraph is well pleaded and meets the issues raised in accordance with the rules. As to the seventh, I think particulars should be stated as shewn in Bullen & Leake, 992. Four days in which to amend. Costs in the cause.

Judgment accordingly.

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STODDART v. PRENTICE.

Contempt of Court—Observations in newspaper pending suit—Application to commit—Criminal Code, Secs. 290 et seq., R.S.B.C., 1897, Cap. 56, Sec. 10.

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The Supreme Court has no power to decide the validity of the appointment of one of its members.

The Court has power summarily to commit for constructive contempt notwithstanding sections 290, 292 and 293 of the Criminal Code; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice.

A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court.

A statement to the effect that a Judge of the Court having taken an active part in a general election, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt.

A statement to the effect that the spectacle of such Judge trying election cases is not edifying and that it does not produce a good impression in the public mind, is not a contempt.

A party to a suit has status to move to commit a stranger to the suit for constructive contempt, although no affidavit is fyled by him or on his behalf to the effect that the alleged contempt is calculated to prejudice him in his suit.

Any person may bring to the notice of the Court any alleged contempt.

Statement.

MOTION by respondent to commit W. H. Ellis and C. H. Lugrin, the Manager and Editor of the Victoria Daily Colonist, for contempt of Court, in writing, publishing, and procuring to be published in the said newspaper in the issues of 22nd October, 17th and 22nd November, 1898, articles commenting upon the proceedings herein, and intended and calculated to scandalize the Court, and to prejudice or interfere with the fair trial of the petition; and further that the said comments were intended by means of calumniating Mr. Justice MARTIN to deter him from

hearing or determining any questions arising herein, and from determining the questions now pending before him for determination herein.

Affidavits setting forth the articles complained of and going to shew that Messrs. Ellis and Lugrin were respectively the Manager and Editor of the newspaper, were fyled and served with the motion.

The articles complained of were as follows :

Of 22nd October.

An embarrassment common to every political appointee to a Judgeship was experienced by Mr. Justice MARTIN yesterday. He did not feel like hearing a motion in an election case, because he had taken an active part in the election. The feeling is natural, but unless the Judge was an agent for a candidate in the case he is not disqualified, and even then he would be disqualified only as to that case. If the election cases are to come to trial, and any way, in view of the probability of the preliminary points coming before the Full Court on appeal, Judge MARTIN will have to devote his spare moments to schooling himself into forgetfulness of his political career.

Statement.

Of 17th November.

The election protests are pretty well disposed of numerically, but enough remain unsettled to determine the complexion of the Legislature. The certain loss of the seat for Lillooet by Mr. Prentice offsets the success of Mr. Higgins in Esquimalt. There seems to be very little doubt that the seat for North Yale will be given to Mr. G. B. Martin on a recount, and those who are able to form an opinion say that Mr. Booth has nothing to fear from the proceedings instituted to vacate his seat. Pending the determination of the Esquimalt case, the Colonist said that the government might find itself in a minority of four, and at best they seemed likely to be in at least a minority of two, which would mean that after they had elected a Speaker, supposing that the opposition will permit them to organize the House,

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they would be defeated by three votes on the Address. Speaking from its own point of view, and without desiring to be understood as expressing the decision of its political friends, the Colonist thinks it would be good policy on the part of the opposition to force the fighting from the very start. If Mr. Semlin is unable to organize the house, it will be a clear constitutional intimation to the Lieutenant-Governor that he was not warranted in asking Mr. Turner for his resignation, and it would be his duty to send for that gentleman and entrust him with the formation of a new Government. It must be borne in mind that the present House is fresh from the people, and therefore, if Mr. Semlin has not a majority in it, he has no claim to be allowed a dissolution, but it would become the duty of the Lieutenant-Governor to see if any other gentleman is in a position to carry on the Government without a new election.

Statement.

Of 22nd November.

The Colonist does not desire to say anything calculated to reflect upon the judiciary of the Province either collectively or individually, but it cannot help thinking that the spectacle just presented of election cases being disposed of by a Judge who was an active partizan in the recent contest is not edifying. We are far from desiring to intimate that Judge MARTIN will not endeavour to disabuse his mind of any political prejudice, or that he will not succeed in doing so. We do not venture to suggest that he will make any decision in any matter which he ought not to have made or which any Judge in the world would not arrive at under the same state of facts and law. The reference is solely to the public aspect of the matter. Judge MARTIN was a very active partizan during the late election. He had a perfect right to be so. This does not disqualify him in any way from sitting as a Judge in the election cases. We mean, of course, legally disqualifying him. But his sitting in that capacity does not produce a good impression upon the public mind, and it would be very much better if he could

see his way clear to permitting other members of the Bench to take such cases. In making this observation, the Colonist repeats that it fully admits that Judge MARTIN will undoubtedly exercise his judicial functions without any desire to favour either one party or the other.

The remaining facts sufficiently appear in the judgment.

The motion was argued before DRAKE, J., on 12th December, 1898.

Hunter, for Messrs. Ellis and Lugrin, took the preliminary objections that the Supreme Court had no jurisdiction to commit for constructive contempt, such contempt being a criminal offence as shewn by *O'Shea* v. *O'Shea* (1890), 15 P.D. at p. 63 ; *Re Pollard* (1868), 2 P.C. 106 ; *Ellis* v. *The Queen* (1892), 22 S.C.R. 7 ; and since the passage of the Criminal Code the only remedy for this kind of contempt is by indictment ; see sections 290, 292 and 538.

Argument.

The appointment by the Dominion Government of Mr. MARTIN as a Judge of the Supreme Court was *ultra vires* under section 7 of the Supreme Court Act, as Mr. MARTIN had only been called to the bar of this Court on July 30th, 1894, as appears by affidavit fyled.

In any event there was no scandalizing of MARTIN, J., as a Supreme Court Judge ; the articles were written of him in his capacity as an Election Judge, and the Election Court is only a Court of record when the Judge presides at a trial; see Provincial Elections Act, Sec. 237.

Duff, for the motion : The present mode of procedure is correct ; the Criminal Code only deals with libel and not with the offence of prejudicing the fair trial of an action.

[DRAKE, J. : The objections are not in my opinion such as to prevent me from hearing the motion.]

The articles amount to an attempt to prevent Mr. Justice MARTIN from hearing or in any way dealing with the election petition of *Stoddart* v. *Prentice*. It is an attempt to alter the course of justice which constitutes a contempt

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of the highest kind; see *Skipworth's Case* (1873), L.R. 9 Q.B. 230.

As to the right of respondent to complain, he cited *Skipworth's Case, supra*; *Regina* v. *Wilkinson, Re Brown* (1878), 41 U.C.Q.B. 47; and *Regina* v. *Ellis, Ex parte Baird* (1889), 28 N.B. 497.

Hunter: The applicant has no status. The only ground on which a constructive contempt can be complained of by a party to a suit is that the article is calculated to prejudice his case, and no such allegation is made in the affidavits fyled. See *In re O'Brien* (1889), 16 S.C.R. at p. 209. The solicitor fyled an affidavit to such effect in *Daw* v. *Eley* (1868), L.R. 7 Eq. 56. There was no reflection on the Court but merely an expression of opinion that MARTIN, J., should not exercise any judicial functions in the present case by reason of his prior partizanship—this is fair comment under section 293 of the Code.

Argument.

The later cases clearly shew that the Court will not make an adverse order except where there is plainly a gross contempt, and such as is calculated to interfere with justice, and that there is only the summary remedy available; see *Hunt* v. *Clarke* (1889), 58 L.J., Q.B. 490; *The Queen* v. *Payne* (1896), 1 Q.B. 577; *Fairclough* v. *Manchester Ship Canal Company* (1896), 13 T.L.R. 56.

Cur. adv. vult.

December 15th, 1898.

DRAKE, J.: This motion is to commit Mr. Ellis and Mr. Lugrin, the Manager and Editor of the Daily Colonist, for contempt based on the publication of three articles in their paper. There has been a general election in the Province, which resulted in a large number of election petitions. Since the elections and since the fyling of these petitions, a gentleman has been raised to the Bench who was alleged to have been an active partizan in the political issues raised

Judgment.

at the election, and in the fulfilment of his duties as a Judge of the Supreme Court, he has been called upon to adjudicate and make orders in a number of the election cases. On 22nd October the newspaper published an article pointing out the embarrassment which such a position entailed on the Judge, but at the same time indicating that the duty which devolved on him precluded him from refusing to adjudicate in cases brought before him. There is nothing in this article which in my opinion can in the slightest degree be considered as a contempt, or which in any way scandalizes, as the term is, the judicial office. Contempt consists in any conduct which tends to bring the authority and administration of the law into disrespect, or prejudices the parties litigant, or their witnesses. The Courts, and the Judges of the Court, must have the power to deal with questions of this sort in a summary way, otherwise the administration of justice would be impossible, and the trial of cases would be relegated to an irresponsible tribunal, and the judicial office degraded. On 17th November, while the election petition of *Stoddart* v. *Prentice* was pending, and the judgment of the learned Judge who tried the case was reserved on certain points raised by the parties to the petition, the newspaper took upon itself to determine the result, and boldly asserted that the seat for Lillooet was certainly lost by Mr. Prentice. This was a most improper remark to make under the circumstances. It does not matter whether or not the facts warranted any such assumption, or whether or not the Court would be likely to be influenced by any such prophetic utterance. The public press are not entitled to express an opinion on the result of a matter which is reserved for judicial consideration. They are, it is true, entitled to discuss and comment on judicial decisions as matters of public interest, but not to pre-judge matters which are *sub-judice*.

Judgment.

With respect to the article of 22nd November, headed "A Judicial Anomaly": I do not consider this a reflection

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on the Court; it merely points out that in the opinion of the writer some other mode of dealing with election cases would be more satisfactory. But at the same time the writer carefully makes his meaning clear that he has no doubt but that the cases will be decided according to the law and facts, thus practically shewing that his objection is a sentimental one, and one that is answered by the article itself. Mr. *Duff* relied very much on this article as falling within the *Skipworth Case* (1873), L.R. 9 Q.B. 230, but on examination of that case the language used by the defendant was a direct charge that there was no chance of justice being done by the four Judges who were to sit, and that the Lord Chief Justice was not a proper person to try anything in connection with the *Tichborne Case.*

Judgment.

BLACKBURN, J., in rendering judgment, points out that when statements are made to the obstruction of justice, it is a contempt of a serious character, although the language used may not have the slightest effect on the result. The Court does not consider whether the allegations are true or false, it only has to see whether there is an attempt to interfere with the course of justice. A Judge cannot meet his traducer in the columns of the press; it is not a question of his own dignity, but of that of the Court of which he is a member. Lord Justice COTTON, in *Hunt* v. *Clarke* (1889), 58 L.J., Q.B. 490, says: "In my opinion no application to commit for contempt ought to be made unless the offence was of so serious a nature as to render the exercise of this summary power necessary to prevent interference with the course of justice." Applying this language to the case before me, I do not see anything in the articles referred to which can be said to fall within the scope of this language. It is true a technical contempt has been committed, but not of such a character as calls for the extreme measure of committing the parties to prison. I think the case will be fully met by making no order on this motion, the result of which will be that each party will have to pay

their own costs. I have to notice the objection taken by Mr. *Hunter*. His first argument is that the contempt being of a *quasi* criminal nature, should be proceeded with by indictment. BLACKBURN'S exhaustive discussion of the reasons why the Courts have the power of dealing with questions of contempt in the *Skipworth Case* (1873), L.R. 9 Q. B. 230, is a sufficient answer. He next contends that sections 290 *et seq.* of the Criminal Code shew that the proceedings should be by indictment. These sections refer to libel and not to contempt. He then contended that Mr. Justice MARTIN was not properly appointed, as he was not of the standing indicated by section 10 of Cap. 56 R.S.B.C. 1897. This is a subject which I cannot discuss. The appointment having been made by the Governor-in-Council, cannot be reviewed by this Court, and as to the status of the person raising a question of contempt, it is clear from the authorities that any person can bring to the notice of the Court any alleged contempt. The objections are therefore overruled.

Judgment.

Judgment accordingly.

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ARTHUR v. NELSON.

Practice—Service of summons, to abridge time for setting down appeal, on solicitor who took out a taxation summons in same matter—Whether good or not—Rule 30.

While a summons to review a taxation of costs under an order otherwise worked out was still pending, a summons to abridge the time for setting down an appeal from the final judgment in the matter was served on the solicitor who took out the first summons.

Held good service notwithstanding the fact that the solicitor's engagement with the client had terminated, and that he had so informed the party effecting the service.

Statement.

APPEAL by plaintiff from an order of McCOLL, C.J., made 7th November, 1898, dismissing application to discharge order of MARTIN, J., made 31st October, 1898, abridging the time for setting down defendants' appeal from judgment of WALKEM, J., delivered 1st October, quashing Nelson City Electric Light By-law. The ground of the application was want of proper service of the summons leading to the order of MARTIN, J.

The facts fully appear in the judgment of IRVING, J., *infra*.

The appeal was argued 21st November, before WALKEM, IRVING and MARTIN, JJ.

Argument.

Hunter, for appellant: Rule 30 does not authorize the other side to treat the solicitor who took out a taxation summons in respect of an order otherwise fully worked out as a solicitor who is retained by the client for the purpose of possible appeals.

The English rule has been changed to meet the difficulty. Moreover the solicitor informed the party effecting the service that his authority had ceased, and that his retainer was only a special one as appears by an affidavit fyled. He was not the solicitor on the record, but the solicitor who

made the affidavit leading to the issue of the rule was the solicitor on the record and should have been served. He referred to *Lady de la Pole* v. *Dick* (1885), 29 Ch. D. 351; *James* v. *Ricknell* (1887), 20 Q.B.D. 164; and *Regina* v. *Justices*, &c. (1893), 2 Q.B. 153.

A. S. Potts (Sir *C. H. Tupper*, *Q.C.*, with him), for the respondents, distinguished *James* v. *Ricknell* and *Regina* v. *Justices*, &c., as they were bastardy cases before Justices of the Peace and not in the High Court, and therefore the rules did not apply. The summons of 18th August was still pending—it was taken out by Mr. *Duff*, who described himself as solicitor for the applicant, and no notice of change of solicitor was ever fyled or served. He cited *Lady de la Pole* v. *Dick*, *supra*, and *Callow* v. *Young* (1886), 55 L.T.N.S. 543.

Argument.

Cur. adv. vult.

28th November, 1898.

WALKEM, J.: In view of the opinions of the Court as expressed in the cases of *Lady de la Pole* v. *Dick* (1885), 29 Ch. D. at p. 356, and *Callow* v. *Young* (1886), 55 L.T.N.S. at p. 544, I think this appeal must fail. The fact seems to have been overlooked that we are not called upon to decide the question as to whether the authority of a solicitor on the record continues, as between him and the other side, during the whole period through which the right of appeal exists. The question here is of a more limited character. Before the final judgment on the main question was pronounced, a certain order was made, and to this day a question of costs in reference to that order remains unsettled, and has to be worked out. That question was raised by Mr. *Duff*, who in the initiatory summons which he addressed to the solicitors for the City of Nelson, describes himself as "solicitor for the above named applicant," namely, Dr. Arthur, the relator in the main proceedings,

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and his right to so act as solicitor has not been in any way disavowed by the relator. Mr. *Duff* is thus, up to the present time, according to his own statement, solicitor on the record; hence the service upon him of the summons to abridge the time for setting down defendants' appeal from the judgment in this matter was, in my opinion, and in view of the above authorities, good service.

IRVING, J.: On 12th July, application was made to Mr. Justice WALKEM, under section 88 of the Municipal Clauses Act, for a rule to quash the above by-law. On that occasion an affidavit by Mr. *Macdonald*, of Nelson, in which he stated that he was the solicitor for the applicant, was read.

By some mistake the rule was not taken out in proper form, a Chamber summons of some kind being used. On the return day, objection was taken to the form of the summons, and Mr. Justice WALKEM refused to deal with or hear the matter until the rule had been issued in due form. An order dated 4th August was taken out, directing that the applicant should pay the costs of that "argument."

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The rule was then taken out, argued, and judgment given on 1st October, in favour of the applicant, but as no costs were to be taxed under the judgment, the proceedings thereunder were terminated at an early date.

In the meantime, however, the taxation of the costs under the order of Mr. Justice WALKEM, made 4th August, was being proceeded with, and an appeal was taken from the decision of the Registrar, by means of a summons issued 18th August, by Mr. *Duff*, who in such summons described himself "solicitor for the applicant." The summons of 18th August has not yet been disposed of.

The Corporation, desiring to make application to abridge the time for appealing from the judgment of 1st October, served, in October, Mr. *Duff* with the summons. This service it is now contended was not service on the applicant.

I cannot agree to that. The proceedings under the tax-

ation summons are being carried on by Mr. *Duff* as solicitor for the applicant. Those proceedings are under the rule, and until they are worked out I think Mr. *Duff* should be regarded as the solicitor for the applicant. I think it would be highly inconvenient for the applicant to be permitted to have two solicitors on the record in respect of the same matter—one to take steps in Court in attacking such orders as he desired to upset, the other to disappear when convenient.

An officer of the Court has solemnly declared that he is the solicitor for the applicant in this matter. The matter is still pending. The solicitor therefore must still be in communication with his client. In my opinion, service was properly made.

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A very much more difficult question would have arisen if after 18th August, the Corporation had endeavoured to effect service on the applicant by serving Mr. *Macdonald*.

If Mr. *Duff* was merely an agent, I would refer to *Kilbourne* v. *McGuigan* (1897), 5 B.C. at p. 239.

MARTIN, J., concurred.

Appeal dismissed with costs.

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DUNLOP v. HANEY.

DUNLOP v. HANEY.

Full Court—Power of to extend time for payment of costs fixed by order directing dismissal of action in default.

DUNLOP v. HANEY

The Full Court has power to and will in a proper case extend the time fixed by an order directing payment of costs, otherwise action to stand dismissed.

Statement.

APPEAL by plaintiff from judgment of WALKEM, J., reported *ante* at p. 185.

The appeal was argued before McCOLL, C. J., IRVING and MARTIN, JJ., on 30th November, 1898.

W. J. Taylor, for appellant, referred to *In re Grey* (1892), 61 L.J., Q.B. 795, and cases there cited.

Barnard, for respondent.

Judgment.

Per Curiam : We are not prepared to differ from the view of the Court below that the tender made was in strictness invalid, but we are disposed under the circumstances, to relieve the appellant to the extent of setting aside the order and extending the time fixed by the order of 24th June for payment of the $279.41 to the defendant for one week. There will be no order as to costs.

Judgment accordingly.

REGINA v. LITTLE.

FULL COURT

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REGINA v. LITTLE

Practice—Costs of appeal in certiorari proceedings—Leave to appeal to Her Majesty—When refused.

The old rule in *certiorari* proceedings, that the Crown neither pays nor receives costs, is no longer in force, and the Court will grant the costs of a successful appeal to the Crown if asked for.

The Court will not (except in special circumstances) grant leave to appeal to Her Majesty, when the same question is already under appeal to Her Majesty in another proceeding although not between the same parties.

APPEAL from the order of WALKEM, J., made 11th July, 1898, dismissing the application of Francis Dean Little, for a writ of *certiorari* to remove into the Supreme Court for the purpose of having the same quashed, his conviction made 28th April, 1898, by James Abrams and H. P. Collis, Justices of the Peace, for that he as Manager of a certain coal mine of the Union Colliery Company, of British Columbia, Limited Liability, at Union, B.C., did allow to be employed a certain Chinaman, to-wit, Ah Sing, in the said coal mine, below ground, contrary to the provisions of the Coal Mines Regulation Act and Amending Acts. Statement.

The grounds of the appeal were :

"That section 4 of the Coal Mines Regulation Act, being Cap. 138 of the Revised Statutes of British Columbia, 1897, in so far as the same provides that no Chinaman shall be employed or allowed to be for the purpose of employment in any mine to which the said Act applies, below ground, is unconstitutional and *ultra vires* of the Provincial Legislature of British Columbia, as being an interference in the matter of aliens beyond the power of the Legislature."

The appeal came on before MCCOLL, C.J., IRVING and MARTIN, JJ., 10th November, 1898.

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Cassidy, for appellant, stated that the same point had been decided *In re The Coal Mines Regulation Amendment Act, 1890*, and reported in 5 B.C.p. 306, and that judgment had been followed in *Bryden* v. *Union Colliery Company*, which had been appealed to the Privy Council. He asked that no order be made against his client for costs, as the prosecution was by the Crown merely and no private prosecution, and it was an old rule, here and in England that the Crown neither asks for nor pays costs.

Martin, A.-G., asked for the costs of the appeal.

McCOLL, C.J. : The appeal must be dismissed with costs. The old rule was as stated by Mr. *Cassidy*, but it has been broken into of late years.

Judgment.

IRVING and MARTIN, JJ., concurred.

Appeal dismissed with costs.

Cassidy, then asked for leave to appeal to the Privy Council, but this was refused as the same point is now before the Privy Council in *Bryden* v. *Union Colliery Company*, the Court intimating that under such circumstances the leave would not be granted except for special reasons.

RE ARTHUR AND THE CORPORATION OF THE CITY OF NELSON.

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Municipal Corporation—By-law to borrow money—Application to quash—Purchase of electric light plant—Mayor interested in Company—R.S.B.C. 1897, Cap. 144, Sec. 50, Sub-Sec. 12, and Sec. 68.

A City By-law to borrow money for the purchase of an electric light plant belonging to a Company is not invalid merely because the Mayor was President of the Company at the time of the passage of the By-law, and of the completion of the contract.

A statement in a By-law that it shall come into force "on or after" a certain day, is a sufficient compliance with sub-section 1 of section 68, R.S.B.C. 1897, Cap. 144.

Semble, that the Court has power in any case to afford relief where it is shewn that the Council has not properly exercised its powers.

Semble, that a By-law may be quashed on grounds not specified in the rule.

Baird v. *Almonte* (1877), 41 U.C.Q.B. 415 considered.

Statement.

APPEAL from judgment of WALKEM, J., quashing without costs the Nelson City Electric Light Loan By-law, No. 34, 1898, providing for the borrowing of $40,000.00 by the City for the purpose of purchasing and taking over the plant and franchise of the Nelson Electric Light Company, Limited.

On 16th July, 1898, Dr. Arthur, a resident of Nelson, obtained through his counsel a rule *nisi* to quash the said By-law on the grounds that the proposed sale was a sale by the Mayor and Aldermen (being in that behalf trustees of the citizens) of their own property to their *cestui que trustent* at an exorbitant price and was therefore invalid.

". . . That the voting on the said By-law by the electors was irregular, and was not conducted as nearly as might be as at a Municipal election, as required

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by sub-section 3 of section 75 of the said Act, in that the Returning Officer, not having counted the ballot papers entrusted to him, was unable to make a proper statement such as is required by section 62 of the Municipal Elections Act.

". . . That certain unused ballots were not accounted for by the Returning Officer.

". . . That the By-law in question does not name a day in the financial year in which it passed, on which such By-law shall take effect, as required by sub-section 68 of the Municipal Clauses Act."

Section 8 of the By-law was as follows:

"This By-law shall take effect on or after the 15th day of June, 1898."

The By-law was read a first and second time on 9th May, the third time on 23rd May, received the assent of the electors 9th June, and was finally passed 13th June, 1898, and published in the Gazette 23rd June, 1898.

Statement.

In an affidavit Dr. Arthur stated that John Houston, the Mayor of Nelson, was also President and Manager of the Electric Light Company and a large stockholder therein, and that he believed his influence as Mayor was employed towards obtaining the passage of the By-law. He also swore that he believed the proposed purchase price of $36,000.00 was much in excess of the value of the plant and franchise of the said Company.

On behalf of the Corporation affidavits by Mr. Houston and three of the Aldermen were fyled, shewing that the Mayor did not vote on the By-law, but absented himself from the Council when it was voted on, and did not in any way use his influence to obtain its passage.

On September 9th, before WALKEM, J.

Sir *C. H. Tupper, Q.C.*, for defendants, shewed cause.

Bodwell, supported the rule.

Cur. adv. vult.

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WALKEM, J.: Dr. Arthur, a resident of Nelson, has applied under section 88 of the Municipal Clauses Act, to quash the above By-law on three grounds, the two last of which may be more conveniently considered at once. The second ground is that certain unused ballot papers were not accounted for by the Returning Officer as required by sub-section 5 of section 75 of the above Act, which states that the poll shall be taken by ballot on the question "Aye" or "No" whether the By-law shall be confirmed, and that it shall be kept open a certain time, and all proceedings thereat for the purposes thereof be conducted as nearly as may be as at a Municipal election. Such proceedings manifestly refer to proceedings at the poll while open; the next sub-section then states what shall be done "immediately after its close," namely, that the same officer shall open the ballot box, count the ballots cast for and against the By-law, openly declare the result, and return all ballots to the Clerk of the Council, with a statement under oath declaring what the result is. Now there is nothing, as will be seen, in either of these sub-sections that requires spoiled or unused ballots to be accounted for.

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The third ground is that the By-law "does not name a day in the financial year" upon which it shall become operative; and it therefore fails to comply in that respect with sub-section 1 of section 68 of the Act. Section 8 of the By-law is as follows: "This By-law shall take effect on, or after, the 15th day of June, 1898." In several somewhat similar cases, the Courts have read the word "and" for "or" and *e converso*. (Max. Stat. 3rd Ed., 329). It is true that effect, as "a general rule must be given if possible to every word of an enactment;" but the rule is subject to the qualification that "if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of an enactment, it may, or rather it should be eliminated."

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(Max. *supra*). The words "or after" are insensible and also inconsistent with the preceding words which shew an intention on the part of the Corporation to comply with section 68. In my opinion, the word "or" should read as "and," or the two words "or after" be eliminated.

Apart from this, I am unable to assent to the contention that section 83 of the Act of itself remedies the defect. That section provides that "Every By-law passed by any Council shall be reconsidered not less than one day after the original passage, and if adopted by the Council or confirmed by the Municipal Electors as herein provided, and signed by the Mayor or Reeve shall come into effect and be binding on all persons after the publications of the same . . . . . unless the date of its coming into effect is otherwise postponed by such By-law." This is a general enactment relating as the heading shews, to the "Passage and authentication of By-laws." It cannot, therefore, be said to control the special enactments (68 to 73) which appear under the separate heading of "Contracting Debts," and which are to be observed by Municipal bodies in respect of special By-laws like those for borrowing money. The present By-law is one of that class and, as such, is only subject to those enactments and not to the general provision of section 83. It is a cardinal rule that where two or more clauses in a statute are capable, when taken collectively, of more than one interpretation, the Court should in ascertaining what was intended, be guided by such of them as specifically deal with the matter under consideration. (See remarks of WILLES, J., in *Roberts* v. *Bury Commissioners* (1869), L.R. 4 C.P. at p. 60). Following this rule, the clauses grouped under the heading of "Contracting Debts," which, by the way, have the effect of a preamble (see *Lang* v. *Kerr* (1878), 3 App. Cas. 536) must be considered as expressive of the will of the Legislature in respect of By-laws like the one in question, as those clauses specifically deal with the subject of borrowing.

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Moreover, when general and special provisions conflict, the former must give way to the latter, according to the well known maxim, *generalia specialibus non derogant;* for "the Legislature is reasonably presumed not to intend to alter a special provision by the subsequent general enactment unless that intention is manifested in explicit language;" and no such language is used in section 83. (See Max. Stat. 3rd Ed., 242).

Furthermore, in considering the effect of section 83, "we are," to use the language of Lord HERSCHELL in *Colquhoun* v. *Brooks* (1889), 14 App. Cas. at p. 506, "entitled, and, indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which may throw light on 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 construed alone and apart from the rest of the Act."

Again, if section 83 had the effect contended for, it would dispense with the necessity on the part of a Municipal body of observing any of the many provisions relative to money, and other important By-laws, which have been inserted in the Act for the protection of the public. In other words section 83 would supersede, and in effect, repeal those provisions—a result which the Legislature never could have contemplated.

The remaining objection, as stated in the rule, is that "The proposed sale of the plant and franchise of the Nelson Electric Light Company to the City of Nelson is a sale by the Mayor and Aldermen (being in that behalf trustees of their own property) to their *cestui que trustent*—the rate-payers—at an exorbitant price, and is therefore invalid." During the argument, my attention was not sufficiently called to the peculiar wording of this objection. From first to last, save as to price, upon which I express no opinion, the objection is, in view of the evidence, groundless. According to the By-law and affidavits, there was no

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"proposed sale of the plant and franchise of the Electric Light Company to the City of Nelson;" but, as stated in the preamble of the By-law, there was a proposed purchase of it by the City from the Company. The statement that "the Mayor and Aldermen" were "in that behalf trustees of their own property," meaning the Electric Company's property, is not only inaccurate in point of fact, but is on its face a legal absurdity. They are seeking power to purchase that property from the Company, in whom, as the evidence shews, both the legal and equitable estate are vested.

In *Bowes* v. *City of Toronto* (1858), 11 Moore, P.C. KNIGHT BRUCE, L.J., observes, at p. 524: "The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration; for every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to the powers above them." And in a prior passage on the same page, the learned Judge says: "We are of opinion that neither the governing character nor the deliberative character of the corporation council makes any difference, and that the council was in effect and substance a body of trustees for the inhabitants of the City of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform and forbidden to act corruptly."

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A misconception of this judgment which, by the way, was cited by counsel for the relator, would seem to be responsible for the objection just dealt with. The judgment has been read too literally and as if a Mayor and Aldermen were trustees of, and, therefore, owners of the legal estate in all property real and personal within their corporate limits. What, of course, is meant by the judgment is that those functionaries are trustees of Municipal property only.

So far, I have overruled every objection mentioned in the rule. There is, however, nothing in the statute which requires the grounds of objection to be stated in such a rule. I mention this because other objections than those which appear in it are disclosed by the evidence; and, according to *Stevens* v. *Lord* (1838), 6 Dowl. 256, I may mould the rule to meet the justice of the case.

From the affidavits, it appears that Mr. Houston, the Mayor, is a large stockholder in the Electric Light Company. As Mayor of the City, and stockholder in the Company, his private interest and public duty manifestly must conflict. As a member of the Company he would expect the highest price possible for its plant and franchise, and as Mayor it would be his duty, as a trustee, to get the property at the lowest possible price. In *Hamilton* v. *Wright* (1842), 9 C. & F. at pp. 111, 123 and 124, the rule is laid down by the House of Lords that a trustee is bound not to do anything which would place him in a position inconsistent with the interests of the trust, or which might have a tendency to interfere with his duty in discharging it. Story, in section 330 of his Eq. Juris., says that a trustee will not be permitted to obtain any advantage for himself in managing the affairs of his *cestui que trustent.* No language could be plainer, none more explicit. The money which it is proposed to borrow by the By-law will, of course, form, like the rate-payers' taxes, part of the trust funds of the Corporation—or, in other words, will be civic property—the Mayor and his colleagues being trustees of it and the ratepayers *cestui que trustent.* As laid down in several authorities, this is not a question of whether Mr. Houston will reap any advantage from the transaction or not. A Court of Equity, as stated by Lord ELDON *In re Lacey* (1802), 6 Ves. 625, cannot be expected to inquire into a matter of profit or loss on account of the difficulty of proving one or the other. The matter of profit is no ingredient in the case. The question is

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purely one of principle; and in view of the Mayor, as trustee of the ratepayers, being personally interested in the money to be borrowed, it would seem to me that the By-law is opposed to the above authorities. It was, manifestly, Mr. Houston's duty to advise his colleagues as to whether the purchase should be made or not. Yet the affidavits on his behalf make a point of stating that he abstained from doing so while the By-law was, if I may say so, on the anvil, as he did not wish to interfere. And why? Because his private interests and public duty clashed. Another point raised by counsel for the Corporation was that the ratepayers by their votes confirmed the By-law. The majority was only two. *In re Lacey*, *supra*, the purchase by the solicitor of a bankrupt estate of the debts due the estate was attacked and set aside, although counsel for the creditors stated that a majority of them had consented to the sale, and were thankful that the solicitor had bought. Supposing that the City of Nelson had desired to acquire only a controlling interest in the stock of the Electric Light Company, and had, thereupon, decided to buy out Mr. Houston, what difference in principle would there have been between such a purchase and the proposed purchase?

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I shall have to allow this last objection, but as it was not taken in the rule, the latter is to be absolute, but without costs.

From this judgment the City of Nelson appealed and the appeal was argued on 30th November and 1st December, 1898, before McCOLL, C.J., IRVING and MARTIN, JJ.

Sir *C. H. Tupper*, *Q.C.* (*A. S. Potts* with him), for appellants.

Argument.

Bodwell, for the respondent (being first called on): Before the City could bring in a By-law to borrow money By-law authorizing the purchase should have been passed: See section 50, sub-section 12 of R.S.B.C. 1897, Cap. 144. The

City is only authorized to purchase plant already constructed; the statute does not give authority to acquire franchises: Section 50, sub-section 12 and section 68.

The Mayor and Aldermen are trustees and the rate-payers their *cestui que trustent*. See *Bowes* v. *City of Toronto* (1858), 11 Moore, P.C. at p. 524. The language of sub-section 1 of section 68 is very positive in requiring a By-law to name a day in the financial year in which it passed on which such By-law shall take effect. Here the By-law was to take effect "on or after the 15th day of June," and as it was not published in the Gazette until 23rd June, it could not possibly come into effect on 15th June: See section 83; *Truax* v. *Dixon* (1889), 17 Ont. 366; *Roberts* v. *McDonald* (1888), 15 Ont. 80.

"On or after" cannot be said to name a day, and even if it read "on and after" it is not sufficient.

Argument.

Sir *C. H. Tupper*, *Q.C.*: A By-law has never been quashed because a member of the Council was interested in the subject matter of the sale; the sole question is "was there a sufficient number in the Council not interested" to carry the By-law. He cited sections 19 (a), 20, 21, 22 and 299 of the Act. It is an error to attach the technical incidents of trusteeship to the Mayor. His position is like that of a director of a Corporation. In *Baird* v. *Almonte* (1877), 41 U.C.Q.B. 415, three of the five Councillors were shareholders in the Company to receive a bonus and there the By-law was quashed, not because the Councillors were shareholders, but because there was no competent quorum to submit or pass it. See also *Vashon* v. *East Hawkesbury* (1879), 30 U.C.C.P. 194; *In re Faure Electric Company* (1888), 40 Ch. D. 141; Morawetz on Corporations, 2nd Ed., par. 516, 518, 520; *Studdert* v. *Grosvenor* (1886), 33 Ch. D. 528; *Hirsche* v. *Sims* (1894), A.C. 654.

The Mayor was disqualified from voting but the contract was not vitiated. *Foster* v. *Oxford* (1853), 13 C.B. 200; *Melliss* v. *Shirley Local Board* (1885), 14 Q.B.D. 911.

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As to when the By-law came into effect, see section 83. It became "binding on all persons" on 23rd June, the day of its promulgation, as the date was not "otherwise postponed."

For meaning of "on or after," see Maxwell, 3rd Ed., pp. 22 and 332.

The word "franchise" in the By-law is superfluous and simply means the right to use what there was a right to acquire. Thompson on Corporations, Sub-secs. 5353-4.

Now that the debentures have been delivered, serious inconvenience would be caused by quashing the By-law, and the Court should exercise its discretion and not quash. See *In re Michie and the City of Toronto* (1861), 11 U.C.C.P. 379.

Bodwell, in reply: Where the By-law is bad it ought to be quashed and that is when the Court has the discretion. The case of *In re Michie and the City of Toronto*, was one of the strictest kind of technicalities and does not make a rule.

Argument.

Councillors are trustees for the inhabitants and subject to the rules governing trustees. See *Bowes* v. *City of Toronto*, *supra*; Story's Eq. Juris. Sec. 322 at p. 211; *Ex parte Bennett* (1805), 10 Ves. at p. 381; *Ex parte James* (1803), 8 Ves. 337; *Ex parte Lacey* (1802), 6 Ves. 625; *Sanderson* v. *Walker* (1807), 13 Ves. 601; *Campbell* v. *Walker* (1800), 5 Ves. 680.

Cur. adv. vult.

19th December, 1898.

Judgment of McCOLL, C.J.

McCOLL, C.J.: With great respect for the opinion of the learned Judge whose decision is in appeal, I think that he went wrong in applying to this case the authorities upon which he proceeded.

The Municipality was admittedly acting within its powers in acquiring the property in question.

It is not disputed that the Council was composed of persons competent to originate and carry the By-law or that being a quorum they acted honestly and disinterestedly in the exercise of a discretion independent of the Mayor, who did not even attend any of the meetings at which the By-law was read a first, second and third time, or that the necessary assent was duly given by a three-fifths majority of the electors or that they voted knowing the Mayor to be a shareholder in the Company from which the property was being purchased.

In these circumstances there is of course no suggestion that the Mayor was guilty of anything morally wrong. But it is contended that inasmuch as the members of the Council are substantially in the position of trustees for the inhabitants of the Municipality and because as it is said the rule is that any transaction between trustee and *cestui que trust* will be set aside at the instance of the latter, therefore merely by reason of the dual position of the Mayor this By-law must be quashed on the application of the respondent.

Judgment of McColl, C.J.

I do not think it necessary to consider whether the rule has been accurately stated, but assuming its existence and application then to the Municipality and not to a single dissatisfied ratepayer would seem to belong the right to decide whether the transaction should stand as being beneficial to the Municipality or be set aside as not being for its benefit or whether the Mayor should be made to account for any profit which he may have derived.

In this view the question of ratification by the ratepayers would naturally present itself for determination.

The rule applicable between trustees and *cestui que trust* in the ordinary sense of the terms is founded upon the impossibility of determining with certainty whether the trustee has used his influence to bring about the transaction which takes place in private, and if he chooses to enter into it he cannot complain if his interest is made to give

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way to that of the *cestui que trust.* The matter concerns themselves only.

But why should the rule be extended to a totally different situation? A Municipality is created and regulated by statute. The powers given it are for the benefit of the whole community. What a Municipality does is necessarily done in public with every opportunity for full discussion under conditions excluding the possibility of any secret influence and is subject to the safeguards which the Legislature has deemed sufficient. In this case the parties were at arm's length. If the Mayor's dual position was a material circumstance surely it was for the ratepayers themselves to determine what importance ought to be attached to this.

Why should the Court import the rule contended for with the effect of fettering the Municipality by an incapacity not imposed by the Legislature and resulting, as I humbly think, only in serious embarrassment to a Municipality in dealing with the very extensive subjects over which at the present time powers are conferred upon Municipalities?

Judgment of McCOLL, C.J.

Quite apart from any particular provision of the Municipal Clauses Act, I would hesitate to concur in laying down such a rule as applicable to a Municipality.

In my opinion the public interest forbids it.

But I am of opinion that the Legislature has taken into its own hands the measure of protection which it has thought necessary for the ratepayers generally in allowing (Cap. 144, Sec. 19, Sub-sec. 10a) a member of a council to be concerned as a shareholder in dealings and contracts between it and the Municipality while prohibiting him from voting in the Council on any question affecting the Company and in providing for the case of a member of the Council being or becoming interested in a contract with the Municipality (sub-sections 21 and 22) while refraining from avoiding the contract itself as was done by the Ontario Act under consideration in *Baird* v. *Almonte.*

I do not think it would be useful to discuss the numerous authorities cited in the very able arguments addressed to us.

The one mentioned is perhaps that most favourable for the respondent, but it differs widely from this case.

The absence from our Act of the enactment referred to, makes a distinction as regards the question of ratification.

I will only add that I do not doubt that the Court will always be able to afford adequate relief in any case that may arise where it may be shewn that the Council or ratepayers have not freely and properly exercised their powers without the adoption of an arbitrary rule.

I would allow the appeal with costs.

IRVING, J.: I was disposed to support the judgment appealed from on the ground stated in *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 446.

Judgment of IRVING, J.

That conclusion it was easy to arrive at, by contrasting section 21 of the Municipal Clauses Act with sub-section 10 of section 19 of the same Act, as interpreted by the light of the proviso A.

On further consideration, however, I think the comparison fails. The judgment of the House of Lords in *West Derby Union* v. *Metropolitan Life Assurance Society* (1897), A.C. 647, dealing with a very similar proviso, points out that provisions are not always to be regarded as correctly interpreting the Act itself. I therefore concur in the judgment that the appeal must be allowed on this point.

On the other point raised, that the By-law was bad, because instead of complying with the restriction of the statute that it should name a day on which it should take effect, it stated that it would come into force "on or after the 15th June, 1898," I am of opinion that the By-law is bad, apart from the question that if the By-law came into force on 15th June, the thirty days notice required by section 85 could not be given.

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In *Hall* v. *Municipality of South Norfolk* (1892), 8 Man. 439, KILLAM, J., lays down the proper working rule—the only safe course to act on is to suppose that the Legislature meant what it said when it prescribed the method of procedure, and to hold the By-law bad if that method has not been followed.

MARTIN, J.: The proposition of law, as I understand it, that this Court is asked to accede to, is that a By-law of a Municipal Corporation is invalid, because one of the members of the Council (here the Mayor) is a shareholder in an incorporated company which is selling its electric plant to the said Corporation, though the Councillor (Mayor) not only did not vote on the By-law, but absented himself from the Council when it was voted on, and did not in any way use his influence to obtain its passage.

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If this reasoning is correct, then under similar circumstances any contract, however trifling, between an incorporated company and a Municipality is voidable if any member of the Council holds even a one dollar share in such company, notwithstanding the fact that its capital might consist of five million shares of one dollar each.

It will at once be said that this result is absurd, but, as the Lord Chancellor said very recently, "it will not do to throw over any consequences which may reduce an argument to an absurdity": *Wolverton* v. *Attorney-General* (1898), A.C. at p. 543. Courts cannot refrain from considering what the result of an argument will lead to, simply because, if pursued to its logical conclusion, an absurdity is reached. If the application of a principle leads to an absurdity, the principle so called, immediately becomes open to inquiry.

In support of the relator's contention, reliance is mainly placed on the cases of the *City of Toronto* v. *Bowes* (1858), 11 Moore, P.C. 463; and *Baird* v. *Almonte* (1877), 41 U.C. Q.B. 415, in which the case first mentioned was considered.

A careful perusal of these cases, particularly the latter which comes nearer to the present one than any other case cited, shews, to my opinion, that they fall very far short of substantiating the principle sought to be established here. In the former of them the expressions as to trustees, quoted by the learned Judge appealed from, are directed against corrupt acts by trustees, and in the latter as Chief Justice HAGARTY stated, at page 418, "the facts disclosed . . are of a most extraordinary nature;" no less extraordinary, in truth, than that four out of the five Councillors who passed the By-law were shareholders in the Company to be benefited by its passage, including the Reeve and Deputy Reeve, and two of them were also directors of the Company.

It will at once be seen what a great difference lies between that case and the one now under consideration, and I refer to it the more particularly, because I conclude from the fact that it is not referred to in the judgment of the learned Judge below that his attention was not particularly called to its effect.

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As I read *Baird* v. *Almonte*, the judgment of the Court was directed against the glaring impropriety of the interested Councillors voting on the matter, which the Court held was against the spirit of section 75 of the then Ontario Municipal Act, which section is the same as section 19, sub-section 10a of our Act, the effect of which, together with sections 21 and 22, have been considered by the learned Chief Justice of this Court in his judgment; and I agree with him in thinking that the Legislature has by said sections provided the amount of protection which the rate-payers require in such a case as the present. There is also a factor which should not be forgotten in the disposition of this case, which is the wonderful increase in recent years in the transaction of business of all kinds by means of incorporated companies, and it is the aim of courts of justice to adapt themselves so far as may be safely done, to the various great changes in the commercial life of the people.

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The opinion of the Court of Appeal in *Baird* v. *Almonte*, on the said section 75, will be found on page 427 of the report of that case, and HARRISON, C.J., states that "The words are broad enough to prevent voting on such a By-law as the one now before us; and as the evil contemplated is evident, and the words used general, they should be so construed as to extend to all cases which come within the mischief intended to be guarded against, and which can be fairly brought within the words." It will be noted, however, that he adds: "We in this respect agree in the decision of the learned Chief Justice of the Common Pleas," from which I gather that the Appellate Court does not wish to be considered as going so far as some might argue the learned Judge appealed from wished to go, and I cannot bring myself to believe that the Court would have set aside this By-law on the statement of facts before us.

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I do not wish to be understood that I think the Councillors are not trustees for the ratepayers; they are, but not in the exact way, nor to the extent that is implied in the ordinary meaning of the word trustee; to my mind even the most cursory perusal of those sections of the Municipal Clauses Act which relate to the office, duties and liabilities of Councillors must shew that.

As regards the objection taken that the By-law does not "name a day in the financial year in which it passed on which such By-law shall take effect" as required by subsection (1) of section 68, I agree with the learned Judge below that this objection is not fatal, and may be got over in the way he suggests; furthermore, even if it could not be so got over, I think that under the circumstances of this case we may, in the exercise of the discretion conferred upon us in section 88, take the same view of the objection as the Judges in Ontario did in the case of *In re Michie and the City of Toronto* (1861), 11 U.C.C.P., at p. 386 (where Chief Justice DRAPER said that the Court could treat "may" as permissive, not mandatory, and that the occasion there

was a fitting one in which to exercise that discretion) and refrain from quashing the By-law on that ground.

Though the result will be that this By-law will not be quashed, yet should a case arise where there is anything in connection with the passing of a By-law which should call for judicial intervention, I am of the opinion expressed in *Baird* v. *Almonte*, at p. 419, that quite apart from any statutory authority, this Court has the power to fully safeguard the interests of the ratepayers. Appeal allowed with costs here and below.

Appeal allowed with costs.

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Foreign judgment for alimony—Action for arrears of—Whether or not it lies.

Plaintiff, in 1891, recovered a consent judgment against the defendant in Ontario for alimony and maintenance, the judgment being a confirmation, subject to certain provisions, of an agreement previously made for the maintenance of the wife and children.

Held, that an action lay on the judgment for arrears of alimony and maintenance.

Nouvion v. *Freeman* (1889), L.R. 15 App. Cas. 1, specially referred to.

Statement.

ACTION for $1,100.35 arrears of alimony and maintenance (with interest) adjudged to be paid by the defendant to the plaintiff by an order or judgment of the High Court of Justice in and for the Province of Ontario, dated 9th November, 1891, and the certificate of the Master made in pursuance of the said judgment and dated 22nd January, 1892.

The particulars of the claim were as follows:

To arrears of alimony from 1st April, 1896, to 1st October, 1897—19 months at $42.50 per month	$ 807 50
To arrears of maintenance Albert T. Hadden, $45.50; Amy Hadden, $66.50; Eugene Hadden, $66.50; Stella Hadden, $66.50; all up to 1st October, 1897	245 00
To average interest at 6 per cent. on $1,052.50 per statute	47 85
	$1,100 35

The material parts of the judgment sued on and the certificate of the Master were as follows:

1. It is adjudged by and with the consent of counsel for both parties that the agreement made between the plaintiff and defendant, bearing date 14th November, 1888, and everything done thereunder, and the allowance of $30.00 per month therein made to the plaintiff in respect of the maintenance of herself and her five children, by the defendant, now living with her, be and the same is hereby confirmed as between the plaintiff and defendant, subject to the following provisions.

2. It is hereby adjudged, by and with the consent aforesaid, that it be referred to the Local Master of the Supreme Court of Judicature at Barrie, to enquire and state what sum (if any) beyond the said sum of $30.00 per month allowed to the plaintiff by the said agreement, the defendant ought to pay to the plaintiff for her own maintenance and that of her five children aforesaid, or any of them, and for how long and at what times the same should be paid.

3. [Provided for the abandonment of all charges of improper conduct]. Statement.

4. And it is further adjudged by and with the consent aforesaid, that the defendant do pay to the plaintiff as and from 1st March, 1891, such sum as the said Master may find payable, over and above the said sum of $30.00 per month above mentioned, and do also pay to the plaintiff her costs of suit as between solicitor and client.

5. [Provided for future application as to custody of children].

6. [Provided for the dropping of appeals and for set-off.]

CERTIFICATE OF MASTER.

Pursuant to the order of reference to me directed herein, and dated 9th November, 1891, I proceeded on 18th and 29th December, 1891, and on 4th and 12th January, 1892, and in the presence of the counsel and solicitor for the plaintiff and defendant, to enquire into the matters thereby to me referred, and after having heard and considered the

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evidence offered on behalf of both of the said parties, find as follows :

1. That the defendant is possessed of the following amongst other lands : [Here follows a description of the lands.]

2. That the defendant ought to pay and I do hereby order and adjudge that he do pay to the plaintiff as permanent alimony over and above the sum of $30.00 per month, payable to her under the agreement referred to in the judgment herein and the additional sum of $12.50 per month, and I direct that the defendant do on 1st February, 1892, and on the first day of each succeeding month thereafter, pay to the plaintiff or to whom she may appoint, at the office of her solicitors, Messrs. McCullough & Burns, No. 60 Canada Life Building, Toronto, the said sum of $12.50.

3. That the defendant ought to pay to the plaintiff and I do hereby order and adjudge that he do pay to the plaintiff at the place aforesaid, on 1st February next, the sum of $137.50, being as and for eleven months arrears of her alimony since 1st March, 1891, up to 1st February, 1892.

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4. That the defendant ought to pay and I do hereby order and adjudge that the defendant do pay to the plaintiff the following sums respectively for the maintenance of her children : Lyla Hadden, Albert Thompson Hadden, Amy Hadden, Eugene Hadden and Stella Hadden. (The amount being $3.50 per month for each of the said children through different periods of time.)

5. [Provided for place and time of payment.]

6. That the defendant ought to pay to the plaintiff and I do hereby order and adjudge that he do pay to the plaintiff on 1st February next, at the place aforesaid, the sum of $192.50, as and for arrears of maintenance for her children since 1st March, 1891, up to 1st February, 1892.

7. [Immaterial.]

8. That the right should be reserved for the plaintiff to apply to the Court, should she be so advised, for further

provision for the maintenance of any or all of her said children, beyond their respective periods up to which I have directed maintenance to be allowed to them.

9. [Immaterial.]

All of which I humbly certify and submit to this Honourable Court.

Dated 22nd January, 1892.

(Signed) "J. R. COTTER," Master.

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The trial took place at New Westminster, before BOLE, Local Judge, on 25th July, 1898.

Morrison and *Dockrill*, for plaintiff.

Howay and *Reid*, for defendant.

1st September, 1898.

BOLE, LO. J.: The action herein is brought to recover $1,100.35 for arrears of alimony and maintenance (with interest) consented, agreed and adjudged to be paid by the defendant to the plaintiff by an order or judgment of the High Court of Justice of Ontario, dated 9th November, 1891, and the certificate of the Master made in pursuance thereof, dated 22nd January, 1892, of which particulars are given. To this a number of the usual defences are pleaded, but I apprehend none of them would have given the Trial Judge much trouble in disposing thereof, as it is not seriously contended that there was no such judgment as the one relied upon by the plaintiff, were it not that the defendant relies strongly on the point that the judgment sued is not a final judgment, or one that can be sued on in this Court, and that there is no jurisdiction in this Court to enforce payment of arrears of alimony alleged to be due on the judgment of a foreign Court.

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It is clear that if judgment for the payment of a sum of money had been obtained in a foreign Court, an action may be brought on that judgment in an English Court and judgment may be recovered on it in England: *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. at p. 305 (C.A.), so that

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practically the question for decision resolves itself into this: Is this judgment such a one as falls within the rule? It is equally clear that the Courts of this country will not enquire whether the foreign Court pronounced a judgment correct in point of law, or right and accurate in point of fact (*vide* same case at p. 302) so that the question is narrowed down to this proposition: Is this judgment according to the law of Ontario a final one to the extent of being authority for bringing an action for arrears of alimony which have become due thereunder?

Lord HERSCHELL in *Nouvion* v. *Freeman* (1889), L.R. 15 App. Cas. at p. 9, says: "The principle upon which I think our enforcement of foreign judgments must proceed, is this: That in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." Again it was decided by the Court of Appeal *In re South American & Mexican Co.* (1894), 12 R.1, that where a judgment by consent for a sum of money proceeds on the ground that an agreement under which the money was payable, was a valid one, the parties to the judgment are estopped from disputing the validity of the agreement, and although *In re Binstead* (1893), 1 Q.B. 199, the Court held that in a suit by a husband against his wife for divorce where a decree *nisi* for dissolution was made, the decree containing an order for the payment of petitioner's costs by co-respondent, the decree being made absolute and an order made for payment of the taxed costs which the

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co-respondent failed to pay, there had not been within the meaning of the Bankruptcy Act, 1893, a "final judgment," yet it is to be observed that KAY, L.J., at p. 208, says: "Order LXVIII., provides that nothing in the rules shall, save as expressly provided, affect the procedure or practice in proceedings for divorce. Accordingly, the Divorce Court is governed by its own rules in these respects, and its causes or suits are not called actions, and its decisions are not called judgments, but decrees. This, and as I think this only, creates the difficulty. In strict language, a decree of the Divorce Court is not called a 'judgment,' nor is a suit for divorce called an 'action,'"—thus basing his judgment on a state of things not all fours with the present action. Considerable reliance has been placed by defendant on some observations attributed to VAUGHAN WILLIAMS, J., in *In re Hawkins* (1893), 10 R. at p. 32, but which does not appear in the Law Reports; but it does not appear to me that the observation in question, which is to the effect that instalments of alimony, although a debt for non-payment of which a man could be sent to prison, do not create such a debt that an action of law could be brought or a judgment obtained in any Court whatsoever for the non-payment of the debt, were intended by His Lordship to form part of his judgment in the case, which merely decided that arrears of alimony, payable under order of the Divorce Division of the High Court, which have accrued due after the date of the receiving order and before proof, are not provable in bankruptcy, and the learned Reporter of the Law Reports evidently took the same view, and in the present case, it is to be noted, that a judgment by consent has already been obtained. The matter, however, cannot be disposed of entirely on English authorities, as we find that Messrs. E. F. B. Johnston and C. C. Robinson, eminent counsel at the Ontario bar, are of opinion that the whole matter, as viewed in its legal aspect, stands on an entirely different footing in England from what it does in Ontario, and they as well

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as Mr. Alexander Henderson, a gentleman of high standing at the bar of British Columbia, and a barrister and solicitor of Ontario, agree in stating that according to the law of Ontario, a judgment for alimony is final so far as the overdue arrears are concerned, and stands on the same footing with regard to its enforcement as any other judgment; and Mr. Holmested, also a gentleman of high repute as a lawyer, states that a judgment for alimony is final until a further order of the Court is made, and does not contradict the views expressed by the experts, who say that the law in England and the law in Ontario are not the same with respect to alimony. Mr. J. H. Macdonald, Q.C., is very positive and gives elaborate reasons for the distinction which in his opinion exists between judgments in alimony cases and judgments in ordinary cases, and quotes to support his view that "an alimony judgment is not considered a debt, or is not treated as a contract or awarded by way of damages": *Magurn* v. *Magurn* (1883), 3 Ont. 577; *Lee* v. *Lee* (1895), 27 Ont. 193, and *Wheeler* v. *Wheeler* (1895), 17 P.R. 45, in support of his views. Now in *Magurn* v. *Magurn*, the Chancellor says at page 576: "But what I have to deal with is, does that divorce (in question) operate in this Province so as to bar the plaintiff's claim for alimony? It is conceded that she is entitled to alimony if not excluded by the decree of divorce. I have to determine this question by the law of England as made applicable to this Province by the Chancery Act." And I have been unable to find any portion of His Lordship's judgment which goes so far as to be to my mind an unequivocal and distinct authority for Mr. Macdonald's opinion. In *Lee* v. *Lee*, the Chancellor said it was his impression that a judgment of a County Court, founded upon a judgment of the High Court, was a nullity, but guards his expression of opinion from being considered as a judgment by saying that it was not necessary for him to decide that point in that case. As to *Wheeler* v. *Wheeler*, Mr. Macdonald, in cross-examination admits that

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the case is not an authority respecting the finality of a judgment in a case for alimony. In *Aldrich* v. *Aldrich*, (1893), 24 Ont. at p. 130, Mr. Justice MEREDITH, speaking of a judgment for alimony, says: "But in this Province it is a judgment recovered and generally enforceable upon and by the same proceedings and process as any other judgment of the Court. . . . . The plaintiff's action for alimony was based on the statute referred to, and, here, the ordinary proceedings and process for enforcing the claim and judgment, are the same as for enforcing legal claims and judgments thereupon, and this judgment is, therefore, different from a decree for alimony of the Divorce Court in England, which under 20 and 21 Vict. Cap. 85, Sec. 52, was made enforceable, as the judgments, orders and decrees of the High Court of Chancery, may now be enforced and put into execution." And so the case of *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855, is distinguishable from this case; and this judgment seems to me to stand upon the like footing, in this respect, as "common law judgments," and BOYD, C., concurred in upholding the decision of FERGUSON, J., in the Court below. No authority expressly overruling this decision has been cited to me, and it appears to me, having regard to the weight of evidence and after carefully considering the very voluminous authorities cited by counsel on both sides, who, if I may be allowed to say so, argued the case with great ability and zeal, I am of opinion that this judgment, so far as it relates to the arrears due and payable thereunder, is a final judgment, and as the amount of the claim has been proved, I must, I think, direct judgment to be entered for plaintiff for amount claimed with costs.

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The defendant appealed and the appeal was argued 7th and 8th November, 1898, before MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ.

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Howay, for appellant: The possibility of enforcing a foreign judgment by action, or of bringing an action on the judgment, is subject to two conditions, each of which is essential to the maintenance of the action. The judgment must be a judgment for a debt, and it must be "final and conclusive." See Dicey's Conflict of Laws, 416.

The judgment of the Ontario Court does not set out a definite sum of money—it is not a judgment for debt or actually ascertained sum of money and does not create a debt—therefore it cannot be the subject of an action in this Court: *Obicini* v. *Bligh* (1832), 8 Bing. 335. The judgment sued on is not for an ascertained sum: *Sadler* v. *Robins* (1808), 1 Camp. 253 and *Obicini* v. *Bligh*. The Court in Ontario should have decided what is due; there was a reference to the Master who reported certain amounts to be paid, and a Commission had to issue to ascertain the amount due.

Argument.

Before an order or judgment of a foreign Court can be regarded as final, it must be shewn that it is conclusive between the parties, and it must be final at the time it is pronounced: *Nouvion* v. *Freeman* (1889), L.R. 15 App. Cas. 1; *In re Henderson* (1888), 20 Q.B.D. 509.

Alimony when awarded is neither debt nor damages: *Wheeler* v. *Wheeler* (1895), 17 P.R. 45. He referred also to *Kerr* v. *Kerr* (1897), 66 L.J., Q.B. 838, and *In re Hawkins*, (1893), 10 R. 29.

Wilson, Q.C., on the same side: The judgment for alimony was not a final judgment in every sense, being open to modification on application; see *Bailey* v. *Bailey* (1884), 13 Q.B.D. 704 and *Berkeley* v. *Elderkin* (1853), 1 E. & B. 805; and one of the conditions essential to the maintenance of this action is that the judgment should be unalterable: *Nouvion* v. *Freeman*, *supra*, at p. 13. An action cannot be maintained in British Columbia for alimony pure and simple; it is maintainable only by introduction of statute in connection with divorce proceedings. He cited also

Dicey's Conflict of Laws, pp. 419–20, and *De Brimont* v. *Penniman* (1873), 7 Fed. Cas. 309.

Dockrill, for respondent: The law in England and Ontario differs as to alimony. See 20 & 21 Vict. Cap. 85, Sec. 32; 29 & 30 Vict. Cap. 32 and R.S.O. 1887, Cap. 44, Sec. 29.

A judgment for alimony in Ontario is final: See *Aldrich* v. *Aldrich* (1893), 23 Ont. 374, and on appeal (1893), 24 Ont. 124; BOYD, C., at p. 126, and MEREDITH, J., at pp. 130–1.

He distinguished *Kerr* v. *Kerr*, *supra*, as the law in England is different.

For authority that the judgment is final, see judgment of Lord HERSCHELL in *Nouvion* v. *Freeman*, at p. 9. Arrears of alimony can't be changed; the only respect in which a change can be made is as to future payments, and then only on petition after hearing new evidence.

Argument.

The judgment sued on is a consent judgment, and by it the parties settled up all their differences; it is a contract or agreement strengthened by an order of Court: See judgment of PARKE, J., in *Wentworth* v. *Bullen* (1829), 9 B. & C. at p. 850.

Wilson, *Q.C.*, in reply: Whether the judgment is final or not must be determined upon a view of it at the time at which it was made: *In re Henderson* (1888), 20 Q.B.D. at p. 510. It is the judgment sued on here, not the arrears.

Cur. adv. vult.

9th January, 1899.

McCOLL, C.J., and WALKEM, J., were of opinion that the appeal should be dismissed.

Judgment of IRVING, J.

IRVING, J.: The plaintiff in this action on 9th November, 1891, recovered against the defendant, by consent, a

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judgment of the High Court of Ontario in the following terms:

[Then follows the Ontario judgment printed *supra*.]

The defendant paid up to April, 1896, and stopped, and in consequence of his so stopping this action was brought for $1,100.35, arrears of alimony and maintenance (with interest) consented, agreed and adjudged to be paid, particulars of which are as follows:

[Setting out particulars.]

The action was tried before BOLE, Lo. J., who gave judgment for the amount claimed.

In *Nouvion* v. *Freeman* (1889), L.R. 15 App. Cas. 1, it was pointed out that the decision of that case must depend on the nature of the judgment sued for.

Judgment of IRVING, J.

In an action on a foreign judgment, this Court, before enforcing the obligation or debt, requires to be satisfied that the matter has been adjudicated upon by a competent Court, and that the adjudication is final and conclusive. The cases are collected in Smith's Leading Cases, under *Doe* v. *Oliver* (1828), p. 706, and in *Nouvion* v. *Freeman* (1887), 35 Ch. D. 704; (1887) 37 Ch. D. 244, and (1889), L.R. 15 App. Cas. 1, the question of what was a final and conclusive judgment was the point in issue.

In that case plaintiffs were seeking to enforce in England a Spanish judgment obtained in what was called an "executive" action. The Lord Justices and the House of Lords were all of the opinion that it was not final and conclusive. Why? Because, according to Lord HERSCHELL, (1) The defendant could only defend the executive action by such defences as were open to him on the assumption that certain deeds were valid; that is to say, the defendant was at liberty to shew that there was a waiver, or that he had discharged the obligation by payment or otherwise, but he could not, in that action, impeach the instruments themselves on the ground of fraud, misrepresentation, failure of consideration or any similar ground of defence.

(2) That in the plenary action the decision in the executive action could not be set up as at all affecting the rights of the parties, either in the way of proof, or of title to succeed in the plenary action. (3) The same points which had been decided in the executive action can again be raised in the plenary action, as well as the other questions which were not open in the executive action.

Lord WATSON took the same ground. Lord BRAMWELL said it was merely an order upon which execution could issue ; a defeasible judgment.

Lord ASHBOURNE, at page 17, said that the judgment sued upon was not a judgment upon a claim which would be met by pleas upon the merits, going exhaustively into all the topics upon which the defendant was entitled to rely if he had the wide scope open to him which in any plenary suit a litigant would have.

Such was the judgment the House of Lords refused to enforce.

Judgment of IRVING, J.

Now let us examine the nature of the judgment sued on here. It is a judgment by consent, confirming an agreement made between the parties, that the husband, the defendant, will pay $30.00 per month in respect of the maintenance of the wife and five children, and such additional sum as the Master shall fix, also arrears of alimony, and maintenance for his children, and that the plaintiff and defendant shall abandon their respective appeals.

So far it would seem that the Ontario judgment has none of those defects which prevented the House of Lords from recognizing the Spanish executive judgment as final and conclusive. But in *Nouvion* v. *Freeman*, *supra*, this proposition is laid down : "The (foreign) judgment must be final and unalterable in the Court which pronounced it." "It need not be final in the sense that it cannot be made the subject of appeal to a higher Court ; but it must be final and unalterable in the Court which pronounced it."

The defendant contends here that as under the Ontario

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practice alimony is liable to be reduced upon application to the Judge or Court by whom the original decree was pronounced, that this is not a final and conclusive judgment, according to the standard established by *Nouvion* v. *Freeman*, and a great deal of evidence was given by Ontario barristers on that point; but whether a judgment for alimony under the usual decree can, having regard to the power of the original Court to abrogate, or vary the allowance, be enforced by suit in this Court, is not the exact question before us. We must look at the nature of the judgment sued on. That judgment is not the usual decree for alimony in Ontario; it is to my mind clear that the parties have, notwithstanding the eighth paragraph of the Master's report, arrived at and agreed to a final and conclusive judgment, and that judgment is of such a character as to impose on the defendant an obligation to pay the same.

Judgment of IRVING, J.

It was also argued that the judgment sued on was not for a definite or ascertained sum, and *Sadler* v. *Robins* (1808), 1 Camp. 253 was cited, but in that case the defendant's costs were first to be taxed and deducted from the sum which had been found due to the plaintiff, upon his original demand. Something therefore was clearly due to the defendant; that was first to be ascertained before the plaintiff was entitled to the fruits of his judgment, and till that was done his demand was not ascertained. Here the decree and report do fix the exact sums, and the dates of payment; that surely is sufficiently certain. The writ of monition referred to in *Obicini* v. *Bligh* (1832), 8 Bing. 354, is not similar in character to a report or certificate of the Master.

Then the defendant argues that as the plaintiff could not obtain a judgment on her decree there in Ontario, she cannot have judgment here. The answer to that is covered by what has already been said—that she has obtained a judgment in a Court of competent jurisdiction of such a

character as to create an obligation upon the defendant to pay her certain sums at certain periods.

Mr. *Wilson* raised this objection, that as no action could be maintained here for alimony pure and simple, she could not sue on a judgment for alimony, but as already pointed out, the judgment of the Ontario High Court was a judgment by consent, confirming an agreement made between the parties.

MARTIN, J.: I concur.

Appeal dismissed with costs.

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CARROLL v. THE GOLDEN CACHE MINES COMPANY, LIMITED LIABILITY.

Practice—Examination for discovery—Nature of—Cross-examination.

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An examination for discovery should be conducted as an examination in chief and not as a cross-examination.

Statement.

SUMMONS to shew cause why the Secretary of the defendant Company should not attend at his own expense before the Examiner on examination for discovery, and answer certain questions which were admittedly such as would only be allowed on cross-examination.

Argument.

Davis, Q.C., in support of the summons, cited *Beaven* v. *Fell* (1895), 4 B.C. 336; *Leitch* v. *Grand Trunk Railway* (1890), 13 P.R. 380; Bray's Law of Discovery, 147, 309 and 571; *Republic of Costa Rica* v. *Strousberg* (1880), 16 Ch. D. 12 and 13.

Wilson, Q.C., contra, cited Order XXXI., as to discovery and inspection; Holmested & Langton, 625; *Mack* v. *Dobie* (1892), 14 P.R. 465; *Eade* v. *Jacobs* (1877), 3 Ex. D. 335; *Rogers* v. *Lambert* (1890), 24 Q.B.D. 573; *Kennedy* v. *Dobson* (1895), 1 Ch. 334.

Judgment.

IRVING, J.: I am of opinion, having regard to the language used in the rules, that the examination is to be conducted as an examination for discovery, and not as a cross-examination. The officer presiding is to see that the examination is conducted as nearly as may be in the mode in use on a trial. This will enable the examining party to obtain from a hostile witness full discovery as to the matters in question in the action.

Summons dismissed.

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IRON MASK v. CENTRE STAR.

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CENTRE STAR v. IRON MASK

Consolidated Statutes, B.C. 1888, Cap. 82, Secs. 77 and 82—Right to follow vein—Practice—Injunction—Order for Inspection—Rule 514.

The Centre Star Company had been enjoined from mining in the Iron Mask Claim, in which it was alleged was a continuation of a vein whose apex was in its own claim, and was also refused leave to do experimental or development work on the Iron Mask claim in order to determine the character or identity of the said vein:

Held, by the Full Court, on appeal (MARTIN, J., dissenting) refusing to modify said orders, that it ought to be left to the Trial Judge to decide whether it was necessary to have any work done to elucidate any of the issues raised.

Statement.

APPEALS argued together from orders continuing injunctions until trial and from orders refusing inspection of property in dispute.

The Centre Star Mining & Smelting Company (Foreign) issued a writ in October, 1897, claiming an injunction

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NOTE (C.S.)—B.C. 1888, Cap. 82, Sec. 77, is as follows:—"The lawful holders of mineral claims shall have the exclusive right and possession of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface locations; but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downwards, as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claims to enter upon the surface of a claim owned or possessed by another."

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against the Iron Mask Gold Mining Company, (Foreign) on the ground that it was taking ore out of the Centre Star vein where it had run into the Iron Mask ground, and an *ex parte* order was obtained restraining the Iron Mask Company from removing the ore, and upon motion to dissolve in November, 1897, judgment was given continuing the injunction until the trial.

This judgment was appealed from but was not gone into on this argument.

Prior to December, 1897, the Centre Star Company had begun the sinking of an inclined shaft on its own ground, on what it claimed was the apex of its vein, and on continuing the inclined shaft down the dip of the vein it passed under the side line of the Centre Star claim and into the Iron Mask ground. After sinking about 320 feet an obstruction was encountered—this obstruction was styled in the affidavits by the various names of "watercourse," "flat fault," and "mud seam." In December, 1897, the Iron Mask Company issued a writ against the Centre Star Company and obtained an *ex parte* injunction restraining the defendant Company from going any farther with the inclined shaft. On a motion to continue, judgment was given by WALKEM, J., in October, 1898, continuing the injunction until the trial.

Statement.

This judgment was appealed from. (See *infra*).

Subsequently the Centre Star Company came back to a point about twenty-five feet from the bottom of the inclined shaft and ran a drift eastward for ninety-five feet (as claimed) on the dip of the vein, continuously in ore. Then from the end of that drift a winze was sunk twenty-five feet in the same direction as the inclined shaft, following (as claimed) on the dip of the vein. There was again struck in the bottom of that winze what is variously termed a "watercourse," "flat fault," and "mud seam." The Iron Mask Company then obtained an *ex parte* order in June, 1898, restraining the Centre Star Company from going on

working at that point, and on a motion to continue, judgment was given by WALKEM, J., in October, 1898, continuing the injunction until the trial.

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Both of the above motions were heard by WALKEM, J., who gave judgment as follows:

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WALKEM, J.: I had intended preparing a written judgment in this matter, but owing to press of work I have been hitherto unable to do so. As all the counsel engaged in the case are now present, I may as well state my views with regard to the motion before me. That motion is one on behalf of the Iron Mask Company to continue an order granted by Chief Justice McCOLL, restraining the Centre Star Company from further working in a certain shaft which is acknowledged to be within the surface boundaries of the Iron Mask Company's ground.

Judgment of WALKEM, J.

The opinions of eminent Judges of the American Courts, in cases like the present one, are that the Centre Star Company is *prima facie* a trespasser, as it is working within the surface boundaries of its neighbour's ground.

Twenty affidavits have been produced on behalf of the Iron Mask Company. A critical examination of them would be of no service to either of the parties. It is incumbent on the Centre Star Company to convince the Court by overwhelming evidence that it is a sufferer, especially as its extralateral rights are in derogation of the common law, in a vein of ore with a continuity upwards from the bottom of its shaft to the apex of the vein it claims, which apex is admittedly in its own ground. This overwhelming evidence has not been produced; hence I have only one course to pursue, and that is, to continue the injunction already granted until the hearing, when, doubtless, further and much more satisfactory evidence on both sides will be forthcoming.

This judgment is intended to settle the two adverse

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motions before me; that is to say, the motion of the Centre Star Company to dismiss the injunction granted against it, and the present motion of the Iron Mask Company for a continuance of the injunction granted in its favour by Chief Justice McCOLL. The costs in each case will abide the event.

This judgment was also appealed from. (See *infra.*)

It was claimed by the Iron Mask Company that the obstruction is a "flat fault" and destroys the continuity of the vein, and, on the other hand, it was claimed by the Centre Star Company that the obstruction is only a "fracture" and not fatal to continuity.

Subsequent to the judgments continuing the injunction until the trial, the Centre Star Company in both suits made applications under Rule 514 for leave to inspect the mining workings and premises in question, and to experimentally continue the present prohibited workings in the shaft and winze in said vein, through and across a certain dike and alleged flat fault, toward and into the ore bodies in dispute, and to take samples in order to discover and ascertain the true facts in regard to the identity and continuity of the said vein and the rights of the respective parties, and for the purpose of obtaining full information and evidence requisite for the trial.

Statement.

Both applications were refused by WALKEM, J., and the Centre Star Company now appealed from the refusal in both cases.

The appeals from the orders continuing the injunction orders until the trial, and the appeals from the refusal of the Centre Star Company's applications for inspection, were all argued together on 19th and 20th December, 1898, before McCOLL, C.J., DRAKE and MARTIN, JJ.

Davis, Q.C., for appellant: In appealing from the orders continuing the injunctions, we are not asking for a general dissolution of the injunctions, but for such a modi-

Argument.

fication of them as will enable us to do, pending the trial, whatever work is necessary at the various points to determine the identity and continuity of the vein in dispute—to do sufficient work to put the Court at the trial of the action in possession of sufficient evidence of facts, so that it may decide properly. In the applications under Rule 514 for inspection, we were asking for the same thing.

Extralateral rights are not in derogation of the common law. See Lindley on Mines, 678.

The uncontradicted affidavit of the Manager of the Centre Star Company shews that it is impossible for this case to be properly tried unless this work is allowed to be done, that being the only way in which the true facts can be properly shewn.

Mr. Carlyle, late Provincial Mineralogist, and several other experts say, after looking at the winze, that more work ought to be done before they can arrive at a proper conclusion as to the identity and continuity of the vein.

Argument.

The conflicting affidavits have arisen to a certain extent from the different meanings attached to the word "vein." Originally "vein" was understood in the sense of a true fissure vein—it was a geological definition—a cleft in the rock filled with mineral. This definition was first enlarged in *Eureka Consolidated Mining Co.* v. *Richmond Mining Co.* (1877), 9 Morr. 578, where it was held that any mineralized zone with well defined boundaries could be considered a vein. In *Hyman* v. *Wheeler* (1886), 29 Fed. Rep. 347; *Cheesman* v. *Shreeve* (1889), 40 Fed. Rep. 787, and cases there collected, it was held that although it was necessary to a vein that it should have walls or boundaries, it was not necessary that the walls or boundaries should be such as could be seen.

As a preliminary to the point which your Lordships wish argued, is the question whether or not, as a matter of law, any fracture in a vein destroys its continuity. If it did we would be out of Court.

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The other side claims that the continuity of our vein is destroyed at the bottom of the inclined shaft and at the bottom of the winze, and the question therefore arises, what is sufficient fault to destroy continuity? The authorities are clear that all faults or fractures do not destroy continuity.

A fault is a fracture, plus displacement: See Barringer & Adams, lix., lx.

Whether or not a fault destroys the continuity of the vein is a question of mixed fact and law depending on the extent of the displacement. See Barringer & Adams, ciii.; Lindley 418, and *Stevens* v. *Williams*, 1 Morr. at pp. 564–5.

As to the question of jurisdiction in the Court to make the order for inspection: My learned friend in the case below relied on *Ennor* v. *Barwell* (1860), 1 DeG. F. & J. 529, but that case was decided before there was any such rule as 514. That the Court has jurisdiction now is settled by *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356, a case very similar to the present.

Argument.

Order 514 is directed expressly towards preparing evidence for the trial, and in that differs from section 58 of the Common Law Procedure Act, 1858, in which the Court had power to grant inspection. The reason is that the Trial Judge should be in possession of the true facts of the case; and if the Court can be satisfied that any particular procedure will bring this about, then the Court should allow such procedure to be carried out so long as it does not unduly harrass the other side.

Permission to do work of this kind is only a species of inspection: See *Bluebird Mining Co., Ltd.* v. *Murray, et al* (1890), 23 Pac. Rep. 1022, a mining case in which the plaintiff Company was mining upon lands owned by defendants and pending litigation the Company obtained an injunction enjoining the defendants from interfering with its workings, and on motion by defendants the injunction was modified so as to allow them to enter and inspect and prosecute certain development work in order to

obtain a knowledge of the character and identity of the veins for use at the trial.

See also, *Thornburgh* v. *Savage Mining Co.* (1867), 7 Morr. at p. 680.

Both the English and American cases shew that the Court will give everything necessary for inspection, even to utilizing the machinery of the adverse party. See *Bennett* v. *Griffiths* (1861), 30 L.J., Q.B. 98; *Bennitt* v. *Whitehouse* (1860), 29 L.J., Chy. 326.

In all the later American cases such orders as we are asking for are made as a matter of course: See *Cheesman* v. *Shreeve* (1889), 40 Fed. Rep. 787, and *Last Chance Mining Co.* v. *Tyler Mining Co.* (1895), 157 U.S. 683.

Galt, on the same side: In following a vein from the apex downward, a party is not a trespasser when he gets into an adjoining claim. The Centre Star was the first location upon Red Mountain, and it was taken under the law which gave the locator the right to follow the leads into adjoining territory—the Government then had a complete ownership of Red Mountain, and the Iron Mask was not in existence. It is well known and it appears in the evidence, that these fractures are very common in the Rossland camp. None of the mining companies regard them of any importance, because a single round of shots in the face of the tunnel will go through one of these dikes, fissures, or faults and expose the ore intact on the other side. How unjust it would be to allow an adjoining owner to stop the working and take the mine if it happened that just enough rock was blown out to expose one of these small dikes. But this is exactly what we contend has taken place here.

Argument.

Bodwell (*A. H. MacNeill* with him), for respondent: On 19th April, 1898, an order was made restraining the Centre Star Company from drifting from the east end of the inclined shaft, and that order was afterwards continued by consent until the trial. Then again on 31st May, 1898, another injunction order was made, and that was by con-

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sent continued to the trial, so that if liberty is given the Centre Star Company to do work at the bottom of the winze and on the ore in the inclined shaft, it would be practically getting over the consent that these matters should all stand until the hearing of the action.

The first question to be tried is: Is there an apex of a vein on the Centre Star ground? The second is: Is there any vein in the inclined shaft? The third is: Supposing there is a vein of some sort, has the Centre Star followed that vein? Or has it stepped across from one small ore body to another, and thus made an apparent continuity of ore without any real continuity of the vein? Now if all these things are decided in favour of the Centre Star, there is another issue raised by the pleadings, which as a question of law, if our contention is correct, will settle the whole case, and that is: Where are the vertical lines to be drawn across the apex which will define the lateral rights?

Argument.

Then assuming everything else in favour of the Centre Star, its vein is cut off long before it reaches any of the points in question.

We are ready to go to trial, and the real contest in the actions is on the points just mentioned, and if the litigation can be ended, as we say it can, upon the evidence which we have upon these other issues, what use or benefit can there be in allowing this work to be done?

Inspection should not be granted unless the injunction orders were not properly granted, and if they were properly granted we should be protected until the trial. The burden of proof of a vein and continuity of ore is upon the person asserting the extralateral rights; and if there is conflicting testimony on that point before the trial, the Courts can grant an injunction, not to prevent a party mining on the vein, but to prevent his doing anything whatever until he proves he has a right to be there.

As to the authorities cited, the powers under Rule 514

are discretionary. In *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356, no question of principle is discussed or expressed in the judgment. There it was a question whether the defendant had joined on to an old drain or a new drain. The defendant had made the connection and knew all about it, and the plaintiff did not; and all that was done in that case was to allow the plaintiff to see what work the defendant had done. For instance, suppose a man had an important document in a case, known to be evidence for the plaintiff, there is not much question that the Court would order him to open his safe and allow it to be looked at.

The reason Mr. Carlyle and others say that more work ought to be done on the winze, is that they have not been shewn the work in the Iron Mask winze, or on the drift, or at the bottom of the inclined shaft.

The American cases cited cannot be taken as safe guides because we do not know the circumstances under which orders for inspection were made in them, the practice under which it was done, or whether we have the machinery for working out an order in the way in which the orders in those cases were worked out. They were cases in which the whole issue was in one action, but here the issue is divided into two actions—the *Centre Star* v. *Iron Mask* action can be tried after the disposal of our action; and the settlement of the issue in our action, while it may possibly demonstrate our right completely in so far as these workings are concerned, will not if decided against the defendant Company, conclude it at all.

Argument.

Davis, Q.C., in reply: As to the injunctions which by consent have been continued to the trial, they refer to doing work in a certain direction which was considered not to be of any importance in providing evidence for the trial, and we cannot be estopped through them from asking leave to do work in other places.

The contradictions in the evidence of the experts arise from facts which will disappear if further work is done.

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As to the argument that we have no machinery for carrying out such an order, all that is required is for the Court to appoint some one to determine what work shall be done.

He referred to *Last Chance Mining Co.* v. *Tyler Mining Co.* (1895), 157 U.S. 683.

Cur. adv. vult.

24th December, 1898.

DRAKE, J.: The Centre Star claim that they have on their land the apex of a vein which dips toward and under the land of the Iron Mask, and therefore they are entitled to follow this vein down to its termination.

The Iron Mask deny the existence of a vein, and say if there was one it has been cut off by a flat fault, and terminated.

Judgment of DRAKE, J.

The Centre Star say that if you allow us to explore beneath and through this fault, it will be demonstrated that the vein we have followed, as we claim, exists on the other side of the fault.

The Centre Star have been enjoined until the hearing from continuing the work.

They now seek for an order to give them leave to explore in the land of the Iron Mask, so as to ascertain whether or not there is any ore below the fault, for they say, "if there is, then we are entitled to continue working it as part of the vein we have followed."

The first thing to be decided in the action of *Iron Mask* v. *Centre Star*, is whether the Iron Mask can shew that the Centre Star has no apex and no vein. If they succeed in doing this, then the Centre Star has no use for the order asked for.

If they fail, then the question has to be decided whether this fault is a solution of continuity of the vein. This is a

question of law and facts; if it is decided against the Centre Star, then again there is no necessity for the order.

If it is decided in their favour, then again there is no necessity for the order, for they have established their right to continue the work.

I am not prepared to deny the Court has power to grant the order asked for, but there is no case that goes to such an extent based upon Rule 514. *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356, is an authority that where a certain fact is known, such as an existing drain, the Court authorized the plaintiff to ascertain one other fact, viz.: whether this drain was a drain made by the defendants to connect his house with the existing drain which was already known.

The present circumstances are very different. The defendants seek to establish a theory that the alleged vein exists below the fault, not to prove any connection between two existing facts. If they had actual evidence of a vein both above and below a certain spot, and sought to explore the intermediate ground, they would have a stronger case. The Iron Mask has rights as well as the Centre Star. There is no doubt that the Court has always exercised the powers of granting inspection of mines and their workings, but it has not gone to the extent of allowing independent work.

If the Centre Star can shew a clear title down to the fault, and satisfy the Court that the fault is not such an interruption of the vein matter as to constitute a termination of the vein, then they would be entitled without an order to proceed.

In the meantime every step is disputed, and every statement denied. I therefore do not consider that the Centre Star are entitled to the order asked for.

In equity the rule is that when in conscience the defendant has a right equal to that claimed by the plaintiff, the Court will not grant discovery. Mitford Pl. 199.

The parties here have equal rights depending however on different titles. The Centre Star has a right to follow a

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vein into the adjoining claim. The Iron Mask, until that vein is proved, has a right to all ore within vertical lines of their claim.

I think it should be left to the Judge at the trial to say whether or not actual work should be done for the purpose of elucidating any particular point with regard to the issues raised.

The Chief Justice authorizes me to state that in his opinion the Centre Star appeal ought to be dismissed.

The appeal will therefore be dismissed with costs.

MARTIN, J.: In this matter I regret I am unable to come to the same conclusion as my learned brothers.

The Centre Star and the Iron Mask are adjoining mineral claims, but the Centre Star Mining & Smelting Company, the owner of the first mentioned claim, by virtue of the Mineral Act, C.S.B.C. Cap. 82, Sec. 77, is entitled to extra-lateral rights, the section quoted providing that:

Judgment of MARTIN, J.

"The lawful holders of mineral claims shall have the exclusive right and possession of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface locations," etc., etc.

In the course of sinking an inclined shaft upon the dip of a vein, the apex of which the Centre Star Company alleges lies within its surface lines, the said shaft entered within the lines, and underneath the surface of the Iron Mask claim, and there encountered an obstruction which the Iron Mask Company alleges is a flat fault destroying the continuity of the vein, but which the Centre Star Company contends is only a fracture, not fatal to continuity. The Iron Mask Company also denies the existence of any such vein

as the Centre Star Company relies on as a justification of its workings, and further denies, if there be such a vein, that it is continuous or identical.

The Court is informed by counsel for both parties that the questions involved come before us for the first time, and as they are as important as they are novel, careful consideration is required to arrive at a proper conclusion.

The Centre Star Company has been enjoined, by two orders of this Court, until the trial, from further sinking the said inclined shaft, or sinking or carrying on any other mining process at the bottom of the winze which has been sunk from the uppermost drift, run in an easterly direction from the said shaft.

Two applications were made by the Centre Star Company, one in the case of the *Iron Mask* v. *Centre Star*, and the other in the case of the *Centre Star* v. *Iron Mask*, by way of summons for leave to inspect the mining workings and premises in question, and to experimentally continue the present prohibited workings in the shaft and winze in said vein, through and across a certain dike and alleged flat fault, toward and into the ore bodies in dispute, and to take samples in order to discover and ascertain the true facts in regard to the identity and continuity of the said vein, and the rights of the respective parties, and for the purpose of obtaining full information and evidence requisite for the trial.

These applications were refused, and the Centre Star Company now appeals from the refusal, and further asks, not for a dissolution of the injunction, but for a modification of it only to such an extent as will permit of the inspection and experimental and sampling work above specified.

In dealing with this question it should not be forgotten that extralateral rights are in no way in derogation of the common law; they are in fact of equal dignity with any other title, and the ownership of them is founded upon

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statutory rights; Lindley on Mines, p. 678, so any idea of a trespass in connection with their enjoyment must, in view of the latest authorities, immediately be dismissed from the mind.

In regard to the vein and its continuity, we must also, as the Court said in the leading case of *Cheesman* v. *Shreeve* (1889), 40 Fed. Rep. at p. 793: "Keep in mind that the vein or lode must be continuous only in the sense that it can be traced by the miner through the surrounding rocks, that is, slight interruptions of the mineral bearing rock are not alone sufficient to destroy the identity of a vein; nor could a short, partial closure of the fissure have the effect to destroy the continuity of a vein, if, a little further on, it appeared or recurred again, with mineral bearing rock in it." And further, at page 795: "An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the Act of Congress as any other form of deposit. . . . It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence and continuance, as by assay and analysis. . . ."

Judgment of MARTIN, J.

In opposition to the application it is contended by counsel on behalf of the Iron Mask Company that at the trial it will have to shew that there is no apex and no vein in the Centre Star ground, and if either of these points can be proved, then the appellant will fail, and have no need of the inspection it applies for. But surely the answer to that is that even if there are three or more main points in this case, the solicitors for each party are bound to be armed at all points to meet any and all issues raised on the pleadings; if they did not take every reasonable precaution in this respect, they would fail in their duty to their clients.

Counsel for the respondent further urged that there was a practical danger to his client, because if the inspection and work be permitted, and, as a result, connection is shewn

to exist between the Centre Star alleged vein and the disputed ore bodies, the difficulties of the respondent would be vastly increased, because after such connection was made any mining man looking up the Centre Star shaft would say (so cleverly has the work in the shaft been done, jumping from one small fissure or vein to another) that it was all part of the same vein. But surely this is, when considered, really an argument in favour of the appellant's application, because if "any mining man" would take such a view the Court would have to do so also, and the Centre Star would succeed. Though it is true that the existence of the apex, continuity and identity of the vein are denied in the pleadings, yet on the argument before us it was plain that what the respondent chiefly relies on is the alleged flat fault. I am satisfied that so far as is necessary for the purpose of this application the appellant has made out a *prima facie* case for inspection, whatever may be the result of the trial. Now for the purposes of that trial the Court should be placed in the best possible position for ascertaining the truth as to whether, primarily, the obstruction met with is a fault or a fracture; a mere fracture is nothing, there must be a displacement to an "unconscionable distance": Barringer & Adams, lix.–lx., ciii.

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Let us see what course is pursued by Courts in other countries under similar circumstances.

In Scotland inspection pending litigation seems to be, though not of course frequently, resorted to. In Stewart's Mines, Quarries and Minerals of Scotland, at p. 255, mention is made of a case where "a motion was granted to give the pursuer and two mining engineers, on forty-eight hours' notice, access to the defender's workers and mineral stores, and to mineral properties and workings for the purpose of enabling him to give evidence at the trial." That is exactly the object for which inspection is sought here.

In England, according to McSwinney on Mines, 610, the rule is the same. After mentioning that the order for

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inspection may be obtained, he proceeds, "And as auxiliary thereto, he may, in proper cases, obtain leave to measure and dial; to make sections, plans and machinery, to remove obstructions to the inspection; and, for the latter purpose, to break up the neighbour's soil. And the neighbour will be ordered to give all reasonable facilities in the way of ventilation and otherwise for effectuating those objects;" and he adds, "the right in question not depending on the balance of testimony, but on the circumstance that by its exercise the fact of the encroachment will be best ascertained."

In Australia (Victoria) as appears by Armstrong's Law of Gold Mining in Victoria, at pp. 101–3, it appears that "apart from the power inherent in the Supreme Court," the Warden of the Goldfields has power to authorize an entry on a claim in case of encroachment, and liberty to inspect a mine to ascertain the true limits of a claim, seems to be an every day proceeding. The only restrictions upon this applicant seems to be that (1) the application must be *bona fide*, and not sought for an indirect object; (2) no other means are open of obtaining the required information, and (3) no definite injury will result from the inspection.

Judgment of MARTIN, J.

Owing to the similarity of the law in this case to that of the United States as already noticed, it is to the Courts of that country that we must necessarily turn for the greatest assistance. In this respect I follow the course pursued in *The Queen* v. *Bradlaugh* (1877), 2 Q.B.D. by COCKBURN, C.J., where he said (p. 572): "These decisions are not so conclusive upon us as if they were Courts having equal jurisdiction in this country, but we look upon the decisions of the American Courts with very great respect, and take advantage of them in the solutions of questions of law." These expressions could not possibly have a fitter application than the present.

I refer at once to what would appear to be the leading case on the subject, *Thornburgh* v. *The Savage Mining Co.*

(1867), 7 Morr. 667, decided by BALDWIN and WILCOX, JJ., of the United States Circuit Court of the District of Nevada. The circumstances in that case are very similar to these. An injunction had been granted, and an application was made for an order of survey and inspection of the premises in dispute, and of such mining works adjacent as might serve to enlighten the issue of fact in the action. Objection was taken to the jurisdiction, and to the excercising of it. In delivering judgment Mr. Justice BALDWIN said, (p. 680):

"Ought a Court of Equity, in a mining case, when it has been convinced of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favour the affirmative of this proposition. The very great powers with which a Court of Chancery is clothed, were given it to enable it to carry out the administration of nicer and more perfect justice than is obtainable in a Court of Law. That a Court of Equity, having jurisdiction of the subject matter of the action, has the power to enforce an order of this kind, will not be denied; and the propriety of exercising that power would seem to be clear indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined, cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a Court justly decide a case without knowing the facts; and can it refuse to learn the facts?"

This judgment was approved and followed in *St. Louis*

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Mining & Milling Co. v. *Montana Co. Limited* (1890), 23 Pac. Rep. 510, which case was in turn followed by *The Blue Bird Mining Co. Limited*, v. *Murray et al.*, at p. 1022 of the same volume. This last case I draw attention to as being particularly like the present, the main portion of the application being for liberty to prosecute development work by extending a drift in order to determine the continuity and identity of a vein. In the *Blue Bird case* it was held that the Court had inherent equitable jurisdiction to make the order asked for irrespective of the Montana code. In both these cases, which (as also does the *Thornburgh case*) review the earlier English authorities, the point is made clear that inspection is granted " as the best means of discovering the truth," and the same object is to be attained at all times, " regardless of the commencement of the suit, and that is the best evidence for the trial." (pp. 515, 1024).

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It is further stated (514) that " There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed " by the making of such orders.

The law, then, being to my mind settled, in what does the application of the appellant fall short of the requirements above set out for the proper exercise of our judicial discretion ? I am unable to discover any reason why they should be deprived of the benefit of a proceeding which I regard as one of the most valuable aids a Court can have for the satisfactory disposal of the very difficult questions which arise in these mining cases. As the Master of the Rolls pointed out in *Bennitt* v. *Whitehouse* (1860), 28 Beav. 122, it is not " a question depending only on the balance of testimony. . . . . The Court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendants' mine." The best evidence here is also the same.

In my opinion the appellant has made out a strong case for the exercise of our discretion, our sound judicial discretion grounded on precedent, in its favour. The application

is *bona fide*, there is no other way of obtaining the required information, and no definite injury is shewn as likely to result. In addition to the foregoing we have the following circumstances set out in the affidavit of John B. Hastings, Mining Engineer, the manager of the Centre Star Company, fyled in support of the application, paragraphs 2, 4, 6 and 7 of which are as follows :

2. " That before the plaintiffs can safely proceed to the trial of this action, and in order to determine the ownership of the disputed ore bodies, it will be necessary that the plaintiffs be permitted to sink through the water course or alleged flat fault, and do certain work and excavations for the purpose of inspecting and tracing the plaintiffs' vein through and beyond such water course, towards and into the disputed ore bodies, and also to tunnel, sink or drift through the vertical dike lying immediately to the west of the plaintiffs' inclined shaft, and referred to in the affidavits, in order to locate the plaintiffs' vein on the westerly side of said dike, and trace such vein into the disputed ore bodies situate on the west side of said dike.

4. " That unless such additional work be done it will be impossible to ascertain the true facts in regard to the identity and continuity of the said vein, and place the Court in a position to deal with the said action upon its merits at the trial thereof.

6. " That I verily believe that if the plaintiffs are permitted to do a reasonable amount of work for the purpose of obtaining the true facts in regard to the said vein, all the necessary evidence can be brought before the Court at the trial of this action, and the rights of the parties in and to the disputed ore bodies finally determined.

7. " That the expense of preparing for the trial of this action will be very great, and unless the defendants are permitted to do the necessary work in order to obtain proper and sufficient evidence in regard to the continuity of the said vein, the rights of the parties to the ore bodies in

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dispute cannot, as I verily believe, be determined at the said trial."

These allegations remain uncontradicted, and even were they not largely supported in several particulars by expert evidence of the highest authority, *e.g.*, Mr. W. A. Carlyle, late Provincial Mineralogist, would of themselves fully support the application.

It may be said that if the required inspection be permitted it may be fruitless, for another obstruction may be met with in the course of a few feet, and another application would be made, and so on *ad infinitum*. I have considered this objection with some care, and the answer to it is that the Court should not be deterred from making an order which at the present time must be deemed to be reasonable, and in the best interests of justice, simply because there is a chance that in the working out of that order something not now shewn, and which cannot be shewn to exist, may interfere to render the present expected good consequences of the order of no avail.

Judgment of MARTIN, J.

In the memorandum of judgment of the learned Judge appealed from, it would not appear that all the features of this case above mentioned, particularly the application for inspection, were considered by him, and I understand that he deemed himself bound by the case of *Ennor* v. *Barwell* (1860), 1 DeG. F. & J. 531, which was quoted by the respondents, and that *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356 and other cases cited to us were not before him, otherwise I think I am justified in believing that he would have allowed the inspection on the principles above established.

I would allow the appeal with costs.

Appeal dismissed.

NOTE—On 9th January, 1899, leave to appeal to the Privy Council was refused.

IN RE SPINKS TRUSTS.

IRVING, J.

1899.

Jan. 31.

IN RE SPINKS TRUSTS

Trustees and Executors Act, R.S.B.C. 1897, Cap. 187, Sec. 39—One of trustees outside jurisdiction—Vesting order—Service of petition for.

When one trustee is resident out of the jurisdiction the Court will not vest the estate in the trustees within the jurisdiction on the ground that it will not reduce their number.

A petition to vest the trust estate in certain trustees within the jurisdiction ought to be served on the absent trustee.

PETITION under section 39 of the Trustees and Executors Act, R.S.B.C. 1897, Cap. 187, for a vesting order.

Statement.

The petition shewed that the testatrix, who died in September, 1882, had by her will appointed her brother, a resident of Lancashire, England, and the petitioner (her brother-in-law) her executors, and after bequeathing certain specific and pecuniary legacies, had devised and bequeathed the residue of her real and personal estate to her executors upon trust to sell and convert the same as therein mentioned. The will was duly proved in 1892 by the petitioner, power to prove being reserved for the other executor, who has never proved, renounced probate, disclaimed, nor acted in any way in the execution of the trusts.

Argument.

Wilson, Q.C., for the petitioner, asked that the lands be vested solely in the petitioner. It is not intended to serve the petition on anybody: *Re Martin Pye's Trusts* (1880), L.T. 247, is an authority for proceeding without notice to the trustee resident outside the jurisdiction.

Judgment.

IRVING, J.: I think notice should be given whenever possible, especially so since the passage of the Act of 1898,

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allowing trustees remuneration. But the application cannot be granted. The Court will not reduce the number of trustees, and the application amounts to that. See *In re Gardiner's Trusts* (1886), 33 Ch. D. 590. Let petition stand over, with leave to amend by applying for another trustee, and notice to be given to the foreign trustee.

Order accordingly.

CANADA PERMANENT v. BRITISH COLUMBIA PERMANENT.

McColl, C.J.

1898.

Dec. 20.

CANADA PERMANENT v. B.C. PERMANENT

Company—Similarity of name—Deception—Injunction—Investment and Loan Societies Amendment Act, 1898, Cap. 7.

The plaintiff Company was registered in British Columbia, in 1892, as "The Canada Permanxnt Loan & Savings Company (Foreign)," and carried on business under that name until January, 1898, when it obtained a license under the Companies Act, 1897, to carry on business as "The Canada Permanent Loan & Savings Company," and the defendant Company was incorporated in April, 1898, as "The British Columbia Permanent Loan & Savings Company."

Held, in an action for an injunction to restrain the defendant Company from carrying on business under its name, that the two names were not so similar as to be calculated to deceive the public.

Statement.

ACTION for an injunction to restrain the defendant Company, its agents and servants, from using or carrying on business under its present name, style or title, or any style or name which included the plaintiff Company's name, or so nearly resembled the same as to be calculated to deceive the public, or to induce the belief that the business carried on by the defendant Company was the same as the business carried on by the plaintiff Company, or in any way connected therewith.

The plaintiff Company, whose head office is in the City of Toronto, in the Province of Ontario, was registered in British Columbia on 9th June, 1892, as "The Canada Permanent Loan & Savings Company (Foreign)," and since such registration carried on an extensive loan business in this Province under that name until January, 1898, when it obtained a license under the Companies Act, 1897, to carry on business as "The Canada Permanent Loan & Savings Company."

The defendant Company was incorporated on 9th April, 1898, under the Investment and Loan Societies Act, R.S.B.C.

McCOLL, C.J.

1898.

Dec. 20.

CANADA PERMANENT v. B.C. PERMANENT

Statement.

1897, Cap. 22, as "The British Columbia Permanent Loan & Savings Company."

The plaintiff Company applied to the Registrar of Joint Stock Companies for a direction under section 2 of the Investment and Loan Societies Amendment Act, 1898, Cap. 7, that the defendant Company should change its name, alleging that defendant's name so nearly resembled its own as to be calculated to deceive. The Registrar being of opinion that the name was calculated to deceive, notified the defendant Company to change its name, and on refusal he gave notice of his intention to cancel its certificate of incorporation on account of such refusal. The defendant Company then commenced action against the Registrar and obtained an interlocutory injunction preventing his cancelling its certificate.

The defendant Company denied that its name so nearly resembled plaintiff's as to be calculated to deceive.

The action was tried at Vancouver on 6th December, 1898, before McCOLL, C.J.

McPhillips, Q.C., for plaintiff.

Davis, Q.C., and *Harris*, for defendant.

Cur. adv. vult.

20th December, 1898.

Judgment.

McCOLL, C.J.: The plaintiffs do not contend that the defendant Company intended any wrong to them in choosing its own name, or has been using it in an improper manner. The sole question therefore is the statutory right claimed by the plaintiffs under 61 Vict. Cap. 7, Sec. 2. Does the name of the defendant Company so nearly resemble that of the plaintiff Company as to be calculated to deceive? Although I had no doubt at the conclusion of the arguments, I wished to consider the decided cases. I have since done so, but I can only say of them what Sir GEORGE JESSEL

says in one of them about those existing at the time, that they afford little assistance. The question is one of fact.

Mr. *McPhillips* urged that the name of the defendant Company suggests that it is a branch of the plaintiff Company. A branch it could not be from the very nature of an incorporated company, but even assuming that some people might suppose it to be so as if unincorporated, yet I do not see that such an inference can be drawn. It often happens that two companies are amalgamated under name indicating the amalgamation. And it has happened that a company doing business in two or more countries has withdrawn from one of them, its business there being taken over by a new company formed for the purpose of using the name of the old company with the addition of the words "of India," or, as the case may be, for the purpose of disclosing what has occurred. But for what reason can the names of these two Companies be said to suggest any connection between them? Whether the word "Permanent" means, as the plaintiffs' manager says, a kind of loan made by both Companies, or, as the defendants' manager claims, a kind of stock issued by his Company and not by the other, the word is not a fancy word, but is as descriptive as either "Loan" or "Savings" of the business carried on. Suppose that the names had been "The Canada Company" and "The British Columbia Company" simply, would any connection between them have been implied. If not, how can it make any difference that other words proper and usual if not necessary to shew the kind of business done, are included in the names? Then can the right to use the words depend upon their sequence? No possible combinations would be sufficient to provide the numerous existing companies and the number not unlikely to seek incorporation, with names free from objection on this score, without extending them to an inordinate length. No doubt the difficulty might have been avoided by the defendants by the use of a fancy word. But is there any rule of law

Judgment.

McCOLL, C.J.
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requiring this of them more than of the plaintiffs? All that the defendant Company claims the right to do is to use as its name, words commonly if not necessarily used for the purpose of advertising the kinds of business it does, coupled with words not used by any other company engaged in the business, thus securing its own identity and pointing out that it does business throughout the Province. I am satisfied upon the evidence that no confusion which may have arisen is fairly attributable to this cause. Is any likely to arise? It is common knowledge that when a company's name consists of more than two or three words, the company becomes commonly known and is referred to by two of them, usually the first two, or by some two words adapted from them. The plaintiff Company itself, is it appears, known as "The Canada Permanent," and the defendant Company may in time become known as "The British Columbia Permanent." What the plaintiffs are really endeavouring to do, as indeed their manager frankly admitted, is to prevent the use by the defendants of the word "Permanent."

Judgment.

But besides the evidence given as to the meaning of the word, the right to its general use has been recognized, not only in the existence of the very large number of companies whose names are shewn to contain it, but in the sanction in one instance at least, by an Act of the Parliament of Canada, 61 Vict. Cap. 101, following an Order-in-Council in Ontario. I do not understand in what way the supposed confusion complained of would be likely to arise.

Persons familiar with the name of the plaintiff Company will, I think, at once perceive the marked difference between the two names, and persons who may be attracted to it by its advertisements or referred to it by others, will naturally take note of its name and address. Nor do I think that any variation in the position of the words used would prevent any confusion now possible. And the case relied upon for the plaintiffs shews that there is no rule of law applicable

to this point: *Manchester Brewery Co. Limited* v. *North Cheshire & Manchester Brewery Co. Limited* (1898), 1 Chy. 539.

As Lord Justice JAMES remarks in *Hendriks* v. *Montagu* (1881), 17 Ch. D. at p. 645, speaking of the difference between the words "universe" and "universal"—"Many people do not care to bear in mind exactly the very letters of everything they have heard of," so I think that they do not bear in mind the precise order in which words common to the names of two or more companies are used, and thus distinguish them. People are, I think, more likely to bear in mind some prominent word in each name, not contained in the other. The plaintiffs chose to become incorporated by words merely indicating the business intended to be carried on, with the addition of a word signifying that it might be extended throughout the Dominion.

Judgment.

They might have avoided the chance of any confusion now possible, by the adoption of some striking fancy word. I am of opinion that they are not entitled now to ask this Court to interfere in which I think would be an unreasonable way with the defendants in their choice of a name, merely to prevent the possibility of some slight confusion which is perhaps always possible between companies similarly employed, no matter what reasonable precautions may have been taken.

That any appreciable damage is likely to result to the plaintiffs if the defendants use their name properly, I do not believe, and if they act otherwise they may be restrained. I think that the situation cannot be better described than in these words of JESSEL, M.R.: "As we know in the case of these companies, there are so many under similar names that people do look out for themselves."

The action is dismissed with costs.

Action dismissed with costs.

McColl, C.J.

1898.

Dec. 20.

B.C. Permanent v. Wootton

BRITISH COLUMBIA PERMANENT v. WOOTTON.

Companies, Joint Stock—Registrar of—Similarity of names—Injunction—Investment and Loan Societies Amendment Act, 1898, Cap. 7, Sec. 2.

The opinion of the Registrar as to the similarity of the names of different Companies is not conclusive under the Investment and Loan Societies Amendment Act, 1898, Cap. 7, Sec. 2.

ACTION for an injunction to restrain the defendant as Registrar of Joint Stock Companies from cancelling the plaintiff's Certificate of Incorporation.

Statement.

The plaintiff Company was incorporated in April, 1898, under the Investment and Loan Societies Act, R.S.B.C. 1897, Cap. 22, as "The British Columbia Permanent Loan & Savings Company." Subsequently the defendant, being of opinion that the plaintiff Company was incorporated under a name so nearly resembling "The Canada Permanent Loan & Savings Company," (a registered Company subsisting at the time of plaintiff's incorporation) as to be calculated to deceive, gave notice to plaintiff Company to change its name, and on refusal gave notice of his intention to cancel plaintiff's Certificate of Incorporation under section 2 of the Investment and Loan Societies Amendment Act, 1898, Cap. 7.

The plaintiff Company issued a writ against the defendant in August, 1898, and obtained an interlocutory injunction pending the trial, and in October, 1898, The Canada Permanent Loan & Savings Company issued a writ against the plaintiff, claiming an injunction to restrain the plaintiff Company from carrying on business under its name as being calculated to deceive.

For the defence it was objected that the statement of

claim disclosed no cause of action, and it was contended that the opinion of the Registrar was conclusive under the Investment and Loan Societies Amendment Act, 1898, Cap. 7, Sec. 2.

The action was tried at Vancouver, on 6th December, 1898, before McColl, C.J.

Davis, Q.C., and *Harris*, for plaintiff.
McPhillips, Q.C., for defendant.

Cur. adv. vult.

20 December, 1898.

McColl, C.J.: The single question presented for determination is whether the opinion of the defendant, who is Registrar of Joint Stock Companies, is conclusive under 61 Vict. Cap. 7, Sec. 2.

The material part of this enactment is "and if any society has heretofore been . . . . incorporated by a name so nearly resembling that of another Company as to be calculated to deceive such first mentioned society shall, upon the direction of the Registrar, change its name," etc.

Judgment.

The section in the English Act (20 of Cap. 89, 1862) reads "may with the sanction of the Registrar, change its name," and was intended to enable a company prohibited from carrying on business by its registered name, to continue it by some other name without reorganization.

Whatever the intention of the Legislature may have been, the words used do not in their ordinary sense mean that the opinion of the Registrar concludes the question.

In the Ontario Act which invests the Lieutenant-Governor-in-Council with the authority now claimed for the Registrar, the language used is "In case it is made to appear to the satisfaction of the Lieutenant-Governor-in-Council," etc., R.S. 1897, Cap. 191, Sec. 24.

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Judgment.

In Manitoba it is provided that the Company may obtain from the Lieutenant-Governor-in-Council supplementary letters patent changing its name, and may be compelled to apply for them by the Court of Queen's Bench. R.S. 1891, Cap. 25, Sec. 20. Here the Registrar is empowered to act only in certain stated circumstances. Whether they exist is a question of fact which in the absence of any provision to the contrary the parties are entitled to have determined judicially whenever there is a substantial question to be tried. In this case the names are not identical and there is clearly such a question.

I am not at liberty to extend the words of the enactment even if I thought it desirable that the Registrar should have the power contended for uncontrolled by any appeal from his decision. The injunction must be continued until the final disposition of the action now pending between the two Companies.

The defendant must pay the costs of the action, as it appeared that he is indemnified by the other Company.

Judgment accordingly.

SHORT v. FEDERATION BRAND SALMON CANNING COMPANY.

McColl, C.J.

[In Chambers.]

1898.

Dec. 8.

SHORT v. FEDERATION BRAND SALMON CANNING Co.

Patent—Venue—Practice—Writ of summons—Indorsement of plaintiff's address—Rule 18—R.S. Canada, 1886, Cap. 61, Sec. 30.

In an action for damages for infringement of a patent, the writ need not be issued out of the Registry nearest the place of residence or business of the defendants, but section 30 of The Patent Act is complied with if the venue is laid at the place of such Registry.

SUMMONS to set aside writ of summons on the grounds that the indorsement did not contain the plaintiff's address and that the writ should have been issued out of the Victoria Registry.

Statement.

The indorsement on the writ was: "The plaintiff's claim is against the defendants for damages for infringement of a patent dated 16th July, 1897, and for an injunction restraining the defendants from further infringing said patent."

J. H. Senkler, in support of the summons, referred to Rule 18, which requires the plaintiff's address to be indorsed on every writ of summons.

Argument.

The principal place of business of the defendant Company is in Victoria, and under R.S. Canada, 1886, Cap. 61, Sec. 30, (*a*) the writ of summons should have been issued out of the Victoria Registry.

Macdonell, contra.

McColl, C.J.: As I understand the cases of *Goldsmith* v. *Walton* (1881), 9 P.R. 10, and *Aitcheson* v. *Mann* (1882), 9 P.R. 253, 473, the construction placed by the Ontario Courts upon the Act is that where as in this case the action is brought, not in a County Court, but in a Court having

Judgment.

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jurisdiction throughout the Province, the enactment is satisfied by the venue being laid and trial had in the County where the defendants carry on business. Here the application is to set aside the writ, no statement of claim having yet been delivered. I adopt the construction referred to. Leave to amend by inserting plaintiff's address. Costs to defendants in any event.

Order accordingly.

NOTE (*a*).—Any action for the infringement of a patent may be brought in any Court of Record having jurisdiction, to the amount of the damages claimed, in the Province in which the infringement is alleged to have taken place, and which is also that one of the said Courts which holds its sittings nearest to the place of residence or of business of the defendant; and such Court shall decide the case and determine as to costs.

HOGG v. FARRELL.

FULL COURT

1895.

Dec. 12.

HOGG v. FARRELL

Practice—Pleading—General denial—Whether sufficient—Rules 158, 169 and 171—New defence on appeal.

The rules of pleading relating to denials specially considered and applied.

The Full Court will not allow a defence to be raised for the first time, based on non-compliance with the directions of the mineral laws relating to location.

THIS was an appeal by the defendants from the judgment of CREASE, J., pronounced 9th October, 1895. The plaintiffs were Alexander L. Hogg and Frank Houghton, and the defendants were Charles C. Farrell and G. H. Johnson. They were all free miners and resided at Fort Steele.

Statement.

The pleadings were as follows:

Statement of Claim:

1 and 2. [Immaterial.]

3. Contained an allegation that the plaintiffs and one Benjamin Pugh in partnership, located, and on 13th June, 1893, duly recorded the Queen of the Hills and Moyea mineral claims, etc.

4. The plaintiffs duly performed the representation work required by law, and duly received and recorded certificates of work on the said claims.

5. Contained an allegation that Pugh, on 2nd November, 1893, conveyed claims to plaintiff Hogg.

6. Under and by virtue of the said records and instrument, the plaintiffs are the lawful owners of the said mineral claims.

7. Contained allegation that one Charles Farrell located, and on 18th July, 1893, duly recorded the Lake Shore mineral claim.

8. Contained allegation that on 27th March, 1894, the

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said Charles Farrell transferred the said Lake Shore mineral claim to the plaintiff Hogg.

9. The said Alexander L. Hogg duly performed the representation work required by law, and duly received and recorded a certificate of work on the said Lake Shore mineral claim.

10. The said Moyea claim adjoins the said Queen of the Hills claim, and the said Lake Shore claim adjoins the said Moyea claim.

11. Since the plaintiffs' claims were located and recorded the defendants have located, and recorded in the office of the Mining Recorder at Fort Steele, certain claims known as the Deadwood and Legal Tender claims, and the same extend over portions of each of the said Queen of the Hills, Moyea and Lake Shore claims.

12. The defendants said records are a cloud upon the title of the plaintiffs to their said claims.

Statement.

13. The defendants have entered upon the said claims of the plaintiffs and have done considerable work thereon, and have dug, excavated and removed mineral therefrom and have trespassed on the said claims of the plaintiffs, and the defendants threaten and intend to continue their said work and their said trespassing, and the plaintiffs fear that they will continue to do so unless restrained by the order and injunction of this Honourable Court.

14. Allegation of damages.

15. The plaintiffs claim that the said records of the defendants should be cancelled and set aside and removed from the record books of the Mining Recorder at Fort Steele, as a cloud upon the plaintiffs' title.

16. Asked that the defendants might be restrained from trespassing, etc.

17 and 18. Asked for damages and costs.

Statement of Defence:

1. Admitted paragraph 1 of claim.

2. The defendants also admit the location and recording

by them of the mineral claims, Deadwood and Legal Tender, mentioned in paragraph 11 of the plaintiffs' said statement of claim.

3. The defendants deny all the other allegations contained in the said statement of claim, and put the plaintiffs to the proof thereof.

4. The defendants disclaim any interest in the ground included within the boundaries (proper) of the Queen of the Hills mineral claim referred to in paragraph 3 of the said statement of claim, and have never claimed any portion thereof.

5. If the plaintiffs and the said Pugh did duly locate and record the Moyea mineral claim as alleged in said paragraph 3 of the plaintiffs' statement of claim, then the defendants say that the said Moyea mineral claim is on the same vein or lode as the said Queen of the Hills mineral claim, and that the plaintiffs' location and record thereof is illegal and invalid.

Statement.

6. In further answer to said paragraph 3 of the plaintiffs' statement of claim, the defendants say that in the month of October, 1893, the plaintiffs or their agents located the mineral claim Mono, being a relocation of the said Moyea mineral claim, without the written permission of the Gold Commissioner in that behalf.

7. In answer to paragraph 7 of the plaintiffs' statement of claim, the defendants say that the said Charles Farrell in the said paragraph mentioned, did, in the month of September, 1893, relocate the said Lake Shore mineral claim, or attempted so to do by putting up two new stakes and changing the location line of said claim, as well as including thereby other and different ground than that included in the said claim as located on 18th July, 1893, to the knowledge of the plaintiffs.

8. The defendant, Charles C. Farrell, located the said Legal Tender mineral claim on 1st July, 1894, and duly recorded the same, and the defendant, Johnson, located the

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said Deadwood mineral claim on 8th July, 1894, and duly recorded the same.

9. In any event the defendants say that upon a correct survey of the ground included within the proper boundaries of the said mineral claims, some portion thereof belongs to them.

The defendants before trial obtained an order to add to the pleadings an additional or alternative defence, to-wit:

"That the Lake Shore claim was recorded in the name of Charles Farrell, but at the time of the location thereof the said Charles Farrell, Ole J. Johnson and the defendant Charles C. Farrell were together, and it was agreed that the said claim should be held by the two Farrells and Ole Johnson in partnership.

"And that while this partnership of three was existing, the same three recorded two other mineral claims named the Broncho, and the Mossback, and it was agreed between the three that Thomas Roder should be admitted into the partnership.

Statement.

"And that the plaintiff Hogg, at the time of the transfer of the Lake Shore mineral claim to him by the said Charles Farrell, purchased with knowledge of the defendants' alleged rights."

The trial took place before CREASE, J., at Kamloops, on 4th June, 1895, and His Lordship held in regard to paragraph 5 of the defence, that no "vein or lode" was proved to exist, and therefore that plea failed.

In regard to paragraphs 6 and 7 of the defence, he held, that although these pleas were traversed, no part of either of them was proved, and they therefore failed. His Lordship held that defendants' said claims did overlap the plaintiffs' claims, and he accordingly gave judgment in favour of the plaintiffs, granting them an injunction, $1.00 damages for trespass, and ordering the cancellation of so much of the records of the Deadwood and Legal Tender claims as overlapped the plaintiffs' claims.

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From this judgment the defendants appealed on the grounds (1) That the mineral claims Moyea and Queen of the Hills are both on the same vein or lode. (2) That no discovery post was placed on either of said mineral claims. (3) That neither of said mineral claims were located under section 84, Cap. 25, B.C. Stat. 1891, and that if they were the requirements of that section have not been carried out. (4) That the plaintiffs' title to the said mineral claims was not proved, and the requirements of the Mineral Act, 1891, and Amending Acts, were not complied with. (5) That certain evidence on behalf of the plaintiffs was improperly admitted. (6) That there was no proof that the said mineral claims were staked according to the Mineral Act, 1891, and Amending Acts. (7) That no partnership agreement was recorded. (8) That the defendants are entitled to some part of the ground in dispute.

Statement.

The appeal was argued 12th December, 1895, before the Full Court, consisting of McCREIGHT, WALKEM and DRAKE, JJ.

Wilson, Q.C., for appellants.
Davis, Q.C., for respondents.

Mr. *Wilson* applied for leave to introduce fresh evidence, but leave was refused.

After hearing the arguments of counsel, the Court dismissed the appeal with costs.

Subsequently, on 1st June, 1896, the written opinion of the Court was handed down by McCREIGHT, J.:

Mr. *Wilson* for the appellants and defendants Farrell and Johnson in this case, made several objections to the decision of Mr. Justice CREASE, which was given in favour of Hogg and Houghton, the plaintiffs.

Judgment.

First he objected that the plaintiffs didn't prove that they had satisfied the requirements of section 3 of Cap. 29 of the Act of 1893, as to posts and other conditions of loca-

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tion, but to this objection there are several answers; first, the general denial in paragraph 3 of the statement of defence is bad (see Rule 171) and must be disregarded; next the failure to comply with the requirements of the said section 3 of the Act of 1893, should have been specially set out under Rule 169, and the last part of paragraph 5 of the statement of defence does not get over the difficulty, as was contended, for that paragraph only applies to acts done regardless of the proviso in section 84 of the Mineral Act of 1891, as the context I think fully shews. Again, if the defendants intended to rely on the absence of proper posts and other conditions of location as suggested by Mr. *Wilson*, Rule 158 requiring the party pleading to "state the material facts on which he relies" especially as their omission would be likely to take the "opposite party by surprise," words to be found in Rule 169, should have been attended to.

Judgment.

The plaintiffs' witnesses were not much, if at all, cross-examined as to their being a proper location, etc., and I gather from the evidence of McVitty, the Land Surveyor, that all was properly done—and see the evidence of Frank Houghton. Indeed I don't see that compliance with section 3 of the Act of 1893 was discussed or a point made about it; anyhow, for the reasons I have given, I think the point is not now of importance. I may add that there appears to have been no examination or cross-examination as to the evidence on the three points that Mr. *Wilson* made with reference to section 3 in the Full Court on appeal:

(1). Posts not legal and that they must be on the line of the lode. (2). Want of location notice. (3). No discovery post as to rock in place.

Mr. *Wilson* objected that having taken up in partnership the Queen, they couldn't take up the Moyea, but the answer is that by proviso in section 84 of the Mineral Act of 1891, the law seems to be otherwise, as they were partners.

Moreover, the Trial Judge finds that no "vein or lode" was proved to exist there.

Mr. *Wilson* says that certain documents referred to in the statement of claim were not duly proved. The Trial Judge seems to have thought they were. Anyhow the remark applies again that the general denial, see paragraph 3 of statement of defence, is bad under Rule 171, and such allegations must be taken as admitted. The defendants further pleaded in answer to paragraph 3 of the statement of claim, that in October, 1893, the plaintiffs or their agents located the mineral claim Mono, being a relocation of the Moyea claim, without the written permission of the Gold Commissioner. The Trial Judge finds that though this defence was denied it was not proved by the defendants who seem to have called no witnesses.

The next plea of the defence was that Charles Farrell, mentioned in paragraph 7 of the statement of claim, in the month of September relocated or attempted to relocate the Lake Shore, by putting up two new stakes and changing the location line of that claim, as well as including therein other and different ground than that included in the said claim in the location of it on 18th July, 1893, to the knowledge of the plaintiffs. The learned Trial Judge finds that this pleading though denied by plaintiffs, was not proved.

The cases of *James* v. *Smith* (1891), 1 Ch. 384, and *Clarke* v. *Callow* (1876), 46 L.J., Q.B. 53 (C.A.) per Lord ESHER, shew the Court will give no facilities in the raising of such defences as are made in this case, especially under section 3 of the Act of 1893 ; see Rule 169, and to amend would I think be plainly unjust ; compare what is said by Lord HERSCHELL in *The "Tasmania"* (1890), 15 App. Cas. 225, and see p. 230 ; and *Connecticut Fire Insurance Company* v. *Kavanagh* (1892), A.C. at p. 480. I mention this as Mr. *Wilson* wanted to call fresh evidence before the Full Court to shew that section 3 of Cap. 29 of 1893 had not been complied with. I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

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Mineral Act, 1891, and Amending Acts of 1892 and 1893—Location—Blazing—Adverse claim—Affidavit of—Whether good if made by plaintiff's husband—Reopening of case—Jurisdiction of County Court.

Practice—Pleading—Costs.

Per WALKEM, J.: To constitute a valid location, the statutory requirements as to blazing must be complied with.

Semble, after the case of the adverse claimant has been closed the Court will not allow the case to be reopened to enable the claimant to give fresh evidence as to his location.

Held, on appeal, ordering a new trial:

(1) If the defendant wishes to rely on defects in the plaintiff's location he must set them forth specifically in his pleading;

(2) The fact that the affidavit was made by the claimant's husband does not *ipso facto* vitiate the adverse claim, but the question is one of *bona fides* under the Act;

(3) No costs of appeal will be given to the appellant who succeeds on a point not taken below.

Quaere, whether the County Court has jurisdiction, also whether trespass lay independently of the proceeding by adverse claim.

Per WALKEM, J., on new trial dismissing the action: The affidavit of adverse claim must be made by the claimant.

Statement.

THIS was an action of trespass brought for the purpose of enforcing an adverse claim under the Mineral Act of 1891, as amended by Cap. 32 of the Act of 1892, Sec. 14, Sub-Sec. 2 and subsequent Acts. The action was commenced in the County Court on 4th January, 1896, and was afterwards transferred to the Supreme Court.

The plaintiff, Mary Jane Aldous, was the owner of the mineral claim Berlin, located in August, 1894, and the affidavit leading to the adverse claim was made by her husband George Aldous.

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The action was tried at Nelson, before WALKEM, J., on 21st June, 1896, and after hearing the evidence it was ordered to stand over for argument which subsequently took place on 27th February, 1897. After plaintiff's case was closed, and during the argument on defendant's motion for non-suit, Mr. *Wilson* asked leave to call a witness to prove "blazing," but to this Mr. *Davis* objected on the ground that it would be opening the door to perjury. His Lordship sustained the objection.

Wilson, Q.C., for plaintiff.
Davis, Q.C., and *Bowes*, for defendant.

2nd April, 1897.

WALKEM, J.: This case is one of an "adverse claim" brought under the laws relating to minerals (other than coal) which were in force prior to 1896. The mineral ground in dispute may be shortly described as an "overlap" in the locations of each of the parties.

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The defendant's counsel contends, that as the plaintiff's proceedings, after the fyling of her "adverse claim," were brought in the County Court, they were not brought "in a Court of competent jurisdiction" within the meaning of section 83 of the Mineral Act, 1888. A decision on this point is in my opinion needless, as his next objection, namely, that the plaintiff has not shewn that she ever complied with the requirements of section 3 of the Mineral Act of 1893, Cap. 29, in the matter of defining her main line by posts or the blazing of trees, seems to be unanswerable.

Section 3 is as follows:

"A mineral claim shall be marked by two legal posts, placed as near as possible on the line of the ledge or vein, and the posts shall be numbered 1 and 2, and the distance between posts 1 and 2 shall not exceed fifteen hundred feet, the line between posts Nos. 1 and 2 to be known as the location line, and upon posts Nos. 1 and 2 shall be written the name given to the mineral claim, the name of the

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locator, and the date of the location. Upon No. 1 post there shall be written, in addition to the foregoing 'Initial Post,' the approximate compass bearing of No. 2 post, and a statement of the number of feet lying to right and to left of the line from No. 1 to No. 2 post, thus: 'Initial post. Direction of post No. 2, feet of this claim lie on the right, and feet on the left of the line from No. 1 to No. 2 post.'

"All the particulars required to be put on No. 1 post shall be furnished by the locator to the Mining Recorder at the time the claim is recorded, and shall form a part of the record of such claim.

"When a claim has been located, the holder shall immediately mark the line between posts Nos. 1 and 2 so that it can be distinctly seen; in a timbered locality, by blazing trees and cutting underbrush, and in a locality where there is neither timber nor underbrush he shall set legal posts so that such line can be distinctly seen.

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"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'; he shall also set a legal post as near as possible at each corner of his claim, on which shall be written 'A. B.'s claim, N.E. C.' (meaning north-east corner), 'A. B.'s claim, N.W. C.' (meaning north-west corner), as the case may be: Provided that when the claim is surveyed, the surveyor shall be guided entirely by posts 1 and 2 and the notice on No. 1, the initial post, and the records of the claim."

The foundation, or root, of title to a mineral claim depends, save in the case of a Crown grant, upon a proper location being made, that is to say, a location made in accordance with the rules prescribed in the Mineral Acts by the Legislature. The plaintiff's alleged location was made in 1894, and is, consequently, subject to the provisions of the Act of 1893, which I have quoted above.

No evidence was given on her behalf that she had com-

plied with the above requirement, namely, that "When a claim has been located the holder shall immediately mark the line between posts Nos. 1 and 2 so that it can be distinctly seen; in a timbered locality by blazing trees and cutting underbrush, and in a locality where there is neither timber nor underbrush he shall set legal posts so that such line can be distinctly seen."

The plaintiff's counsel, virtually, asks me to expunge this provision from the Act on the ground that the words "When the claim has been located" must imply that a location sufficient to satisfy the law has been made when the previous requirements of section 3 have been complied with, and that, therefore, the marking of the line between posts 1 and 2 by intermediate posts, or by the blazing of trees, etc., might be dispensed with as superfluous. The Legislature, it will be observed, refers to that line as being the "location line," and the word "located" would seem to have been used as a consequence of the "location line" having been decided upon. One can, in an ordinary sense, decide upon, or speak of a location, but to acquire possession of it is quite a different thing.

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The importance attached by the Legislature to the intermediate staking or in the alternative, blazing of the location line, so as to confer the possessory right I allude to, is obvious from the fact that the words "so that such line can be distinctly seen" are twice repeated in the regulation we are considering, and in my opinion, that regulation cannot be dispensed with.

The result is that the plaintiff's or claimant's case must be dismissed with costs.

From this judgment the plaintiff appealed on the grounds amongst others, that the Judge erred in refusing to receive evidence of the blazing of the line, and that blazing of the line between posts 1 and 2 is not imperative nor a condition precedent and forms no part of the location and location complete without it.

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The appeal was argued 3rd and 4th May, 1897, before DAVIE, C.J., MCCREIGHT and MCCOLL, JJ.

Wilson, Q.C., for appellant.
Davis, Q.C., for respondent.

Cur. adv. vult.

12th July, 1897.

MCCREIGHT, J.: This was an action of trespass brought for the purpose of enforcing an adverse claim under the Mineral Act of 1891, as amended by Cap. 32 of the Act of 1892, Sec. 14, Sub-Sec. 2 and subsequent Acts. The learned Trial Judge held as the plaintiff had not shewn that she had complied with the requirements of section 3 of the Mineral Act of 1893, Cap. 29, in the matter of defining her main line by posts or the blazing of trees, she could not recover. His attention does not seem to have been drawn to Order XIX., Rule 14 of the Supreme Court Rules, of which it is said in Odgers on Pleading, 2nd Ed. at p. 64: "Although it is not any longer necessary for a plaintiff to plead the due performance of all conditions precedent to his right of action, yet the burden of proving the due performance is still on him, if the defendant specially plead no performance." Now in the statement of defence there is no plea referring to the defining of the main line by posts or the blazing of trees, for paragraph 4 merely says that no adverse claim as required by the Mineral Act, 1891, etc., has been fyled herein, and Odgers further remarks, referring to Order XIX., Rule 14 at p. 64, that the party who desires to contest the performance or occurrence of any condition precedent must raise the point specifically in his pleading, and neither party need allege the performance of any condition precedent. Our attention was called in the Full Court to Order XIX , Rule 14, and I don't under-

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stand Mr. *Davis* for the Hall Mines Company now to rely on that point, though it seems to have been the *ratio decidendi* of the learned Trial Judge's judgment in favour of the Mines Company. He, Mr. *Davis*, confined his argument in the Full Court to the points which he raised under paragraph 4 of the statement of defence, namely, that there was no proper adverse claim by plaintiff through want of an affidavit which should have been made by the plaintiff, Mary Jane Aldous—and that that which was made by her husband was useless; and that the action was not commenced within the required time, or any extension obtained which became necessary, as the case was removed from the County Court, which he contended had no jurisdiction as to adverse claims. The first point as to the absence of an affidavit by the person making the claim, that is, Mary Jane Aldous, seems at first sight, according to section 14 of the Mineral Act, 1891, Amendment Act, 1892, to be formidable, but I think Mr. *Davis* did not sufficiently attend to section 10 of the Mineral Act of 1891, Amendment Act of 1893, which amends the section of the Act of 1892 and reads as follows in the proviso to the section: "Provided, however, that if an adverse claim has in the opinion of the presiding Judge been *bona fide* made, notwithstanding that the same may have been imperfectly made, the same shall nevertheless have legal recognition and effect shall be given thereto, according to the intent thereof." Now surely the mistake of having the affidavit made by the husband instead of by the wife, appears to fall within the purview of this proviso, and the attention of the learned Judge should have been called to the question of whether the adverse claim had been *bona fide* made or not. I think there should be a new trial on this ground. The policy of the Legislature judging from section 16 (d) of the Act of 1896, and see the Act of 1897, seems to continue unchanged in this respect. I had rather give no opinion on the point as to whether the County Court had jurisdiction, but I may call attention to

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the circumstances that Mr. *Davis'* objection that an action of trespass can't be brought, unless the plaintiff gets a Crown grant, seems to be met by section 34 of the Mineral Act, 1891, which says that the interest in a mineral claim shall be deemed to be a chattel interest, and that section 149, sub-sections 4 and 5 of the same Act must be read with the sub-section 34 as well as with section 14 of the Act, 1892, sub-section 2. As to when trespass can be maintained, (and section 149, sub-section 4, seems to contemplate that it can be brought in the County Court) see Cole on Ejectment, and when preferable to ejectment, see pages 73, 74 of the same book. I may add that section 14, sub-section 2, of the Act of 1892, contemplates proceedings, etc., to determine the question of the right of possession and the prosecution of the same, etc., to final judgment. And that after judgment the person, etc., entitled to the possession of the claim, may fyle a certified copy of the same, etc. And after the fyling of the judgment, and upon compliance with, etc., such person shall be entitled to the issue of a certificate of improvements in respect of the claim or the portion thereof which he or they shall appear from the decision of the Court to rightly possess. *McGinnis* v. *Egbert* (1884), 15 Morr. 329, for the reasons apparent in the judgment at the end of pages 339 and 340, is not applicable to a case under our laws. The United States legislation is different from ours. I don't wish to be understood as expressing an opinion in favour of Mr. *Wilson's* contention that the adverse claim may be enforced by an action of trespass independently of section 14 of the Act of 1892, (although it seems it may be enforced by that action under that section) for it may be urged that the Legislature could not have intended that the limits of time mentioned in that section should coexist with those fixed by the Statute of Limitations or the rules of procedure in an ordinary action of trespass. Indeed, perusal of sub-sections 1 and 2 of section 14 shews this. For the adverse claim must be fyled

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before the expiration of the period of publication in the next preceding section mentioned, that is, in section 36 of the Act of 1891, or a period of sixty days. Again, the Statute of 1891, Sec. 34, gives the miner a right or interest in his claim which he had not at common law, and as a remedy for breach of that right in a case like the present of an adverse claim given by sub-sections 46, 47 and 48 of the same Act coupled with section 149, sub-sections 4 and 5 of the same Act, and section 14 of the Act of 1892, to be read in lieu of section 37 of the Act of 1891, it should seem that the procedure by way of adverse claim prescribed by the Act of 1891, as so amended, is compulsory; see the language of Mr. Justice WILLES in *The Wolverhampton N. W. Company* v. *Hawkesford* (1859), 28 L.J., C.P. at p. 246, where he says: "There are three classes of cases in which a liability may be established by statute, etc., etc. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it, etc., etc., and as with respect to that class it has been always held, that the party must adopt the form of remedy given by the statute." It seems difficult to maintain the argument that an action of trespass lies independently of the remedy by adverse claim, though it may be a proper way of enforcing an adverse claim in the manner prescribed by section 14 of the Act of 1892. I have made these remarks as they refer to points alluded to in the argument, and I do so without any intention of giving a decided opinion upon any of them, but for the reason I have already given I think the judgment of the learned Trial Judge cannot stand, and that there must be a new trial, either party having liberty to amend his pleadings as he may be advised, costs of the first trial to abide the result of the second, but no costs of this appeal as the point was not taken before the Trial Judge. This seems to be the practice of the Lord Justices, and the Judicial Committee in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, say we should follow the

WALKEM, J. law as laid down by them, and see Annual Practice of 1896,
1897. p. 1050, and *Goddard* v. *Jeffreys* (1882), 46 L.T. N.S. at p. 905.
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DAVIE, C.J., and MCCOLL, J., concurred.

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New trial ordered.

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Pursuant to the order of the Full Court the case came down for trial at Nelson, on 26th October, 1897, before WALKEM, J., who dismissed the action in the following judgment:

WALKEM, J.: The plaintiff in this adverse claim is a married woman living, as I gather from the evidence, out of the jurisdiction, and in that sense, apart from her husband, who took out a mining license for her, and has kept it renewed ever since. Under the mineral laws of those years
Judgment. he located the mineral claim in dispute in her name, and as he states, as her agent. As such he has also brought this adverse claim on an affidavit of verification made by himself. This affidavit is objected to on the ground that, according to section 14 of the Mineral Act of 1892, as amended by section 10 of the Mineral Act of 1893, it should have been made by the plaintiff.

The amended provision is as follows: "Any adverse claim to be fyled shall be on the oath of a person or persons making the same, and shall shew with reasonable particularity having regard to all the circumstances of the case, the nature, boundaries and extent of such adverse claim. Provided however, that if an adverse claim has, in the opinion of the presiding Judge, been *bona fide* made notwithstanding that the same may have been imperfectly made, the same shall nevertheless have legal recognition, and effect shall be given thereto according to the intent thereof."

It is clear that this proviso in view of the context, merely

authorizes a liberal construction on the section to be given in respect of the so called reasonable particularities required to be stated; but I cannot accede to the proposition of the plaintiff's counsel that it has the effect of repealing the foremost or principal enactment in the section, namely, that "any adverse claim to be fyled shall be on the oath of the person or persons making the same." This enactment would seem to have been borrowed from section 2326 of the Revised Statutes of the United States, which is as follows: "Where an adverse claim is fyled, during the period of publication it shall be upon oath of the person or persons making the same," etc.

This provision was literally construed by the United States Courts, hence to enable an adverse claim to be instituted on an agent's oath it was considered necessary by Congress to pass an Act which it did on 26th April, 1882, to permit it. No such Act has been passed here.

Judgment.

Our Rules of Court in cases of "Attachment of Debts" (see Order XLV., Rule 1) provide that a garnishee order may be issued on an affidavit of the "plaintiff or his solicitor."

It has frequently been held by myself, as well as other members of the Court, that an affidavit of any other person than the "plaintiff or his solicitor," was insufficient.

When the language of a statute is clear and unambiguous, as it is in the present instance, it must be followed.

The plaintiff's claim to a strip of ground marked "A" on the plan produced at the trial, was abandoned at the trial. But this is neither here nor there, for the foundation of this claim, namely, the affidavit of Mrs. Aldous, is wanting. The claim must therefore be dismissed with costs.

Action dismissed with costs.

DAVIE, C.J.

[In Chambers.]

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LEAVOCK v. WEST

LEAVOCK v. WEST *ET AL.*

Practice—Injunction—Cross-examination of plaintiff on his affidavit—Discretion of Court or Judge—Rule 401.

As a general rule an order under Rule 401 will not be made for the attendance for cross-examination of a plaintiff who has made an affidavit leading to an interim injunction before the defendant fyles an affidavit of merits.

SUMMONS for leave to cross-examine plaintiff on his affidavit. Plaintiff obtained on 24th November, 1897, an interim injunction, restraining the defendants from disposing of certain interests in a mineral claim, with liberty to apply on 1st December for a continuation of the injunction until the trial. The summons and the motion to continue the injunction both came on before DAVIE, C.J., on 2nd December, 1897.

Statement.

Langley, in support of the summons cited Rule 401, and asked that plaintiff's motion stand over until after plaintiff's cross-examination.

Argument.

Schultz, contra: The application is made for the purpose of delay, and should not be granted: *Mayer* v. *Spence* (1860), 1 J. & H. 87. It is also premature and should not be granted before defendants fyle an affidavit shewing they have a defence on the merits. The power given the Judge under Rule 401, is discretionary and a deponent should not be examined as a matter of course: *La Trinidad* v. *Browne* (1887), 36 W.R. 138.

DAVIE, C.J.: I think Mr. *Schultz's* point is well taken. So far we have only the plaintiff's case, and defendants may not shew any defence, hence it is premature now to order cross-examination of plaintiff.

Judgment.

Summons dismissed with costs.

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McColl, J.
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Mineral Act, 1896, Secs. 24, 28, 53 and 161—Assessment work—Power of Lieutenant-Governor-in-Council to extend time for—Abandonment and forfeiture.

An Order in Council, under section 161 of the Mineral Act, 1896, extending the time for the doing and recording of assessment work on a mineral claim, is *intra vires.*

A certificate of work recorded pursuant to permission granted by a Gold Commissioner acting under such an Order-in-Council, is a good certificate within section 28 of the said Act.

Statement.

APPEAL from judgment of McColl, J., delivered 6th August, 1898. The action which was one of adverse claim, was tried at Nelson on 16th June, 1898. The facts fully appear in the judgments.

Macdonald, Q.C., and *Johnson*, for plaintiffs.
Peters, Q.C., for defendants.

6th August, 1898.

McColl, J.: The mineral claim, Gold Cure, owned by the plaintiffs, was located on 12th, and recorded on 23rd August, 1895. The assessment for the first year was done within the time, but was not recorded until the 26th day of the month.

Judgment of McColl, J.

The mineral claim Bismark, owned by the defendants, was located on 7th October, 1896, admittedly in the belief that the plaintiffs had abandoned their claim and in ignorance of any proceeding taken by them under the Order-in-Council presently referred to. The Bismark, which was conceded to be a valid claim, subject only to any prior claim of the plaintiffs in respect of the Gold Cure, overlaps it, and the ground common to both claims is the subject of this action.

By an Order-in-Council dated 2nd July, 1896, after

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reciting that owing to the lateness of the season the depth of snow in the mountains prohibited many holders of claims from performing the assessment work required by the Mineral Act during each year, it was, professedly in pursuance of section 161 of the Act of 1896, provided that "It shall be lawful for the Gold Commissioners throughout the Province to extend the time for a period of sixty days, to date from the 17th day of July, 1896, for the completion of the assessment work on such mineral claims as the Gold Commissioners have good cause to believe are at this time inaccessible in consequence of the depth of snow that covers the said claims."

On 6th August, 1896, the Gold Commissioner of the District, acting under the Order-in-Council, on the plaintiffs' application, extended the time for doing the assessment work which had not then been completed, to 17th September, 1896. The work was actually finished in time to have been recorded within the year, and the only reason given for the delay was that the plaintiffs relied upon the extension.

Judgment of McCOLL, J.

By an agreement between the parties at the trial the only questions for determination are: (1) Was the Order-in-Council *ultra vires?* (2) Whether the plaintiffs can avail themselves of it? (3) And are the plaintiffs, if necessary, entitled to the benefit of section 53, which provides that no free miner shall suffer from the act of any Government official?

As to the second question, there being no evidence either way, I must assume that the Gold Commissioner had good cause for granting the extension. This being so, I know of no principles upon which the extension, if valid when granted, would become void merely because of the unexpected disappearance of the snow in time to permit of the work being done within the year.

With reference to the third question, it seems to me clear that if the Order-in-Council was *ultra vires*, the section invoked by the plaintiffs cannot apply.

It only remains to consider whether the Order-in-Council was *ultra vires*. Section 24 enacts that "If such work shall not be done, or if such certificate shall not be so obtained and recorded in each and every year, the claim shall be deemed vacant and abandoned, any rule of law or equity to the contrary notwithstanding." This provision is neither ambiguous nor doubtful. To give effect to the Order-in-Council would be not to carry out the provision, but to excuse non-compliance with it. And I do not think that the circumstances dealt with in the Order-in-Council are such as were contemplated by the words "To meet cases which may arise and for which no provision is made." Seasons were not less likely to be late after than before the passing of the Act, and if the Legislature had intended to create an exception in such event from section 24, they would have done so. It is not even as if compliance with the Act had been impossible. The work might have been done before the commencement of the winter season. To delay it was to incur a known risk of increased difficulty, with of course, additional expense. And this case itself shews that the event sought to be provided for by the Order-in-Council is too uncertain to be ascertained beforehand. It is important to bear in mind the limited power expressly conferred by section 161 to relieve against certain forfeitures—those arising under section 9. And the privileges given of paying $100.00 instead of doing the year's assessment (section 25) and of relocating a claim with the permission of the Commissioner (section 32) are, I think, against the construction for which the plaintiffs contend.

To speak of the intention of the Legislature is, as has been said by an eminent authority, to use a "slippery expression," and the rule that a mining claim can only be held (before grant) by the doing annually of the work required by the Act, or what it allows to be an equivalent, is so essentially a part of our mining laws that if I were in doubt, I think I ought not to hold that the language of

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section 161 gives the power assumed, but I am of opinion that to do so would be to disregard the enactments to which I have referred. The judgment will be for the defendants with costs.

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From this judgment the plaintiffs appealed and the appeal was argued 29th and 30th November, 1898, before the Full Court, consisting of WALKEM, IRVING and MARTIN, JJ.

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Bodwell (*Duff* with him), for appellants: The points on which we rely are: (1) that the Order-in-Council is *intra vires* and in accordance with the Act; (2) that we are protected under section 53 of the Act, and (3) under section 28 our title to the Gold Cure claim was ratified on 26th August, 1896, when the certificate of work was recorded. The Judge in the Court below relied on section 24, but that section contemplates only an abandonment and not a forfeiture.

Argument.

As to the difference between abandonment and forfeiture; the Act distinguishes between them: see section 32, "abandoned or forfeited." Abandonment is a presumption of fact and presupposes an intention to abandon, and on the other hand a man losing his claim by forfeiture loses it against his will. The Legislature never intended that a claim should be lost by abandonment unless there was some evidence of intention to abandon: see section 30. Compare section 9, "shall absolutely forfeit, etc.": see *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. at 454–5; *The Queen* v. *London County Council* (1893), 2 Q.B. at 491; and *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627.

As to the rights of a holder of a mineral claim, he cited *Nelson & Fort Sheppard Ry. Co.* v. *Jerry et al* (1897), 5 B.C. 396. He cited also, *Davenport* v. *The Queen* (1877), 3 App. Cas. at 129; *Attorney-General of Victoria* v. *Ettershank*, (1875), L.R. 6 P.C. at 369; *Osborne* v. *Morgan* (1888), 13 App. Cas. at 234; and *Peterson* v. *The Queen* (1889), 2 Ex. C.R. 74.

The proper construction of section 24 is that the lease obtained under section 34 is avoided by the non-performance of work unless waived by the Crown.

Section 161 is wide enough to cover the Order-in-Council and the intent of the section is that the conditions of section 34 may be waived. The general policy of the Legislature has been to relieve the miner from consequences which would amount to a hardship. Lay overs are still permissible under the Placer Mining Act, and they were under the Mineral Act until 1894, and since then they have been regulated by Orders-in-Council; see B.C. Gazettes, 1897, p. 2397; 1898, pp. 596 and 699. As to long use and public policy, see Maxwell, 3rd Ed. 425. All orders made under the section must be laid before the Legislative Assembly which has approved the order in question, and the Court is now ousted of its jurisdiction: *Institute of Patent Agents* v. *Lockwood* (1894), A.C. at 359; Hardcastle at pp. 300–2; *De Beauvoir* v. *Welch* (1827), 7 B. & C. 266; *Casgrain* v. *Atlantic & N.W. Ry. Co.* (1895), A.C. at 300; *Foskett* v. *Kaufman* (1885), 16 Q.B.D. at 286; *Jay* v. *Johnstone* (1893), 1 Q.B. 25; *Danford* v. *McAnulty* (1883), 8 App. Cas. at 460; *Ex parte Wier* (1871), 6 Chy. App. at 879; *Ex parte Campbell* (1870), 5 Chy. App. at 706; *Greaves* v. *Tofield* (1880), 14 Ch. D. at 571; *Clark* v. *Wallond* (1883), 52 L.J., Q.B. at 323; *The Queen* v. *Burah* (1878), 3 App. Cas. at 906.

Argument.

Independently of all other grounds we are entitled, if we were wrong, to relief under section 53 because we were led into being late by the act of the Gold Commissioner who purported to be acting under the Order-in-Council. Section 28 perfects our title to Gold Cure claim as no one can question it except the Attorney-General.

Cassidy (*Davey* with him), for respondents: The interest of a free miner in his claim is only a license for a year. We located on "vacant" ground. The Crown has simply an administrative interest in the lands, and since the passage of the Act has no control over the minerals or mineral

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claims. As to *Osborne* v. *Morgan*, *supra*, there was apparently no statutory system as here.

Section 34 says that the chattel interest is equivalent to a lease for a year—it does not say nor mean that the relation between landlord and tenant exists—nor that the Crown alone can exert defeasance. By virtue of the Mineral Acts the Crown has denuded itself of its character as landlord. The Lieutenant-Governor-in-Council cannot put such construction on provisions of the Act as seen fit, and this Order-in-Council is contrary to the tenor of the Act. Provision was made in the Act for a case such as this—they could have relocated under section 32 with the permission of the Gold Commissioner.

As to section 53. The appellants would not have suffered—they were seeking an advantage to which they were not entitled, as they had let the time expire. The section applies to some physical act such as if in the absence of the official from his office the miner could not fyle a certificate of work. It is admitted the work was all done within the year but they did not record it until too late—it was their own neglect and the representations of the Gold Commissioner are irrelevant.

Argument.

As to section 28. The failure to record certificate of work in time is not an irregularity—it is an essential requirement. The certificate of work required to confirm a title must be a good certificate, not a bad one such as there is here. The record is bad on its face: see *Atkins* v. *Coy* (1896), 5 B.C. 6; *Ex parte Coates, In re Skelton* (1877), 5 Ch. D. 979, and *Sweet's Dictionary* 449. The mining system is a registration system: *Parkdale* v. *West* (1887), 12 App. Cas. 602: *Hudson's Bay Company* v. *Kearns and Rowling* (1896), 4 B.C. 536. The words "issued within the statutory year" must be understood and read into the section after the word "work" in line three.

He cited also *McGarrahan* v. *The New Idria Mining Co.* (1874), 11 Morr. 641. As to usage, it should be long and

notorious. See Maxwell, 3rd Ed. 425, and *Magistrates of Dunbar* v. *Duchess of Roxburghe* (1835), 3 Cl. & F. 354.

Bodwell was not heard in reply.

The Court was unanimous in allowing the appeal with costs, and subsequently the following opinions were handed down.

WALKEM, J.: This is an appeal from the interpretation given by the learned Chief Justice to section 143 of the Mineral Act, (R.S. Cap. 135) when considered in connection with so much of the latter part of section 24 as relates to the doing and recording of annual work on a mineral claim.

Section 24 provides that a miner, who has duly located and recorded a mineral claim, is entitled to hold it for a year from the date of its record, and thereafter yearly without the necessity of re-recording, provided, amongst other things, that he does work in each year on the claim to the value of one hundred dollars, and obtains a certificate to that effect from the Gold Commissioner, or from the Mining Recorder. The section then concludes as follows:

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"If such work shall not be done, or if such certificate shall not be so obtained and recorded in each and every year, the claim shall be deemed vacant and abandoned, any rule of law or equity to the contrary, notwithstanding."

This language is too clear to admit of any other construction than the literal one put upon it by the learned Chief Justice, except we find that it has been modified by, or under the authority of, other provisions of the Act. As pointed out by Lord HERSCHELL, in *Colquhoun* v. *Brooks* (1889), 14 App. Cas. p. 506, "We are bound when construing the terms of any provision found in a statute to consider any other parts of the Act which may throw light upon the intention of the Legislature, and which may serve to shew that the particular provision, as for instance the one we are now considering, ought not to be construed as it would be if considered alone and apart from the rest of the Act." Again, the "literal

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construction of any enactment has, in general, but a *prima facie* preference. To arrive at its real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act." (Max. Stats. 3rd Ed. 29).

The object of the Mineral Act is beyond question, to encourage the development of the mineral resources of the Province. In comparing the Act with prior legislation on the same subject, it will be seen that it contains many changes in favour of the miner. For instance, section 16 re-enacts the old rules for taking up a location, but relaxes their stringency by providing that a locator is not to lose his ground owing to non-compliance with them, if it should appear that he has found "rock in place," and has made a fair effort to comply with them. This change, important in itself, as it relates to boundary lines, is also important as it clearly indicates that the Legislature intended that a miner should not, when taking up a location, be deprived of the fruits of his discovery by reason of inadvertent mistakes, or a misconception of the rules. By section 17, a location is not to be deemed invalid owing to its having been made on a Sunday, or public holiday. By section 18, the general rule which requires boundary posts to be placed at the ends of a location line is modified to meet the case of inaccessible ground, so as to permit of their being placed at a distance from the line, with notices on them indicating its position. Such stakes, I might observe, are known, under the American system, as "Witness Stakes." In further sections of the Act, the same liberal intention is apparent. All these changes are, obviously, of a remedial character, and were made in recent years to meet known difficulties or defects; and with a view, as it appears to me, of meeting unknown ones, or such as could not have been anticipated, or might have escaped attention; the legislation went a step further and gave the Lieutenant-Governor-in-Council power, by section 143, to "make such orders as are deemed necessary from time to time . . . . . to meet cases which

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may arise, and for which no provision is made in this Act." Under this authority, the impeached Order-in-Council, which is as follows, was passed:

"Whereas, owing to the lateness of the season, the depth of the snow on the mountains is still very great and thus prohibits many holders of claims on the higher ranges from performing the assessment work required by the Mineral Act during each year, and

"Whereas, it is desirable with a view to obviate this difficulty that an order granting discretionary permission to Gold Commissioners throughout the Province to extend the time for a period of sixty days for the completion of the assessment work on such mineral claims as are at this date covered with snow, and consequently inaccessible, be made:

"On the recommendation of the Honourable the Minister of Mines,

"His Honour the Lieutenant-Governor, by and with the advice of this Executive Council, and under the provisions of section 161 (now section 143 of R.S. 1897) of the Mineral Act, 1896, has been pleased to order, and it is hereby ordered as follows, that is to say:

"It shall be lawful for the Gold Commissioners throughout the Province to extend the time for a period of sixty days, to date from the 17th day of July, 1896, for the completion of the assessment work on such mineral claims as the Gold Commissioners have good cause to believe are at this time inaccessible, in consequence of the depth of the snow which covers the said claims."

July 2nd, 1896. sd. "JAMES BAKER,"
Clerk Executive Council.

Gazetted, fol. 778, Vol. 1, 1896.

The above facts, in view of the date of the order, mean that snow covered the ranges in mid-summer, and to such a depth as to render the completion of assessment work on local mineral claims, within the time prescribed by section 24, impossible. This has not been denied; but as the Order

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purports to extend that time, it has been held to be *ultra vires* and unauthorized by section 143; hence this appeal.

The object of the Act has already been pointed out, and it is clear from several sections that the Legislature considered that the best means of promoting it was to protect the miner in the possession of his claim. Consequently, he is not to lose it through unintentional mistakes in locating it (Sec. 16); or for having located it on a Sunday (Sec. 17); or recorded it in a wrong district (Sec. 22); or for delays or errors on the part of Government officers (Sec. 53). Every certificate of work when recorded, or registered, is to have the effect of sweeping away, as it were, all irregularities existing in his title prior to the moment of registration, (Sec. 28); and a certificate of improvements is to operate as a release from further assessment work, and is not to be impeached except for fraud. (Sec. 37.)

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In the light of these protective measures, the construction to be put upon section 143 should be that which will best harmonize with them, especially as that section, as applied to the case set forth in the Order, is a measure of the same nature.

That case is exceptional, and is one "for which" in the words of the section "no provision is made in this Act." It is, therefore, within the purview of the section. An opposite view would mean that the Act is remarkably inconsistent as it affords the miner protection against loss from inadvertent mistakes made in matters within his control, and yet denies him that protection in such a case as the present one, which is beyond his control and in which he is blameless.

Effect must be given to the section; and I can conceive of no case to which its provisions could be more beneficially, as well as legitimately, applied, than to the case in point. Furthermore, if they cannot be applied to such a case, they cannot be applied to cases, which, physically speaking, are of the same class—such as freshets, land-slides and snow slides.

Under all the circumstances I consider that the Order-in-

Council is valid. It is next contended on behalf of the appellants that even if the Order-in-Council is *ultra vires* they are protected by section 28, as they obtained and recorded a certificate of work on the 26th August. That section is as follows:

"Upon any dispute as to title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work, shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud."

The section is not as clear as it might be, but the meaning of it, as expressed in the last two lines, is that when a certificate of work is recorded the title shall be deemed to be perfect up to the date of record and not open to question except for fraud. On behalf of the respondents, it is, however, said that as the certificate held by the appellants was issued two days after the time prescribed by section 24, it was in that respect seriously defective, and that the above section (28) referred only to certificates that were not defective. The section does not say so; and, in my opinion, it was intended that the word "irregularities" should apply to certificates irregularly issued as fully as it does, in practice, to locations or records irregularly made. It would be mischievous were it otherwise, for a certificate, when endorsed by the Recorder as having been recorded, is, in practice, accepted by a purchaser of a mineral claim as official evidence of a good title up to the date of the record. Now this attack upon the certificate is, in effect, an attack upon the title, for the title depends upon the certificate, and an attack upon the title, except for fraud, is absolutely prohibited by the section.

The appellants completed their work within the year which expired on the 23rd of August; but relying on the extension of time until the middle of September which was given to them, under the terms of the Order-in-Council, by

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the Gold Commissioner, they did not apply for their certificate of work until the 26th, on which day they got it and recorded it. The requirement in section 24 as to annual work is evidently a matter of public policy and an essential feature of the Act; but the provision that the certificate of work shall be recorded is a minor matter which only concerns the holder of that document; hence the delay in recording it, which in this case was at most seventy-two hours, may be regarded as an irregularity, and one that is within the scope of section 28. The appellants should have the costs of appeal and of the action.

Judgment of IRVING, J.

IRVING, J.: Mr. *Cassidy's* contention is that section 28 should be read as if the words "issued within the year" were inserted immediately after the words "certificate of work" in the third line. If we so read it the section would not cover the irregularity of failing to record the certificate of work one hour after the expiration of the last day. That seems to me to put too narrow a construction on the section. Section 28 declares that no "irregularity happening previous to the date of the record of the last certificate shall effect the title to the mineral claim." Mr. *Cassidy's* contention, if it prevailed, would translate that expression "No irregularity, other than the failure or omission to record within the year the certificate, shall, etc." That seems to me to be quite different from the wide language used. "Nothing, without any exception, so long as it is only an irregularity shall, etc." seems the fair way of amplifying the expression "no irregularity."

When Parliament has adopted so wide an expression as "no irregularity," it would be wrong for the Court to pare it down to "no irregularity other than the failure to record the certificate of work within the year." A wide expression was used, and used without any limitation. Why should we curtail the language used by the Legislature?

Plain, every day words were used to signify a plain in-

tention to meet and stop an every day evil. Men were honestly doing work on a claim under the impression that they were advancing to a definite goal, viz.: the obtaining of a Crown grant to their claim; when of a sudden they found that although they had obtained one, two, or possibly more certificates of work, they were undone by reason of their failure to do something in the manner prescribed. By sub-section (d) the Legislature provided against irregularities in staking, and so stopped jumping before certificate of work had been obtained. By section 28 of 1896, the same body endeavoured to prevent a man losing his claim afterwards.

The irregularities must be irregularities relating to title. Let us see what the requirements of title are: (1) a free miner's license; (2) a proper location; (3) doing of work—the failure to do this could not be called an irregularity, although (4) the failure to do it all within the year might be so considered; the (5) recording of the work, and (6) that within the year.

Judgment of IRVING, J.

Under section 143 provision was made in case of a forfeiture arising from the omission to secure a free miner's license (1); sub-section (d) of section 16 cured defects in location (2); the failure to do the work (3) in my opinion is not an irregularity. All then that remains is (5) the recording of the work, and (6) within the year. As all the other irregularities of title have been specifically provided for, I see no reason why the section should have been passed, unless it was to include the case of non-recording.

The proviso at the end of the section, "except upon suit by the Attorney-General based upon fraud," strengthens me in the opinion I have formed. Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Company* (1897), A.C. 653, says that there may be many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words.

Appeal allowed.

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BEAUCHAMP v. MUIRHEAD

BEAUCHAMP v. MUIRHEAD.

Practice—Discovery—Order XXXI., Rule 12, Order XIX., Rule 6.

The Court has discretion to order defendant to make an affidavit of documents before delivery of defence for the purpose of enabling the plaintiff to give particulars of charges of fraud made in the statement of claim.

SUMMONS by plaintiff for defendant to furnish an affidavit of documents. The statement of claim alleged fraud in the execution of a certain mortgage and deed of conveyance, and claimed rectification of the mortgage and to have the conveyance set aside. The defendant gave notice that he required particulars of fraud. No statement of defence had been delivered. The plaintiff's affidavit shewed that he was unable to deliver particulars until he had inspected the documents in defendant's possession.

Statement.

Langley, for the application.

Mills, *contra*, objected that discovery should not be ordered before delivery of particulars or of statement of defence, and that in any event the particular documents mentioned in plaintiff's affidavit were privileged.

Argument.

MARTIN, J.: I think the plaintiff is entitled to the usual Order for Discovery. It is shewn satisfactorily to me that he is not in a position to furnish particulars unless he has discovery, and following the words of BOWEN, L.J., in *Millar* v. *Harper* (1888), 38 Ch. D. at 112, it appears to me that this is a case in which it is good practice and good sense that the defendant should give discovery before the plaintiff delivers particulars. See also *Sachs* v. *Speilman* (1887), 37. Ch. D. 295. As to the question of any documents being privileged from inspection, that is a point to be dealt with after the defendant has made his affidavit of documents and may be raised on a subsequent application.

Judgment.

Order accordingly.

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SCHOMBERG v. HOLDEN ET AL

Mineral Acts—Adverse claim—Affirmative evidence—Of what—B. C. Stat. 1898, Cap. 33, Sec. 11—Practice.

Section 11 of the Mineral Act Amendment Act, 1898, applies to all adverse proceedings, including those commenced before the Act.

By proving (1) his free miner's certificate; (2) prior location and due record; and (3) the overlapping of the claims in dispute, a prior locator who is plaintiff in adverse proceedings makes out a *prima facie* case.

ADVERSE action under the Mineral Act and Amendment Acts to establish plaintiff's title to the Black Prince mineral claim, the defendants having restaked the claim under the name of the Catardin and applied for a certificate of improvements. The action was tried at Nelson before MARTIN, J., on February 11th, 1899. Statement.

It was admitted that the plaintiff was a free miner, and that the Catardin claim which the plaintiff was attacking by these adverse proceedings occupied practically the same ground as the plaintiff's claim, the Black Prince.

Bowes and *Lennie*, for plaintiff.

W. A. Macdonald, Q. C., and *Grimmett*, for defendants.

Counsel for the plaintiff put in a certified copy of the record shewing priority of location and due record of the plaintiff's claim, and stated that, it being admitted by the defendants that the defendants' claim occupied the same ground as the plaintiff's, and that the plaintiff was a free miner, this would be the case. Argument.

Macdonald moved to dismiss the plaintiff's action on the ground that affirmative evidence of his title had not been established as required by section 11 of the Mineral Act Amendment Act, 1898.

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Bowes, in reply: The section relied on does not apply in this case because the action was commenced prior to the passing of the statute. The plaintiff has made out such a case that if no evidence is offered on the part of the defendants the plaintiff would be entitled to judgment. A combined reading of the judgments in *Waterhouse* v. *Liftchild**, decided by MCCOLL, J., on April 1st, 1897, (*The Grand Prize Case*) and *Fero* v. *Hall**, decided by DRAKE, J., on July 6th, 1898, (both unreported) support this view.

MARTIN, J.: As to the first point I am of the opinion that the section in question applies to all cases which come before the Court for trial.

As to the second point I think the plaintiff has made out such a case that he would be entitled to judgment if no further evidence were forthcoming. In *Waterhouse* v. *Liftchild*, the present learned Chief Justice laid it down that "ordinarily occupation may be found to consist of a valid location, and record under the Act." In *Fero* v. *Hall*, Mr. Justice DRAKE decided that where in cases of disputed claims both parties do the necessary assessment work and obtain a certificate of work, "the Court has to fall back upon prior location and record;" and section 27 of the Mineral Act provides that "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 the Act."

Judgment.

Applying the foregoing to the present case, it would seem that where the attacking party is the prior locator, what he would have to prove in an adverse action is: (1) His free miner's certificate. (2) Prior location and due record.

NOTE—*Waterhouse* v. *Liftchild* is reported at p. 424 *post*, and *Fero* v. *Hall* is reported at p. 421 *post*.

(3) The overlapping of the claims in dispute, wholly or partially. Here the first and third of these requirements are admitted, and the prior location and due record are proved in the usual way, and a *prima facie* case is thus established; therefore, it is for the defendants to displace the plaintiff from this position. Of course where the plaintiff is a subsequent locator, the position is reversed, and he must be prepared to establish his case in detail.

Motion overruled.

FERO v. HALL.

Mineral Act, 1896, Secs. 23, 34 and 50—Statute of Frauds—Verbal agreement—Whether enforceable.

The interest of a free miner in his mineral claim is an interest in land and an agreement not in writing respecting it cannot be enforced.

Where one person on behalf of another locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal.

ACTION for a declaration that defendant was a trustee for plaintiff of a one-half interest in the Great Eastern and Little Bennie mineral claims. Statement.

The trial took place at Nelson, before DRAKE, J., on 30th June, 1898. The facts appear in the judgment.

Galliher, for plaintiff.

Hamilton, for defendant.

6th July, 1898.

DRAKE, J.: The plaintiff and defendant are miners. Judgment.

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July 6.

FERO v. HALL

The plaintiff alleges an agreement under which the parties were to locate certain claims, known to the plaintiff, in their joint names as owners. The agreement is denied by the defendant, but the evidence of independent witnesses satisfies me that such a parol agreement did exist, and matters went so far that the defendant undertook to execute a transfer of one-half of each of the two mineral claims which had been staked out by them in company, to the plaintiff, but subsequently refused.

The claims staked are situated on Wild Horse Creek, near Ymir. The plaintiff's story is, that as he could neither read nor write, it was necessary to get some one to go with him to place the notices required by law on the posts, and he was willing to make over one-half of the claims to the person who accompanied him. He got the defendant to go with him, and they staked the Great Eastern and Little Bennie. It is not shewn that these two claims were those known to the plaintiff, they are alleged to be new discoveries. The defendant placed the notices on the posts in his own name, and he admits, as to the Great Eastern, that his name was used for and on behalf of the plaintiff. As regards the discovery and staking of the Bennie, there is very contradictory evidence; what, however, is clear, is that the defendant recorded this claim in his own name and has done assessment work on it.

Judgment.

The defendant relies on the Statute of Frauds and sections 50 and 28 of the Mineral Act. The interest of a miner in his claim is, by section 34, declared to be a chattel interest, equivalent to a lease for a year; in other words, it is a chattel real and is an interest in land; by section 28, which is a section very difficult of application, the record of the last certificate of work shall clear up all irregularities prior thereto, and it shall be assumed the title to such claim is perfect up to the date of such certificate, except for fraud. As in almost every case of disputed claims, both parties do the necessary assessment work

and obtain a certificate of work, the Court has to fall back, upon prior location and record; there may be no fraud in either contestant, yet both claims cannot stand; if both are assumed to be perfect, how are the rights to be ascertained? These are difficulties which render the application of this section of disputed claims uncertain, and in the present case, while it is admitted that both parties have done assessment work on both claims, it cannot be held that the certificate of work is conclusive. By section 50, no transfer of any interest in a mineral claim shall be enforceable unless the same shall be in writing, signed by the transferror and recorded. This section combined with the Statute of Frauds, section 4, precludes the enforcement of any agreements such as alleged here, and, therefore, as far as regards the Bennie claim, the plaintiff cannot enforce his alleged agreement. But as respects the Great Eastern, the case is different—the defendant acted as agent only for the plaintiff, and he cannot take advantage of his own wrong; he admits that he placed the notice on the posts in his own name for the plaintiff, as the plaintiff had not the number of his free miner's license with him. The subsequent record by the defendant of this claim in his own name was a fraud on the plaintiff, and the order will be that the defendant do transfer to the plaintiff the Great Eastern claim free from encumbrances; the plaintiff will have to repay the defendant the fees which were paid to the Recorder in respect thereof, and the defendant must pay the costs of the action.

Judgment.

Judgment accordingly.

McCOLL, J.

1897.

April 1.

WATER-HOUSE v. LIFTCHILD

WATERHOUSE v. LIFTCHILD.

Mineral claim—Occupation of—Defects in location of—Right of second person to relocate.

The defendant's mineral claim, Grand Prize, was recorded in June, 1894, and certificates of work were issued in respect of it in June, 1895, and in June, 1896.

The plaintiff in July, 1896, located the Buffalo Bill claim on the same ground, and attacked defendant's location on the ground that his posts were situate outside the limits of his claim.

Held, that defendant's ground, being actually occupied and actively worked, was not open to location.

ACTION for a declaration that plaintiff was the owner of the lands embraced within the limits of the mineral claim, Buffalo Bill, which had previously been located by defendant as the Grand Prize mineral claim.

Statement.

The trial took place at Rossland before McCOLL, J., on April 1st, 1897. The facts appear in the judgment.

A. H. MacNeill (*Armstrong* with him), for plaintiff.
Hamersley, for defendant.

McCOLL, J.: The Grand Prize mineral claim was recorded on 9th June, 1894, by one McDougall. A certificate of work was issued on 3rd June, 1895. The defendant on 27th May, 1896, purchased the claim for $4,700.00. Another certificate of work was issued on 1st June, 1896.

Judgment.

The plaintiff having ascertained these facts (except the amount of the purchase money) from Mr. Kirkup, the Mining Recorder, and from searching the records in the Mining Recorder's office, and while the defendant was in active occupation of, and was actively engaged in working the claim, as the plaintiff then himself saw, proceeded to locate the ground as another claim by the name of the Buffalo Bill fraction, on 24th July, 1896, and recorded it

on the next following day in his own name. In the affidavit required by sub-section (c) of section 16 of the Act (1896), the plaintiff, instead of stating his belief that the ground was unoccupied "by any other person as a mineral claim," states that in his belief it was not "lawfully" so occupied.

The plaintiff claims the right to make his location because it is alleged that the posts of the Grand Prize were situate outside the limits of that claim. At the time of the location of the Grand Prize the only claim located adjoining it was the Deer Park, which, however, was not then surveyed. I can place no reliance upon the testimony of the plaintiff or that of Bleeker, from the unsatisfactory way in which they gave their evidence; nor can I accept the evidence of George Ellis as satisfactory upon the question of distances, as it does not appear that he measured them. Mr. Kirk, a Land Surveyor, called by the plaintiff, had not seen either No. 1 or No. 2 post, but was able to speak as to their situation by referring to the field notes of the Grand Prize mineral claim, which were produced.

The way in which the Grand Prize claim was located in itself, shews the desire of the locator to avoid infringing upon the ground of the Deer Park claim, the exact boundaries of which he did not know, as it had not then been surveyed; and it is quite consistent with the exercise of reasonable care upon his part, that the No. 1 post, should, upon a survey, be found where it was. The record of the Grand Prize states it to be situate north of and adjoining the Deer Park claim.

The other posts were, upon the survey, found to be upon what were then waste lands of the Crown. Mr. Kirk himself says it is impossible for a prospector to locate a claim accurately, owing to the roughness of the ground, and admits that an error of 100 to 200 feet might well happen.

I am of opinion that the defects referred to were, in the

McColl, J.

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Water-house v. Liftchild

circumstances of this case, such as were cured by the certificate of work issued.

I think, however, that the ground comprised within the limits of the Grand Prize claim, being actually occupied, and being actively worked by the defendant under his title to it, at the time of the location of the Buffalo Bill fraction, was not open to location by the plaintiff, or any other person. The point is an important one, which, so far as I am aware has never before arisen, and I regret that I have not had the advantage of hearing argument upon it. Reference was not even made to it at the trial.

I think it clear that the circumstances of this case constitute an occupation within the meaning of the Act, even assuming the location to be defective, and the defect not to have been cured; though ordinarily occupation may be found to consist of a valid location, and record under the Act. In the latter case it is intelligible that, but for substantial compliance with the provisions of the Act, there can be no real occupation. But in the former case it is difficult to see, whatever may be the rights of the Crown, or of a lawful occupant for other than mining purposes, how another person can enter upon the ground for the purpose of acquiring a mineral claim. Such person cannot locate a claim upon the same ground without entry, and the previous actual occupation of the ground surely entitles the occupant to hold it except as against some one having a better title which such other person not having had at the time of entry, manifestly cannot get in these circumstances, without committing a trespass. I do not think the Act should be so construed as to permit of the acquisition of a claim in the way contended, for it is not consistent with any general principle of law. It is, I think, not in accordance with the policy of the Act. If permitted, it might and probably would, lead to violence, with results of the most serious character.

Judgment.

I think that the plaintiff's attempt, (which I cannot help

characterizing as a most impudent one), to deprive the defendant of a claim which I find was located with a *bona fide* attempt to comply with the law, merely because of alleged defects which could mislead no one, fails, and the action is dismissed with costs.

Action dismissed.

PENDER v. WAR EAGLE: *EX PARTE* JONES.

Court stenographer—Person undertaking to act as such—Estoppel—Whether bound to furnish copy of notes—Fees payable to.

A person who undertakes to act as Court stenographer cannot refuse to furnish parties to a suit with a transcript of his notes merely because his fees have not been paid by the Crown.

APPEAL from an order of DRAKE, J., dated 22nd February, 1899, refusing to compel one C. F. Jones, to deliver a transcript of his notes taken at the trial of the action. The action, which was one for damages against the War Eagle Consolidated Mining & Development Company, Limited, was tried at Rossland, in October, 1898, and judgment was entered against the plaintiff, who desired to appeal but was unable to obtain the extension of the shorthand notes of evidence taken at the trial by C. F. Jones, who acted as Court stenographer. On 13th September,

Statement.

FULL COURT
1899.
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RE
JONES

1898, Jones received the following letter from the Attorney-General's Department:

ATTORNEY-GENERAL'S OFFICE, VICTORIA, B.C.,
September 13th, 1898.

C. F. JONES, ESQ., Stenographer, Victoria, B.C.

SIR: An Assize will be held at Nelson on the 20th of September instant. You will kindly proceed there for the purpose of acting as Court stenographer. In case Mr. Justice IRVING takes the Assize, and afterwards goes to Kamloops or other places, you had better remain with him. This arrangement is made just for the present Assize, and your remuneration will be fixed after your return.

I have the honour to be, Sir, your obedient servant,
JOSEPH MARTIN, Attorney-General.

Statement.

He was never appointed as provided by sections 63-71 of the Supreme Court Act, R.S.B.C. 1897, Cap. 56.

Jones proceeded to Nelson and thence to Rossland, and acted as Court stenographer during the Assizes at both places, *Pender* v. *War Eagle* being one of the cases reported by him at the latter place. On his return to Victoria he presented to the Attorney-General's Department an account for his services as stenographer at $8.00 per day for the time he was absent from Victoria, and $10.00 for the first day, claiming that under an Order in Council of 13th May, 1891, those were the fees he was entitled to. The Attorney-General refused to vouch the account, and claimed that by his letter of 13th September he was to fix the fees. Jones thereupon refused to deliver up his notes of evidence, claiming a lien on them. The plaintiff was willing to pay the transcript fees for a copy of the evidence, and on being refused a copy applied to DRAKE, J., on 22nd February, for an order compelling Jones to deliver a transcript of his notes. The application was refused, and he then appealed from the order of DRAKE, J., to the Full Court, and the

appeal was argued 9th March, 1899, before WALKEM, IRVING and MARTIN, JJ.

Martin, A.-G., for appellant: The learned Judge in the Court below refused the application on the ground that Jones was never properly appointed and was therefore not an officer of the Court. Jones, by the fact of his having acted as Court stenographer, is now estopped from saying he did not act, and he has made himself liable for the consequences of his acts as if he had been properly appointed. See Taylor on Evidence, 9th Ed., par. 171 and 801; *Regina* v. *Rees* (1834), 6 Carr. & Payne 606. In refusing to transcribe his notes Jones is guilty of contempt of Court. Oswald, 70.

G. A. S. Potts, for Jones: The appellant to succeed must shew that Jones was an officer of the Court duly appointed, as provided by section 63 R.S.B.C. 1897, Cap. 56. The principle of estoppel does not apply when the Court's summary jurisdiction is sought to be exercised. As to the practice in England he cited *In re Hilleary and Taylor* (1887), 36 Ch. D. 262. Jones has a lien on his notes and is entitled to hold them until he has been paid; the remuneration he claims is fair and reasonable and in accordance with the scale fixed by Order in Council of 13th May, 1891.

Argument.

Martin, A.-G., in reply: There is no lien against the Crown.

Cur. adv. vult.

11th March, 1899.

The judgment of the Court allowing the appeal with costs was delivered by

WALKEM, J.: This is an appeal from an order made by Mr. Justice DRAKE on the 22nd of February last, dismissing the plaintiff's application to compel Mr. C. F. Jones to deliver

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a transcript of his notes taken in shorthand at the trial of this action, which took place in Rossland in October last. Mr. Justice DRAKE dismissed the application on the ground that there was no evidence to shew that Mr. Jones had been appointed a stenographer of the Court by Order in Council, as required by the Supreme Court Act. But, it is said on the appeal that although such may have been the fact, yet as Mr. Jones acted as official stenographer, he is responsible for what he did in that respect as far as the public is concerned. In section 171 of Taylor on Evidence, 9th Ed., which has been cited to us, the rule is broadly stated that the fact that a person has acted in an official capacity is presumptive evidence of his due appointment to his office, because it cannot be supposed that he would venture to intrude himself into a public situation which he was not authorized to fill. A great number of cases are cited in which this rule has been applied, some of them referring to high offices, such as those of Lords of the Treasury, Masters in Chancery, Deputy County Court Judges, Sheriffs and others. The assumption of the office is also an admission on his part of his having filled it under proper authority. Taylor on Evidence, 9th Ed., par. 801. In *Dickinson* v. *Coward* (1818), 1 B. & Ald. 677, in which the question as to whether certain persons were assignees or not of a bankrupt, Lord Ellenborough observed in respect of evidence shewing that such persons had been treated by the defendant as assignees, "I take it to be quite clear that any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that that relation exists." The rule thus laid down was adopted by Lord Lyndhurst in *Inglis* v. *Spence* (1834), 1 C. M. & R. 436. We have nothing to do with the dispute which has arisen between Mr. Jones and the Attorney-General's Department with respect to compensation; and it must be obvious that no suitor's right to a transcript of the notes, such as

Judgment.

that now asked for, can be prejudiced in consequence of such dispute. In sitting and acting in the Court at Rossland as official stenographer, Mr. Jones, in effect, held himself out to the suitors of that Court as having been duly appointed, and there is no reason to believe that the suitors thought otherwise; hence they must have relied upon him for transcripts of the notes taken by him in their several cases if they should need them.

The result of what has been said is that the appeal must be allowed, and following the usual rule, with costs.

Appeal allowed.

RYAN v. McQUILLAN.

Mineral Acts—Adverse proceedings—No satisfactory affirmative evidence—B.C. Stat. 1898, Cap. 33, Sec. 11—Practice.

Where both parties in adverse proceedings failed to establish title to the property in dispute the Judge so found, and judgment was entered accordingly, without costs to either party.

ACTION of adverse proceedings tried at Nelson, before MARTIN, J., on 8th February, 1899. The facts sufficiently appear in the judgment. Statement.

Christie, for plaintiff.

Abbott, for defendant.

MARTIN, J.: In this matter I cannot come to the conclusion that either of the parties has given satisfactory "affirmative evidence of title to the ground in controversy," as required by section 11 of the Mineral Act Amendment Act, 1898. Judgment.

MARTIN, J.
1899.
Feb. 8.
RYAN v. McQUILLAN
Judgment.

The question very largely depends on the location of a former claim, the Grizzly, and though the Court would expect to receive definite evidence on such an important point, yet, owing to the neglect of the plaintiff to have his ground even measured, not to say surveyed, and the defendant's being unable to procure the attendance of a certain witness, the Court is left to speculate, practically, on what should be clearly proved. This is a very undesirable situation, but fortunately the section above quoted now enables me to adopt a course which in every way meets such a state of affairs, and I consequently find that title has not been established by either party, and judgment will be entered accordingly, without costs, as provided by the statute.

Judgment accordingly.

IRVING, J.
1899.
March 3.
McGREGOR v. McGREGOR

McGREGOR v. McGREGOR.

Replevin action—Whether it is an action for tort—Can husband maintain it against his wife—Married Women's Property Act, R.S.B.C. 1897, Cap. 130, Sec. 13.

A replevin action is an action for a tort, and therefore a husband cannot maintain it against his wife.

Statement.

THIS was a replevin action tried at Vancouver on March 3rd, 1899, before IRVING, J. The facts appear in the judgment.

Argument.

Martin, A.-G., for plaintiff, cited *Mennie* v. *Blake* (1856),

6 El. & Bl. 843; Addison on Torts, 7th Ed., 515, and Pollock on Torts, 5th Ed., 325.

Gilmour, for defendant, cited *Butler* v. *Butler* (1885), 14 Q.B.D. 831; *Phillips* v. *Barnet* (1876), 1 Q.B.D. 436; Pollock, 5th Ed., 54; Addison, 7th Ed., 123; Wh. Lex. 634; *The Queen* v. *Lord Mayor of London* (1886), 16 Q.B.D. 772; and Crawley's Law of Husband and Wife, 271.

IRVING, J.: This is the trial of a replevin action brought by a husband against the wife. The facts are not in dispute. The furniture in question is admittedly the property of the husband, but the defence is that such an action cannot be brought by the husband against the wife.

By section 13 of the Married Women's Property Act, (R.S.B.C. 1897, Cap. 130), "Every woman . . . . . shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

Judgment.

This section was considered in *Butler* v. *Butler* (1885), 14 Q.B.D. 831, affirmed on appeal (1885), 16 Q.B.D. 374; *The Queen* v. *Lord Mayor of London* (1886), 16 Q.B.D. 772, and it means exactly what it says—no more and no less; see *In re Jupp* (1888), 39 Ch. D. at 152. A wife may now sue her husband for a wrong committed by him against her separate property, but with that exception, no husband or wife is entitled to sue the other for a tort. So far as wrongs are concerned, they are, notwithstanding the Married Women's Property Acts, one and the same person, and being one person one cannot sue the other; see *Phillips* v. *Barnet* (1876), 1 Q.B.D. at 439, except that the wife can sue in respect of her separate property. And this is the case even after a divorce. The wife is thus in a better position than the husband because the Married Women's

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Property Acts do not exempt the husband from being sued jointly with her for wrongs committed by her; *Seroka* v. *Kattenburg* (1886), 17 Q.B.D. 177.

The question is then, is an action of replevin an action for tort? An action of replevin may be brought (Cap. 165 R.S.B.C.), (1) where goods have been wrongfully distrained, or (2) where goods have been otherwise, *i.e.*, otherwise than by distress, wrongfully taken or detained. The word "wrongfully" is applicable to both cases. The word "wrongfully" is a word which has an accurate meaning known to the law. It imports the infringement of some right, and any invasion of the civil rights of another is in itself a legal wrong, and the appropriate action for the violation of legal right unconnected with contract is an action for tort. In *Gibbs* v. *Cruikshank* (1873), L.R. 8 C.P. 454, where the early history of a replevin action in England is traced, Bovill, C.J., says at page 459: "The nature of the complaint in the action was for a *tortious* taking of the goods." Our replevin action, which is wider than the English, gives the right to replevy to the party who could maintain trespass or trover. It is given, as it were, supplementary to, or in aid of, the remedy which those actions afford; but as all three actions, trespass, trover and replevin are classed by Dicey on Parties, p. 25, as actions of tort, I think the action under our statute is for the tortious taking or tortious detention of goods. As to the meaning of an action "founded on tort," see *Bryant* v. *Herbert* (1878), 3 C.P.D. 389.

Judgment.

Another point has occurred to me. How can it be said, having regard to the common law fiction that husband and wife are one and the same person—that the goods were unjustly detained? And see *Smalley* v. *Gallagher* (1876), 26 U.C.C.P. 531, as to what constitutes detention.

I have not lost sight of the Attorney-General's argument that the action is to try a right and not to recover damages. The answer to that is, that no matter what the issue is, no

matter that it is the return of the goods and not damages that is sought, the action arises out of an alleged tortious act.

In the course of the argument the Attorney-General pointed out how monstrous it was that the defendant should, after having admitted that the goods were her husband's, be allowed to recover them or have delivered up to her for suit the bond given by her husband. It does seem strange, but on reading section 33 of the Married Women's Property Act, I cannot arrive at any other conclusion than that this strange result has been brought about by the plaintiff's adopting a wrong method to recover his property.

Under section 33 (acted on in the case of *Phillips* v. *Phillips* (1888), 13 P.D. 220), the plaintiff might have secured his property without instituting his replevin action. Its insertion in the statute removes the anomalous state of things which would exist if a husband was not able to recover from his wife property to which she has no claim.

Judgment.

The action must be dismissed, and I see no reason why the costs should not follow the event. The terms of the judgment can be settled in Chambers.

Action dismissed with costs.

IRVING, J.
1899.
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FULL COURT
March 9.

SHORT v. FEDERATION BRAND SALMON CANNING COMPANY.

Patent—Infringement of—Venue—Practice—Company—Head office and place of business—R. S. Canada, 1886, Cap. 61, Sec. 30.

In an action against a Company for infringement of a patent the venue should be laid at the place of the Registry which is nearest the head office of the Company.

SHORT v. FEDERATION BRAND SALMON CANNING CO

Statement.

APPEAL by plaintiff from an order of IRVING, J., made 23rd February, 1899, changing the place of trial of the action, which was one for the infringement of a patent, from Vancouver to Victoria. The head office of the Company is at Victoria. It had canneries at Naas River, Lowe Inlet and Steveston, respectively. The plaintiff complained that an infringement of his patent in respect of soldering cans took place at Steveston on the Fraser River.

The defendant Company applied by summons that the venue be changed from Vancouver to Victoria, and the summons was heard in Vancouver on 21st February by IRVING, J.

J. H. Senkler, for the summons.

E. J. Deacon, contra.

Judgment of IRVING, J.

IRVING, J.: It is a question of fact in each case. Having regard to the fact that the head office and brain of the trading is at Victoria, and that a cannery is closed for seven or eight months in the year, I am of opinion that Victoria is the proper place of trial.

The plaintiff appealed. The ground of the appeal, which was argued at Victoria on 9th March, 1899, before WALKEM,

DRAKE and MARTIN, JJ., was that the provisions of the Patent Act, R.S.C. 1886, Cap. 61, relating to the issue of the writ and the place of trial of actions thereunder was satisfied by laying the venue at Vancouver.

Martin, A.-G., for appellant: He referred to *Goldsmith* v. *Walton* (1881), 9 P.R. 10, and *Aitcheson* v. *Mann* (1882), 9 P.R. 253 and 473. The question is, where is the place of business of the Company? The material before the Court shews that its head office is in Victoria, and that its place of business is at Steveston.

[MARTIN, J., referred to *Tytler* v. *Canadian Pacific Railway Company* (1898), 29 Ont. 654, as to residence and place of business.]

Argument.

A Company may carry on business at more than one place; see *Brown* v. *London and North Western Railway Company* (1863), 4 B. & S. at p. 334. The meaning of the statute is to have the trial near where the infringement is going on. The question is not as to head office, but it is as to place of business, and it is optional for plaintiff to select place of trial. See *Campbell* v. *Doherty* (1898), 34 C.L.J. 786.

Hall, for respondent, referred to *Goldsmith* v. *Walton* and *Aitcheson* v. *Mann*, *supra*. The writ is addressed to the Company as carrying on business in Victoria, and the statement of claim alleges Victoria is Company's place of business. He cited *Canada Atlantic Railway Co.* v. *Stanton et al* (1888), 4 Montreal, L.R. (S.C.) 160.

Judgment of WALKEM, J.

WALKEM, J.: The place of business of the Company is evidently at Victoria. It is admitted that the Company has canneries at Lowe Inlet, Naas River and Steveston. These places are mere stations selected by the managers of the business in Victoria in consequence of their proximity to good fishing localities. The fish are there caught, cleaned and canned; but the pecuniary arrangements connected with the work and also with the sale or export of the fish

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are necessarily made by the managers of the business here. "Place of business" is a mercantile phrase, and as such must be construed in its mercantile or popular sense. The appeal, in my opinion, should be dismissed with costs.

DRAKE, J.: I concur. The place of business meant is the place of business which every Company is bound to have under the Companies Act; to hold otherwise would in many cases where the Companies' operations are carried on in remote parts of the Province, operate unjustly, and the very object of the statute insisting on a registered office of the Company would be frustrated.

Judgment of MARTIN, J.

MARTIN, J.: Applying the expressions in *Tytler* v. *Canadian Pacific Railway Company* (1898), 29 Ont. 654, as to a Company's carrying on business, to the present case, I feel in doubt about the matter, but as my learned brothers are satisfied on the point, and judgment is being given orally, the appeal had better be disposed of without delay.

Appeal dismissed with costs.

NOTE.—See *ante* p. 386 for provisions of section 30 of the Patent Act.

HOLDEN v. BRIGHT PROSPECTS GOLD MINING AND DEVELOPMENT CO.

FORIN, CO.J.
1898.
Dec. 23.
FULL COURT
1899.
March 8.

HOLDEN
v.
BRIGHT
PROSPECTS

Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132—Affidavit of lien—Sworn before a commissioner—Whether good—Whether a miner has a lien for work done on a mineral claim.

Under the Mechanics' Lien Act a free miner may enforce a mechanic's lien against a mineral claim.

A statement in the affidavit of lien that the work was finished or discontinued on or about a certain date is sufficient.

APPEAL from the judgment of FORIN, Co. J., for the County of Kootenay, sustaining certain mechanics' liens filed by the plaintiff and others against the Northern Light mineral claim, owned by the defendant Company. Separate actions were brought by five different plaintiffs to enforce their respective liens, and they were all consolidated and tried together as one action. Statement.

The material parts of the affidavit of lien of the plaintiff Holden were as follows:

"That the particulars of the work done are as follows:

"Thirty-nine days' work done by me on the Northern Light mineral claim between the 23rd day of September, 1898, and the 31st day of October, 1898, as foreman in the running of a tunnel on said mineral claim.

"That the work was finished or discontinued on or about the 31st day of October, 1898."

The affidavits of the other plaintiffs were similar to that of Holden, except that they contained the words *as a miner* instead of *as foreman*. The affidavits were sworn before F. S. Andrews, a commissioner for taking affidavits within British Columbia.

FULL COURT
At Vancouver.

1899.

March 20.

KIRK
v.
KIRKLAND

KIRK v. KIRKLAND, *ET AL.*

Pleading statute—Practice—Rules 169 and 174—Two statutes entitled the same.

Where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section.

APPEAL from an order of IRVING, J., dated 24th January, 1899, dismissing plaintiff's summons for particulars

Statement.

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

Paragraph 2 of the statement of defence was as follows:

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

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

The plaintiff applied by summons for further and better particulars of the Assessment Act mentioned in the said paragraph. The application was dismissed and the plaintiff appealed to the Full Court, and the appeal was argued in Vancouver on 20th March, 1899, before McColl, C.J., Drake and Martin, JJ.

Wilson, Q.C., for appellant: The defendant pleads that the property in question was conveyed to her by virtue of a statute, and in such a case she has to rely on a statute. Under Rules 169 and 174 issues of law must be distinctly raised. Both C.S.B.C. 1888, Cap. 111, and R.S.B.C. 1897, Cap. 179, are entitled the "Assessment Act," and the defendant should state on which one she relies.

Argument.

J. A. Russell, for respondent: We do not rely and cannot rely on any particular section of the Act, but on the effect of the whole Act. It is not necessary to plead any particular section. See *James* v. *Smith* (1891), 1 Ch. 384. No affidavit has been filed that the plaintiff will be embarrassed, and the plaintiff has not laid any foundation for her application by shewing that she is placed at a disadvantage, and therefore particulars should not be ordered. See *Sachs* v. *Speilman* (1887), 37 Ch. D. at pp. 304 and 305, and *Queen Victoria N.F.P. Commissioners* v. *Howard et al* (1889), 13 P.R. 14.

Judgment.

Per Curiam: The defendant should specify the particular Act on which she relies, but not the particular sections.

Appeal allowed with costs.

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March 13.

FALCONER v. LANGLEY.

Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Secs. 13, 19, 20—Alderman for City of Victoria—Property qualification of—Disqualification of—Penalty.

A person to be qualified for Alderman for Victoria City must be the owner in his own right of property of the clear unincumbered value of at least $500.00 during the whole period of the six months preceding nomination.

The period prescribed by section 86 of the Municipal Elections Act for taking proceedings by way of election petition or *quo warranto* does not apply to a *qui tam* action brought under section 20 of the Municipal Clauses Act.

Statement. APPEAL by defendant from judgment of DRAKE, J., pronounced 24th February, 1899. The action was brought against the defendant, who was elected an Alderman of the City of Victoria, for the recovery of $50.00, being the penalty provided under section 20 of the Municipal Clauses Act, R.S.B.C. 1897, for sitting and voting as an Alderman without being duly qualified.

The trial took place at Victoria before DRAKE, J., on 23rd February, 1899. The facts appear in the judgment, except that the defendant was a joint-tenant and not a tenant in common of the property on which he based his qualification.

Walls, for plaintiff.

Peters, Q.C., for defendant.

Judgment of DRAKE, J.

24th February, 1899.

DRAKE, J.: The plaintiff in this action sues for penalties

alleged to be incurred by the defendant for sitting and voting as an Alderman of the City of Victoria without being duly qualified.

The facts admitted are that the defendant was nominated for Alderman for the South Ward of the City on the 9th of January, and was declared by the Returning Officer duly elected on the 12th of January; that the defendant was a registered owner as tenant in common in equal shares of property in the City of the assessed value of $1,800.00, and had been so registered for a period of six months prior to the nomination day; that a mortgage was registered against the said property for $1,000.00, which was paid off on the 3rd of January, 1899, but the mortgage was not cancelled in the Land Registry Office until the 13th of January.

The first point which is to be considered is what meaning is to be attached to section 13, sub-section (b), defining the qualifications of an Alderman. He is to be of full age, and not disqualified under any law. These statutory disqualifications are contained in section 19, and it is admitted that the defendant does not come within any of the disqualifications there mentioned. Then he is to have been registered for six months next preceding the day of nomination as the owner of land, or real property, in the Land Registry Office, of the value, as appears by the Municipal Assessment Roll, of $500.00 over and above any registered incumbrance or charge.

Mr. *Walls* contends that if during the period of six months preceding the nomination day any incumbrance is registered against the property, reducing the value to a sum less than $500.00, the candidate is not duly qualified. On the other hand, Mr. *Peters* argues that the clause is to be read as relating to the registration of ownership for six months, that as long as no incumbrance is existing on the nomination day there is no disqualification.

I think the true meaning of the section is that the candi-

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date has to shew a clear unincumbered value of $500.00 for the whole period of six months. Mr. *Peters* urged that he could shew that the incumbrance was in fact an incumbrance effected by the co-owner, and the money used for her benefit only, but this contention cannot override the mortgage, which was a mortgage of the whole lot granted by both the owners to secure the sum of $1,000.00 and interest. It matters not what became of the money, or by whom it was borrowed. The framers of the statute appear to me to have had this object in view, that an Alderman should by possession of property (here of a very trifling amount) clearly shew that he was not an insolvent, but had such an interest in the Municipality as would tend to a careful administration of Municipal duties.

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The next point taken is that section 20, which imposes a penalty of $50.00 for each time a Mayor or Alderman who is disqualified sits and votes, does not, according to the true meaning of that section, impose a penalty in the present instance, as the person has to be declared to be disqualified before the penalty can attach. The short answer is that the statute declares the incapacity, and when that exists the penalty attaches if the improperly elected candidate sits and votes. It is admitted that the election has not been questioned within the period of thirty days mentioned in section 86 of Cap. 68, for the purpose of declaring the seat vacant. That section enables any voter to present a petition praying that an election may be avoided on the grounds therein mentioned, amongst others, not possessing the requisite property qualification, or being under some disqualification. The petition had to be filed within thirty days from election, or from the date when such disqualification arose, and no writ of *quo warranto* shall issue after the expiration of thirty days from the declaration of the Returning Officer. This indicates that the proceeding by *quo warranto* is only applicable to the case of an invalid election, and not to the case where the disqualification arose

subsequently. But it appears to me that proceedings under this section are not the only mode of avoiding an election. Section 20 of Cap. 144 points out an additional mode. The two sections, contained as they are in different Acts, can be read together, and do not conflict.

Section 20 is rather obscure, as it does not define by whom the disqualification is to be ascertained; it says, "any person who is disqualified by the preceding section," the defendant is not one of those persons, "or who shall be declared incapable of being elected," I think that means declared by the statute to be ineligible by not possessing the necessary property qualification or so declared by some judgment of a Court of competent jurisdiction, "his election and return shall be null and void, and if he sits and votes he shall incur a penalty of $50.00 for each time he so sits and votes." The statute avoids the election, not the Court. The Court deals with the penalty. It is to be noted that if the proceedings are taken under section 86 of Cap. 68, they are to be taken within thirty days; but if the proceedings are taken under section 20 of Cap. 144, there is no limit to the time mentioned in that Act; the proceedings would therefore be governed by the 3 and 4 William IV., Cap. 42.

Judgment of DRAKE, J.

I therefore give judgment for the plaintiff for the sum of $50.00 and costs.

From this judgment the defendant appealed to the Full Court on the grounds (1) that the learned Judge erred in holding that the defendant was disqualified by statute: (2) that the defendant, not having been declared to be disqualified prior to this action and within thirty days from the date of his election, his qualification cannot now be inquired into in this action; (3) that the statute does not impose any penalty; (4) that the Court has no jurisdiction to determine the question of qualification other than by petition or *quo warranto*.

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The appeal was argued at Victoria before WALKEM, IRVING and MARTIN, JJ., on 10th March, 1899.

Argument.

Peters, Q.C., for appellant: Under sub-section (b) of section 13 of the Municipal Clauses Act, the ownership of land of the value of $500.00 for six months is absolutely necessary, yet it is not necessary that during the whole period of the six months it should be unincumbered. Section 19 of the Act refers to personal disqualifications, and under section 20, an action for a penalty can only be maintained for a personal disqualification such as is contemplated in section 19. Compare C.S.B.C. 1888, Cap. 88, Sec. 25. Petitions against the return of an Alderman and *quo warranto* proceedings must be instituted within thirty days after the election, and "shall be declared" in section 20 of Cap. 144, means who shall be declared by election petition or on *quo warranto* proceedings incapable, etc. See R.S.B.C. 1897, Cap. 68, Sec. 86. An action such as this cannot be maintained except by *quo warranto* unless the penalty is clearly defined. See Dillon's Municipal Corporations, 4th Ed., Sec. 892. Compare R.S.B.C. 1897, Cap. 47, Secs. 28, 29 and 31. The defendant and his mother are joint-tenants of the property, and each has the whole and every part.

Walls, for respondent: Under sub-section (b) of section 13, to be qualified for Alderman the person must be the sole owner—ownership with another is not sufficient.

Cur. adv. vult.

13th March, 1899.

The judgment of the Court was delivered by

Judgment of WALKEM, J.

WALKEM, J.: This is an appeal from a judgment of Mr. Justice DRAKE, delivered on the 24th of February last. The facts of the case are stated in the judgment, and are correct with this exception, that the co-ownership in the

real estate referred to in the judgment turns out to be a joint-tenancy, and not a tenancy in common. This, however is immaterial. The question to be decided is what construction is to be placed on section 13, sub-section (b), and section 20 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144. The meaning of section 13 (b) is that no person shall be qualified for nomination or election as an Alderman unless he has been the registered owner for the six months next preceding the day of nomination of unincumbered real estate of the value of five hundred dollars, or more. There are other qualifications mentioned in the section, with which we are not concerned. In respect to the one before us, we consider that the real estate qualification meant by the section unquestionably is, for instance, in the case of the defendant, an ownership in his own right of unincumbered land of the value stated. According to the facts of the case he was nominated on the 9th of January, and elected on the 12th. He and his mother had been registered co-owners, for a period of six months preceding his election, of land within the City limits of an assessed value of $1,800.00. A mortgage, however, had been registered against the property for $1,000.00 prior to his election. It was paid off on the 3rd of January, but not cancelled in the Land Registry Office until the 13th. It was, therefore, a registered incumbrance on the property at the time that he was declared to be elected. The mortgage, of course, reduced the unincumbered value of the property to $800.00, in which his interest was only that of a co-owner; and it is impossible to say that that interest was worth $500.00.

With respect to section 20, under which the penalties have been imposed, we cannot take the view of it which was taken on behalf of the appellant. The section is as follows:

"If any person who is disqualified for the reasons mentioned in the preceding section, or who shall be declared incapable of being elected a member of the Municipal

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Council, is nevertheless elected and returned as a member, his election and return shall be null and void;

"And if any person acts, sits, or votes as a Mayor, Reeve, Alderman, or Councillor, who is disqualified, or who after his election becomes so disqualified, he shall incur a penalty of fifty dollars for each time he shall so act, sit, or vote: and the party so disqualified shall, in the discretion of the Court, be liable to pay the costs of any suit or action brought for the recovery of the same in any of Her Majesty's Courts in the Province having competent jurisdiction."

The section might well have been divided into two separate sections, as I have above divided it. The first part of it refers to disqualifications under section 19, and any disqualifications that are declared to be such. With these we have nothing to do. The second part refers to a Mayor, Reeve, or Alderman who is disqualified at or after his election in any way under the Act; and this case comes within it, for the defendant, as already stated, has not the qualification required by section 13 (b). The appeal must therefore be dismissed with costs.

Appeal dismissed.

HANEY v. DUNLOP.

WALKEM, J.

1899.

April 5.

HANEY v. DUNLOP

Adverse action—Writ of summons—Renewal of—Mineral Act, Sec. 37.

The plaintiff in an adverse action issued a writ in August, 1897, and not having served it before the end of the year, obtained upon an *ex parte* application an order for renewal.

Held, on motion to set aside the order for renewal that the plaintiff had not prosecuted his action with reasonable diligence as required by section 37 of the Mineral Act, and that the order must be set aside.

MOTION to set aside an order of 3rd August, 1898, for the renewal of the writ of summons in the action. The plaintiff's claim was on behalf of the Legal Tender mineral claim to adverse the defendant's application for a certificate of improvements for the Pack Train mineral claim. The renewed writ was not served until 19th January, 1899, and at that time the defendant had made application for his certificate of improvements and Crown grant to the Pack Train mineral claim, and his application was under consideration by the Government. Statement.

The motion was argued before WALKEM, J., on 29th March, 1899. The remaining facts appear in the judgment.

Duff, for the motion.

A. E. McPhillips, contra.

5th April, 1899.

WALKEM, J.: This is an adverse action, under the Mineral Act. The plaintiff took out his writ on the 5th of August, 1897. On the 2nd of August, 1898, he applied successfully to have it renewed, and the renewal was issued as of that date. The application for renewal was, as usual, made *ex* Judgment.

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parte upon affidavit. The defendant now moves on notice that the order for renewal, and all subsequent proceedings taken by the plaintiff be set aside on the following, among other grounds, namely: That no *bona fide* effort was made on behalf of the plaintiff to serve the original writ, and that he was therefore not entitled to have the writ renewed; and that he was guilty of laches in not serving it, and in not taking steps to prosecute the action as required by section 37 of the Mineral Act.

I allowed the renewal, as a renewal is seldom refused—any opposition to it being a matter for consideration by the defendant when served with the writ. There is no evidence which satisfactorily explains the non-service of the original writ. The only explanation offered is that which appears in the affidavit of the plaintiff's solicitor, Mr. *Elliot*, and that explanation is that he thought that as Dunlop had not complied with the terms of a certain order made in June, 1896, in an action in which he, Dunlop, was plaintiff, and Haney and Enslow were defendants, the question in the present action was disposed of by that order, as the order dealt with the same mineral ground. Nevertheless, he came, so he says, to the conclusion in July, 1898—that is to say, nearly a year after he had taken out his writ—that it would be better to serve it. He does not clearly shew why he came to that conclusion, nor can I see why he arrived at it. The action he refers to and the present action are not between the same parties, inasmuch as Enslow is no party to this action. Moreover, it is well-known that under the system of adverse proceedings a plaintiff who may succeed in preventing the issue of a Crown grant to his opponent, may, in turn, be unsuccessful in a contest with claimants for the same ground, owing to their title being superior to his. Again, an unsuccessful defendant may subsequently be a successful plaintiff against the same adversary. I need not instance cases. Mr. *Elliot's* explanation fails to account for the delay that

Judgment.

occurred. If this action had been an ordinary one, the plaintiff's right to a renewal could not have been questioned; but by section 37, above referred to, actions, like the present one, must be commenced within a certain time, and prosecuted "with reasonable diligence to final judgment." This would appear to be imperative, for the Legislature immediately afterwards says that "failure to so commence or so prosecute shall be deemed to be a waiver of the plaintiff's claim."

Some affidavits have been filed explaining the delay which occurred in the service of the renewal writ; but they have, obviously, nothing to do with the question before me. It appears to me that I have no alternative but to allow the defendant's motion. Were I to do otherwise, I should be overriding the above provision of the Legislature, which is evidently one of public policy, as its aim is to secure, as far as possible, a speedy adjustment of mining disputes, and thus promote the development of the mineral interests of the country. It assuredly would be a most mischievous thing to hold that a plaintiff might, in the face of this provision, take out a writ, put it in his pocket, keep it there for nearly twelve months, and then, as in this case, make a sort of spasmodic effort to serve it at the last moment.

Judgment.

It is also to be observed that the Legislature, when passing section 37, must be taken to have known the existing Rules of Court, as they are statutory rules, with respect to the commencement and prosecution of ordinary actions, and that the effect of that section would, in actions like the present one, be to abridge the time given by the rules for the service of writs in ordinary actions. The motion must be allowed with costs.

Motion allowed with costs.

McCOLL C.J.

1899.

March 1.

CHASE v. SING.

CHASE v. SING.

Prohibition—Small Debts Act, Sec. 15—Magistrate's decision not given in open Court—Waiver of right to.

Section 15 of the Small Debts Act, which provides that the decision of the Magistrate must be given in open Court, may be waived either expressly or by the conduct of a suitor, and prohibition in such case will be refused.

SUMMONS by defendant for prohibition to the Magistrate of the Small Debts Court at New Westminster, on the grounds that no day was fixed for the giving of the decision which was reserved, and that it was not given in open Court. The summons was heard by McCOLL, C.J., on 23rd February, 1899, at New Westminster.

Statement.

Jenns, for the summons.

1st March, 1899.

McCOLL, C.J.: The only affidavit used was one by Mr. *Jenns*. The material facts appear to be that the trial was on 20th January, 1899, that when the decision was reserved without any time being mentioned for its delivery, the Magistrate's attention was not called to the enactment, the non-observance of which is now complained of, nor was any objection made; that on 31st January, the Magistrate informed Mr. *Jenns*, who had acted for the defendant at the trial, that after consulting "with certain carpenters not witnesses in the case, and in consequence of what they said," he had determined to decide against the defendant, and that on 2nd February, Mr. *Jenns* received from the Magistrate a copy of his judgment given and purporting to

Judgment.

have been given on the same day. On my observing upon the wording of the affidavit (paragraph 5) that neither Mr. *Jenns* nor his client had consented "to said adjournment," counsel admitted that no objection had been taken, either at the time of the adjournment, or when the Magistrate told what his decision would be, or at any other time before the issue of this summons.

Reliance was placed upon the case of *Tipling* v. *Cole* (1891), 21 Ont. 276, but careful consideration of it and of the subsequent cases of *Bank of Ottawa* v. *Wade* (1892), at p. 486 of the same volume, and *In re Forbes* v. *Michigan Central Railway Company* (1893), 20 A.R. 584, and the authorities there cited, will, I think, shew clearly that effect ought not to be given to the objections in the particular circumstances of the present case. To use the language of Hagarty, C.J.O., in the last-named case, compliance with the enactment may become immaterial by "waiver or consent"—"either by words or conduct."

Judgment.

English authorities as to waiver by conduct are discussed by Richards, C.J., in giving the judgment of the Court *In re Burrowes* (1868), 18 U.C.C.P. 500, and are strong against the present application.

What are the facts? An illiterate plaintiff appearing for himself to enforce a claim made in a petty Court presided over by a Magistrate not a lawyer, finds his claim contested by the defendant represented by counsel, having the confidence of the Court. The Magistrate, wishing time to consider his decision, says he will give it as soon as he can. Nothing is said by counsel. The Court adjourns. So soon as the Magistrate makes up his mind how to decide, he informs the counsel for the party against whom the decision will be, still the counsel says nothing, at least in the way of objecting. Two days afterwards the decision is rendered, and on the same day the Magistrate gives the counsel a copy of it.

Justice, I think, requires that a party who has lain by to

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take the chance of a favourable decision should not be heard when it goes against him, to complain of what he has led the Magistrate by his conduct to believe was consented to, the party not having been prejudiced in any way. Counsel having been informed of the nature of the intended decision two days before it was given, and having received a copy of it on the day it was given, how was the defendant prejudiced? It was rather for the convenience of counsel, if also of the Magistrate, that attendance to hear judgment was dispensed with.

The cases in which prohibition has been granted proceed upon the prejudice done to the party by his being left in ignorance of the decision until the time for appeal had gone by. If, as I think, the question to be determined is, whether in the particular circumstances of the present case the conduct of the Magistrate throughout the proceedings complained of was induced by the conduct of the defendant, he not having been prejudiced, and that the question is one of fact, the case seems to me to present no difficulty.

Judgment.

If it were merely that the adjournment had been made as in this case, but the Magistrate had not communicated his decision as he did, I would not have been prepared to hold that the defendant could be deprived merely by what occurred up to that time of his right of appeal, because I think it must be fairly understood in such a case that he is not so prejudiced. The whole conduct of the Magistrate and of the party must be regarded. The effect of conduct such as that of the party here is more marked, inasmuch as the Magistrate was not a lawyer. Even in the highest Courts a party is bound to object in such a way as will leave no doubt that he is objecting as regards the admission of evidence, misdirection and other things much more serious than a departure from the requirements of the particular enactment here under consideration when made in the harmless way in which it happened.

That the decision was not given in Court is a mere sug-

gestion. If it had been so given, the defendant would in the circumstances have had a right to complain, for how then could he have known of it in time to appeal, no day having been fixed for its delivery, unless, indeed, it was also communicated to him, and as this was done, what difference could it possibly make to him whether the formal entry of the judgment was in open Court or not? If the course adopted by the Magistrate was in other respects such as not now to be open to objection, neither can it be in this. Counsel expressly disclaimed any imputation of unfairness against the Magistrate, who probably not knowing of the statement as to his having been influenced by the statements of persons not witnesses, has made no explanation.

I think that unless the parties are willing to have a new trial before the Magistrate, I ought to extend the time for appeal if I have power under the fourth section.

If prohibition had gone, the plaintiff might, of course, have sued again, and although I think the defendant, if dissatisfied, was wrong in not moving against the judgment on the ground last referred to, which cannot be considered upon the question of prohibition, yet I am unwilling to deprive him of an opportunity to meet the statements which are alleged to have weighed against him.

Judgment.

Order accordingly.

McCOLL, C.J.

1899.

March 10.

COQUITLAM v. HOY

COQUITLAM v. HOY.

Taxes—Municipality assessment roll—Person on roll not owner of property—Liability of—Municipal Clauses Act, Secs. 134 and 155.

The mere fact that a person is named in the assessment roll of a Municipality as the owner of certain real estate does not make him personally liable for the amount of the assessment.

Sections 134 and 155 of the Municipal Clauses Act considered.

Quære, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed.

Statement. ACTION by a Municipality for arrears of taxes tried at New Westminster, before McCOLL, C.J., on 28th January, 1899. The facts appear in the judgment.

Dockrill, for plaintiff.

Reid, for defendant.

10th March, 1899.

McCOLL, C.J.: The plaintiff, a Municipality, seeks payment of arrears of taxes for which the defendant is claimed to be liable under R.S.B.C. 1897, Cap. 144, Secs. 134 and 155.

Judgment. It is admitted that the defendant's wife was the owner of the land assessed during all the period of assessment, and that he himself never owned, or had any interest in, any part of the property.

Section 134 provides that the roll shall "be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error, or misstatement in the notice required, or the omission to deliver or transmit such notice; and the roll

shall, for all purposes, be taken and held to be the assessment roll of the Municipality," etc.

As was pointed out by the Chief Justice of Canada in *London* v. *Watt* (1893), 22 S.C.R. at p. 303, where taxes are imposed in respect of real estate, the property itself is the subject of assessment, not the person.

The assessment of the land upon which the taxes now in question have been imposed is valid as against the owner in the circumstances of this case, only by force of the express provisions of section 134; *Nicholls* v. *Cumming* (1877), 1 S.C.R. 395. And it does not, in my opinion, necessarily follow that the person, merely because named in the roll as owner, is liable personally to pay the amount of the assessment. The assessment itself is made valid and binding upon "all persons concerned." That the roll is to be "taken to be the assessment roll of the Municipality," "for all purposes," cannot, I think, affect the question of the defendant's liability when it is considered that it is not he who is assessed, but the property, and that the personal liability to pay taxes as a debt depends upon another enactment. Section 154 gives the right of recovery of taxes by action to the Municipality against the person by whom they are "payable," and makes a certified copy of so much of the roll as relates to such taxes *prima facie* evidence of the debt; it is not as if the Act had in terms made the roll itself conclusive evidence of the debt, subject to any question of payment subsequently, and the copy *prima facie* evidence of the contents of the material part of the roll.

Judgment.

What I am asked to do is to read into the section, after the word "payable" the words "as appears by the assessment roll" or some equivalent, for the purpose of creating the relationship of debtor and creditor between persons having in truth no such relationship. The position of the defendant would have been very different from what it is if he had once been properly placed upon the assessment roll, and, having parted with the property, had omitted to

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have his name removed ; or if, having an assessable interest at the time of the assessment, the nature of his interest had merely been misstated in the roll. A person so situated cannot perhaps well complain of consequences to which he himself has contributed by his neglect.

But to permit to be fastened upon a mere stranger to land, of even the existence of which he may have been ignorant, a personal unlimited liability with respect to it, for no other reason than that he has been fraudulently or carelessly placed upon the roll by an act of which he may have had no knowledge or means of knowledge until too late—by invoking against him the provision that want of notice is immaterial—would require very plain language indeed.

Judgment.

Action dismissed with costs.

WALT v. BARBER.

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1899.

April 10.

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Arrest—Ca. re—Affidavit—Statement of cause of action—Particulars of contained in exhibit to affidavit—Whether sufficient—Practice—R.S.B.C. 1897, Cap. 10, Sec. 7—Costs.

The plaintiff's cause of action should appear in the affidavit leading to an order for a writ of *ca. re.* and a statement in the affidavit that the defendant is indebted to plaintiff in a sum as appears in an exhibit to the affidavit is insufficient.

Proceedings to discharge from custody a person arrested under a writ of *capias* should be by summons, and where objections are taken to the proceedings on the ground of irregularity, the specific irregularities should be set out.

Statement.

MOTION by defendant for an order that the order of WALKEM, J., dated the 4th day of April, 1899, be rescinded and discharged, and that the writ of *capias ad respondendum* of the same date and all other proceedings had by the plaintiff herein be set aside, and that the defendant be discharged out of custody. One of the grounds on which the motion was made was that the affidavits on which the said order was made were not sufficient to hold the defendant to bail.

The material part of plaintiff's affidavit was as follows:

"That the above-named defendant is justly and truly indebted to me in the sum of two hundred and fourteen dollars and ninety-five cents, according to the endorsement on the writ of summons herein, marked exhibit 'A' to this my affidavit."

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The motion was argued before DRAKE, J., on 8th April, 1899.

T. M. Miller, for the motion.
Alexis Martin, contra.

10th April, 1899.

DRAKE, J.: The plaintiff's affidavit of debt is insufficient, as it does not specify the cause of action. It alleges that the defendant is indebted to the plaintiff in the sum of $214.95, according to the endorsement on the writ of summons. The cause of action should appear by the affidavit itself, and must be direct and positive. It has been held insufficient where the affidavit alleged "as appears by the Master's allocatur," *Powell* v. *Portherch* (1787), 2 Term Rep. 55, or "according to the bill delivered by the plaintiff to the defendant," *Williams* v. *Jackson* (1790), 3 Term Rep. 575, and see *Kelly* v. *Devereux* (1752), 1 Wils. K.B. 339, and *Sheldon* v. *Baker*, (1786), 1 Term Rep. 83. The Court held the affidavit of debt must be positive, and in the latter case, where the deponent swore that the defendant was indebted to the deponent in £1,000 and upwards, as appeared by the account delivered by the defendant to the plaintiff, it was held insufficient, as he had not alleged that he believed the account to be true; here there is no allegation that the endorsement on the writ of summons is true or believed to be true; I therefore am of opinion that the affidavit to hold to bail is defective, and the writ of *capias* must be set aside. When the deponent has or is supposed to have a knowledge of the circumstance which gave rise to the debt, it is incorrect to refer to the account in which the debt appears as an exhibit. The case of *In re Hinchliffe* (1895), 1 Ch. 117, to which I was referred, is an authority that when an affidavit refers to an exhibit, the party entitled to see the affidavit is entitled to see the exhibit also, and the effect of making a document an exhibit is as if it were copied at length in the affidavit; but it goes no further, it only

Judgment.

proves there is a document, but it does not vouch its truth or accuracy.

I have to point out that proceedings to discharge a defendant from custody should be by summons and not by motion, and that where objections are taken to the proceedings on the ground of irregularity, the specific irregularities should be set out. A general objection that the affidavits were not sufficient to hold the defendant to bail without shewing in what particulars they were insufficient is incorrect. As in my opinion the affidavit is insufficient on the grounds already pointed out, I need not refer to the other grounds of objection alleged. The order will be that the defendant be discharged out of custody with costs, but the defendant will only be entitled to such costs as he would incur if the proceedings had been by summons and not by motion, and the plaintiff will be allowed to set off any costs she may have incurred owing to the proceedings being by motion instead of summons.

Judgment.

Order accordingly.

WALKEM, J.

1899.

April 10.

RE NUNN

RE NUNN.

Justices' jurisdiction—Practice—Inquiry commenced by one and completed by two—Invalid commitment.

Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two is irregular unless they have heard all the evidence.

THIS was an order *nisi* calling upon the keeper of the County Gaol at Victoria to shew cause why a writ of *habeas corpus* should not issue, commanding him to bring up Fanny Nunn, a prisoner under bail upon a warrant of committal granted by two Justices of the Peace, in order that she might be discharged from custody. The facts appear in the judgment.

Statement.

G. E. Powell, for the applicant, referred to *Re Guerin* (1888), 16 Cox, C.C. 596.

10th April, 1899.

WALKEM, J.: This is a peculiar case, and one, as far as I know, which has not hitherto been before the Supreme Court. The prisoner, Fanny Nunn, laid an information in October last against one Annie Keats for using threatening and abusive language. On the hearing of the information before Mr. Macrae, then Police Magistrate of the City of Victoria, Fanny Nunn was a witness. Her evidence was subsequently impeached, and proceedings commenced against her for perjury. The hearing of this latter charge was opened on the 1st of November last, before Mr. Shot-

Judgment.

bolt, a Justice of the Peace. After the evidence of Mr. Macrae, who was, of course, a most important witness, had been taken, the hearing was adjourned to a subsequent day. On the latter day Mr. Shotbolt was joined by Mr. Dalby, another Justice of the Peace, and the case was continued before them; the result being that they committed the prisoner for trial.

The commitment has been objected to on the ground that Mr. Dalby was a party to it, although he was not present when Mr. Macrae gave his evidence; and therefore, had only partially heard the case.

A Court of petty sessions may be constituted of one or more Justices of the Peace. In this case, the Court that ordered the commitment, constituted as it was of two Justices of the Peace, was, obviously, not the Court that heard all the evidence. In my opinion, the intervention of Mr. Dalby rendered the proceedings so irregular as to make the commitment an invalid one. If Mr. Macrae's evidence had been given over again in Mr. Dalby's presence, there could have been no such objection as that now urged. It may be quite true that Mr. Shotbolt could, as he had heard all the evidence, have committed the prisoner on his own responsibility; but as he did not do so, the prisoner's counsel is entitled to say, as he has done, that had Mr. Dalby heard all the evidence he might have taken a different view of it from that taken by Mr. Shotbolt, and, possibly, have come to the conclusion that the prisoner should not be committed. I have been referred to the case of *Re Guerin* (1888), 16 Cox, C.C. 596, and although it is not on all fours with the present case, the principles there laid down by the Court clearly shew that Mr. *Powell's* motion should be granted, and the prisoner released from custody and her bail discharged.

Judgment.

Order accordingly.

IRVING, J.

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Jan. 18.

FULL COURT At Vancouver.

March 20.

SPENCER v. HARRIS

SPENCER v. HARRIS.

Crown grant of mineral claim—Whether it includes surface rights—Mineral Acts—R.S.B.C. 1897, Cap. 132, Sec. 16.

Plaintiff sued for cancellation of a lease from the defendant on the ground that the defendant's Crown grant did not pass the surface rights.

Held, by IRVING, J. (without deciding whether it did or not), that the action failed on the ground that the plaintiff had not affirmatively proved that the grant did not pass the surface rights.

Section 16 of the Mineral Act Amendment Act, 1897 (section 132, Mineral Act), is declaratory and not prospective merely.

Appeal to the Full Court dismissed.

Statement. APPEAL from the judgment of IRVING, J., pronounced on the 18th day of January 1899.

The action was to set aside a lease of a lot in Sandon, and for an injunction to restrain the defendant from distraining for rent due under the lease. At the trial which took place at Nelson on 5th December, 1898, the plaintiff did not prove when the defendant's mineral claim was recorded.

McAnn, Q.C., for plaintiff.

Martin, A.-G., for defendant.

Cur. adv. vult.

18th January, 1899.

Judgment of IRVING, J.

IRVING, J.: This is an action to set aside a lease, made between the parties, of a certain lot in Sandon and for the return of all moneys paid under the lease, and for an injunction to restrain the defendant from taking proceedings by distress under the lease.

The plaintiff's case was that the lease had been entered into by mistake, that he was under the belief that the defendant had a Crown grant of the surface, whereas, in fact, the defendant only enjoyed such rights as were conferred on holders of Crown grants issued under the Mineral Act of 1895; the plaintiff believing that his own possessory title could not stand against the defendant's Crown grant, accepted on 1st January, 1896, a lease from the defendant for a term of three years, at a rental increasing year by year, that during the years 1896 and 1897, and one month in 1898, he attorned and paid rent to the defendant, and on 5th November, 1898, having become aware of the character of the defendant's title, he issued his writ to set aside the lease and recover the money so paid.

The defendant counter claims for arrears of rent, and claims that he is owner in fee.

Judgment of IRVING, J.

The lot in question forms part of the parcel of land contained in the description in the Crown grant to the defendant's mine, the Lowden mineral claim, and as the Townsite of Sandon is situate within the metes and bounds of the Lowden mineral claim, the action is of some public importance.

As the plaintiff obtained possession of the lot from one McKelvey, in June, 1895, the rule as to a tenant not being permitted to deny his landlord's title does not apply. *Rogers* v. *Pitcher* (1815), 6 Taunt. 202; 1 Marshall 541, was cited on this point, and several other cases can be found in the judgment of Mr. Justice Taylor in *Dauphinais* v. *Clark* (1885), 3 Man. at p. 227.

The foundation of the plaintiff's case is that the defendant under his Crown grant was not entitled to the surface rights of the lands described in his Crown grant; if the plaintiff fails to establish this, then his case goes by the board, and the defendant is entitled to judgment on his counter claim.

At the trial the plaintiff put in a certified copy of the

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defendant's Crown grant; it is a grant in fee simple of the land in question, and contains a proviso that the Crown may resume any portion (not exceeding one-twentieth) of the said lands, for purposes, but the plaintiff argued it only passed the minerals, not the surface rights.

The defendant claimed the benefit of section 16 of 1897 (passed 8th May, 1897), which is as follows: "Notwithstanding the repeal of any Acts relating to mineral claims, or the saving clauses of any such repealing Acts, all such repealing Acts shall be deemed to have contained provisions declaring the holders of records of mineral claims entitled to apply for Crown grants thereof under the provisions of the law in force at the time of such applications, and that the procedure upon any such applications shall be that prescribed by the statutes in force at the time of such applications, the grants thereafter vesting in the holders such rights as were declared by the statutes in force at the date of record of such mineral claims: Provided, however, that nothing contained in this section shall impair or in any way restrict the rights and privileges conferred on owners of mineral claims by the preceding section of this Act."

Judgment of IRVING, J.

This section was evidently suggested by the decision of *Reynolds* v. *Attorney-General for Nova Scotia* (1896), A.C. 240, decided in February, 1895, but the report of which would not be received here until after the Legislature had adjourned in 1896.

For the plaintiff it was argued that section 16, of 1897, was not declaratory, but prospective.

A consideration of the various Acts relating to the acquisition of mineral claims, and to the obtaining of Crown grants thereof, will, I think, shew how it was that the Legislature came to pass a declaratory Act in the terms of a section now under consideration.

In 1884 (section 64 of Mr. Alexander Davie's Mineral Act, section 77 of the Consolidated Act, 1888,) the holder of

a mineral claim had the exclusive right and possession of all the surface within the lines of his location, and if he proceeded so as to be entitled to a Crown grant (the usual method being to expend $100.00 in five years), he obtained (section 69 of the original Act, section 32 of the Consolidated Acts, 1888), in addition to the minerals, precious and base, all rights set forth in section 64, this gave him the surface, the procedure prescribed requiring him to file his application in the District Land Office, and move the Government Agent to publish his notice.

The form of the Crown grant agrees word for word with the defendant's Crown grant.

In 1891, when the Mineral Acts were revised by a Commission, the holder of a mineral claim was entitled to the surface (section 31), so also (section 43) was the person obtaining a Crown grant under that Act; the procedure required the applicant to obtain a certificate of improvement from the Gold Commissioner; the same form of Crown grant was again used.

In 1892, by the repeal of section 31 of 1891, the holder of a mineral claim was deprived of the surface rights, and the person obtaining a Crown grant, I am inclined to think, (but it is not necessary to decide that) was in no better position, but—and this raises the doubt as to what the real intention of the Legislature was—there still remained on the statute defining the rights under a Crown grant a reference to the repealed section 31 of 1891, and the form of the Crown grant conveying surface and minerals remained untouched. See *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. at p. 69; and *The Queen* v. *Smith* (1873), L.R. 8 Q.B. 146, as to the construction of a section incorporating by reference a repealed statute.

In 1893, by section 23, the holder of a mineral claim and the Crown grantee was, by all Crown grants thereafter issued, given only the right to the use and possession of the surface for the purpose of mining and getting from and

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out of the claim the minerals, the procedure for obtaining Crown grants was again amended.

In 1894 (section 3) the Crown grantee was given the "right to all minerals, including the rights set forth in section 31 of 1891," which section had been repealed in 1892; and again an amendment was made as to the procedure to obtain a Crown grant; here again there is the same reference to the repealed section, and again the old form of Crown grant of surface and minerals is used.

In 1895, section 23 of 1893 was repealed, and the owner of a mineral claim was declared "entitled to all surface rights, including use of timber for mining and building purposes, so long as he held the claim for the purpose of developing the minerals contained therein," and, in correcting the oversight in the amendment of 1894, the Crown grantee was deprived of the surface, but the old form of Crown grant conveying surface rights was not repealed.

Judgment of IRVING, J.

In 1896 (section 44) the statute declared the law as it was stated in 1895, and omitted the form of Crown grant.

From these contradictory enactments a vast amount of confusion has arisen; every holder of a mineral claim would expect, on completing the necessary amount of work, to receive a Crown grant in the terms of the Act under which he originally recorded his claim, but no provision was made in the repealing statute for the case of an application for a Crown grant under the repealed statute, or, indeed, for continuing the claim itself. Compare *Abbott* v. *Minister for Lands* (1895), A.C. 425.

Now, then, having called attention to the alterations in the statute prior to 1897, we come to the Act of that year, under the earlier Acts from 1888 to 1891 the holders of mineral claims took up their claims with a prospect of obtaining a grant of the surface.

In 1892 down to 1896 there was some uncertainty as to what his Crown grant would give him, but it may be stated generally that he would not receive the surface.

Men do not as a rule locate and obtain their Crown grant in one and the same year. That was one of the matters to be dealt with; another was that the procedure to obtain a Crown grant had been varied almost every year, then a third arose from the continued use of the same form of Crown grant, a grant, as I have already said, conveying, on its face, the fee simple in the minerals and surface.

The Legislature then passed sections 16, 17 and 18 of 1897; sections 132, 133 and 134 of Cap. 135, of the Revised Statutes. To anyone anxious to arrive at the meaning of section 16, I would suggest that he do this: Write the section out as it would appear in the repealing statute in which it is deemed to have been contained. It would read this way: "Notwithstanding the repeal of the said Act (say of 1891), it is hereby declared that holders of records of mineral claims are entitled to apply for Crown grants thereof under the provisions of the law in force at the time they make such application (that part contains the claim); "the procedure upon such application shall be" the new procedure (I paraphrase that part of the section as it is unimportant—and then) "The Crown grant thereafter shall vest in the holder such rights as were declared in force at the date of the record of such mineral claim."

Now, the Act of 1895 must be deemed to have contained such provisions—and if the Act of 1895 contained such a section, why should not the defendant's Crown grant be interpreted by it? Under that section the defendant would, if he located under an Act giving to the Crown grantee the surface rights, be entitled to the surface.

But, it is said by the plaintiff, that may apply to Crown grants issued since the passage of the Act of 1897, but it cannot affect Crown grants issued prior to that; I think it does. In my opinion the history of the previous legislation and the language used permit of no other construction being put upon section 16. It is a declaratory section, and as a declaratory Act is, in its principles, retrospective, it

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ought not to be construed as prospective only, unless we can see that it is intended to be prospective. See *Mountcashel* v. *Grover* (1847), 4 U.C.Q.B. 25, and *Attorney-General* v. *Theobald* (1890), 24 Q.B.D. 557, where, in discussing an Act passed in 1889, declaratory of the construction to be placed on Act passed in 1881, Mr. Justice Hawkins pointed out that the construction declared by it would apply to a settlement made prior to 1881, because the section did not expressly provide that its operation was to be limited to settlement executed after the passing of the Act. See as to a declaratory statute and its construction, *Rex.* v. *Dursley* (1832), 3 B. & Ad. 465; *Attorney-General* v. *Pougett* (1816), 2 Price 381.

I am of opinion that section 16 of 1897 is a declaratory section, and that the defendant is entitled to the benefit of it. Section 18 supports this view, the inference to be drawn therefrom is that the Legislature, in providing that the Act of 1897 should not affect any pending legislation, they intended that the Act should be declaratory as to the rights of the parties under previous enactments, *Bell* v. *Bilton* (1828), 4 Bing 615 and 618.

Judgment of IRVING, J.

The plaintiff has not given any evidence as to when the Lowden claim was recorded, and to determine what rights thereby passed to the defendant it is necessary that I should be informed of that date so as to be able to determine what statutes govern its construction; the plaintiff not having done this, and the Crown grant being susceptible of more than one construction, that is, to one construction favourable to the plaintiff's contention and to another construction which would defeat his claim, I think I ought to hold that he has not made out his case. On the face of it the defendant's Crown grant carries the surface, and the onus is on the plaintiff to shew that it is not to be read according to its ordinary meaning.

There will be judgment for the defendant on original action, also on the counter claim, with costs.

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From this judgment the defendant appealed to the Full Court, and the appeal was argued at Vancouver on 20th March, 1899, before McColl, C.J., Drake and Martin, JJ.

Cassidy, for appellant.

Martin, *A.-G.*, for respondent.

At the conclusion of the argument the judgment of the Court was delivered orally by

McColl, C.J.: From the appellant's own evidence it appears that he knowingly took the lease from the respondent under the Crown grant in question; he admits he has not been disturbed in possession or suffered any injury; he has consequently got all he expected to get. He originally came in, not under any one, but as a squatter, and was liable to be ordered off. The defendant, the Crown grantee, has a right, whatever it is; a right to ask the plaintiff to move off the premises. It is not the case of one squatter *versus* another, but the case of a superior right to any claim of the plaintiff, who is a trespasser. The title of the Crown grantee requires the plaintiff to set up some title in answer to it, or move off. If you like to call it status it may be so termed. This is a somewhat bold attempt on the part of a squatter to acquire a title. Taking this view it is unnecessary to express any opinion as to the interpretation placed upon the Crown grant by the learned Trial Judge. The appeal must be dismissed with costs.

Judgment of McColl, C. J.

Appeal dismissed with costs.

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IRON MASK v. CENTRE STAR.

IRON MASK v. CENTRE STAR.

Practice—Mode of trial—Scientific investigation—Practice before Judicature Act, 1879—B.C. Stat. 1876, No. 17—Rules 331, 332, 333.

By Rule 331 a Judge may direct a trial without a jury of any issue, which previous to the Judicature Act could, without any consent of parties, have been tried without a jury, and by Rule 332 he may direct the trial without a jury of any issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury.

In a mining suit respecting extralateral rights, the plaintiff Company sued for an injunction restraining the defendant Company from sinking an incline shaft in plaintiff's claim and for damages. The defence was that the incline shaft was commenced within the lines of defendant's location upon a vein, the apex of which lay inside such surface lines extended downward vertically, and that that vein had been followed upon its dip. The plaintiff Company applied for a trial with a jury.

Held, by MARTIN, J., dismissing the application, that before the Judicature Act the plaintiff Company would have had the right to have the case tried by a jury, and that it has it now under Rule 331, but that there was an issue in the action requiring scientific investigation which could not conveniently be tried by a jury.

Statement.

SUMMONS by plaintiff Company for a jury. The action was one respecting extralateral rights. The plaintiff Company sued for an injunction restraining the defendant Company from continuing to sink an incline shaft in plaintiff's claim, and for damages. The defendant Company pleaded that having the exclusive right and possession of all the surface within the lines of its location and of all veins throughout their entire depth, it commenced an incline shaft at a point within the lines of its said location

upon a vein, the top or apex of which lies inside of such surface lines extended downward vertically, and in continuing the work upon such incline shaft and in following the said vein upon its dip it had entered underneath the surface of the plaintiff's claim, which it said it had a right to do; and the defendant counter-claimed for damages and for an injunction restraining the plaintiff Company from interfering with the said incline shaft.

For further statement of facts *vide ante* at page 355; and the same affidavits were used on the hearing of this summons as were before the Full Court.

MacNeill, Q.C., for the summons.
Davis, Q.C., contra.

28th March, 1899.

MARTIN, J.: The application by the plaintiff for a jury is resisted on two grounds, (1) that this case is within Rule 331 as being one "which previously to the passing of the Judicature Act could, without any consent of parties, have been tried without a jury;" and (2) that, in any event, it should be tried without a jury as being a case within Rule 332 requiring "prolonged examination of documents" or "scientific or local investigation."

Judgment.

Adopting the construction applied to this group of rules by the case of *Baring Brothers & Co.* v. *North Western of Uruguay Railway Company* (1893), 2 Q.B. 406, it is necessary to see what was the practice as to trial by jury in this Province before the Judicature Act, as mentioned in Rule 331.

"Judicature Act" here means, not the English Judicature Act (which is referred to in the corresponding English Rule 428 as "the principal Act"), but Cap. 12 of the B.C. Statutes of 1879, the short title of which is the "Judicature Act, 1879," and which is so referred to frequently in the Supreme Court Rules of 1880.

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Rule 250 of 1880 guides us to what the practice as to trial by jury was prior to the Judicature Act; it was regulated by Statute No. 17 of 1876, entitled "An Act for giving to the parties to civil causes in the Supreme Court the option of having such causes tried by a Judge or jury." This title is to be read as part of the Act; *Fielding* v. *Morley Corporation* (1899), 1 Ch. 1. Section 1 of this Act is as follows:

"All issues of fact in any civil action brought in the Supreme Court, and every assessment or enquiry of damages in every such action shall, in the absence of the notice hereinafter mentioned, be heard, tried, and assessed by a Judge of the said Court, without the intervention of a jury. Provided, that if the plaintiff requires such issue to be tried, or damages to be assessed, or enquired of, by a jury, he shall give notice to the opposite party, by serving with the notice of trial, and the defendant by delivering to the plaintiff within two days after, or at any time before, the receipt by the defendant of the notice of trial, or either party at any other time, by leave of the Judge, delivering to the opposite party a notice in writing to the effect following, that is to say—" (Form of notice here).

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I have been referred to the note of a judgment of the late Mr. Justice Gray (see his Supreme Court Record No. 4, p. 157, June 3, 1879) in the case of *McKenzie* v. *The Corporation of the City of Victoria* on this statute, but in my opinion little, if any, assistance can be derived from it; first, because it deals with the rights of parties when the notice has not been given; and second, because there was no argument, properly so called.

The effect of this section and title, though peculiarly expressed, is, to my mind, plainly to give to any litigant in any civil action the right to a jury if he so desire. It is true that in order to preserve the right a formal notice had to be given, but this "option," as the title expresses it, could be exercised as an absolute right, and was not

dependent upon anything other than the will of the party who wished to exercise it. It is urged that this statute only gave a conditional right, and that if a party failed to give the notice "the cause could, without the consent of parties, have been tried without a jury," therefore there should be no jury here.

If no construction had been placed upon the meaning of this section I might have given effect to this argument, but it has already received judicial interpretation. In the case of *The Temple Bar* (1885), 11 P.D. 6, it was laid down by Lord Justice Lindley (p. 9) that "where before the Act of 1875 parties had a right to a jury, they have it now." This rule was adopted by Mr. Justice Chitty in *Coote* v. *Ingram* (1887), 35 Ch. D. at p. 119, where he says: "The general effect of the above-mentioned rules..... is, as I understand the judgments of the Court of Appeal, and particularly that of Lord Justice Lindley, to preserve to the suitor the right to a jury in those cases where the right existed previously to the passing of the principal Act, viz., "The Supreme Court of Judicature Act, 1873." In *Timson* v. *Wilson* (1888), 38 Ch. D. 72, the *Temple Bar Case* was followed. Lord Justice Lindley in giving judgment, at page 76, expresses himself as follows: "Every party who before November, 1883, was entitled to trial by jury, is so entitled still....." In *Jenkins* v. *Bushby* (1891), 1 Ch. at p. 489, the same learned Judge expresses himself in similar language: "Wherever there was, before the Judicature Acts, a right to a trial by jury, such right still exists....;" and in the same case Lord Justice Lopes at page 492 says, speaking on the same rules: "They do not take away the right of trial by a jury where it existed before, or give it where it did not previously exist. That appears to me beyond all question to be the general effect of those rules." This last case is again followed in *Baring Brothers & Co.* v *North Western of Uruguay Railway Company* (1893), 2 Q.B. 406, wherein Lord Justice Lindley at page 410 specially

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"refers back to the exposition of them given in a case about which we took considerable trouble, *Jenkins* v. *Bushby*."

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As I read the above cases the effect of them is that the plaintiff had the right to have this case tried by a jury before the Judicature Act, and it has it now under section 331.

This brings us to the second point, which is that even if the plaintiff were otherwise entitled to a jury, the cause should be tried without a jury under Rule 332 above quoted. In regard to this rule, I do not think that there will be here any such "prolonged examination of documents" as contemplated by the rule, and the defendant must rely on the the case being one requiring "scientific or local investigation, which cannot in (my) opinion conveniently be made with a jury." The plaintiff relies mainly on the case of *Hamilton* v. *The Merchants' Marine Insurance Company* (1889), 58 L.J., Q.B. 544. Were I without other assistance than this case I should not make the order I am about to make, for it is an authority in favour of the plaintiff, even though it was an application to direct the trial before a special referee; but I feel I should be governed by the later case of *Swyny* v. *North Eastern Railway Company* (1896), 74 L.T. 88, in which *Hamilton* v. *The Merchants' Marine Insurance Company* was considered, and the application of the rule extended. That case laid it down plainly that where there was one "scientific issue" out of several other issues, that brought the action within the rule. The test applied by Lord Esher was: "Now is there, in the case before us, a matter or issue requiring scientific investigation; that is to say, scientific knowledge?" And Lord Justice Rigby says: "I do not feel justified in saying that there must be some very special sort of case for scientific investigation, because in that part of the rule, at any rate, there is nothing more than the plain word 'scientific.' I have no difficulty, therefore, in arriving at the conclusion

Judgment.

that in the present action there is an issue requiring a scientific investigation within the meaning of the rule."

Applying this language to the present case I, in turn, have no difficulty in coming to the conclusion that a scientific knowledge of a high order, and the application of that knowledge to a scientific investigation, will be required to satisfactorily determine the main question raised in a suit of this originality and importance. I must not for a moment be understood to mean that as a rule mining litigation in this country partakes of this description, for I think it does not; but this case is of an exceptional character, and from the nature of the evidence which it now appears will be adduced at the trial, it is not one which could conveniently be tried by a jury. If the day of the trial were not so near at hand, I should have liked time to have more fully discussed the question as to what evidence of the mining engineers and experts would in a case of this description (the ascertainment of extralateral rights) be deemed to be scientific, but as a speedy judgment is required I must content myself with the above general expressions.

Judgment.

Application refused. Costs in the cause.

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March 13

WILLIAMSON v. BANK OF MONTREAL.

Practice—Time for appeal—Place of hearing—Order before new Act came into force—Supreme Court Act Amendment Act. 1899.

WILLIAMSON v. BANK OF MONTREAL

The Supreme Court Act Amendment Act, 1899, limiting the time for appealing against interlocutory orders to eight days does not apply to an order perfected before the Act came into force.

In an action commenced in the Vancouver Registry the notice of appeal which was given after the Act came into force should have been given for the Full Court sitting at Vancouver.

Statement.

APPEAL to the Full Court from (1) an interpleader order made by IRVING, J., on the 26th day of January, 1899, and entered on the 18th day of February, 1899, and from (2) an injunction order of IRVING, J., made and entered on the 25th day of February, 1899.

The writ was issued out of the Vancouver Registry. The notice of appeal was served on the solicitor for the respondents on 27th February, which was the same day the Supreme Court Act Amendment Act, 1899, was assented to. Section 17 of the amendment cut down the thirty days' period of appeal to eight days.

The appeal came on for argument at Victoria on the 9th day of March, 1899, before WALKEM, DRAKE and MARTIN, JJ.

Argument.

Peters, Q.C., and *G. A. S. Potts* for appellants.

Wilson, Q.C., for respondents, took the preliminary objections (1) that the appeal was out of time and (2) that the notice of appeal should have been to the Full Court sitting at Vancouver. As to the second objection the notice of

appeal was given 27th February, 1899, the same day the Supreme Court Act Amendment Act, 1899, was assented to, and under section 14 of the Act of 1899 the appeal should be heard in Vancouver. The statute took effect from the commencement of the day on which it was assented to.

As to the first objection (confined to appeal from interpleader order), under section 17 of the Amendment of 1899, the time for appealing expired on the 26th of February. It is a question of procedure and the new Act governs. He cited *Wright* v. *Hale* (1860), 30 L.J., Ex. 43; *Gardner* v. *Lucas* (1878), 3 App. Cas. 603; *Tollemache* v. *Hobson* (1897), 5 B.C. 223; Maxwell, 3rd Ed., 312-3; *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368.

Peters, Q.C., for appellants: The new statute affects the rights of appeal and is not retrospective, and does not affect pending cases. It is not procedure. He cited *Hyde* v. *Lindsay* (1898), 34 C.L.J. 738; *Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. 562; *Couture* v. *Bouchard* (1892), 21 S.C.R. 281; *Williams* v. *Irvine* (1893), 22 S.C.R. 108; *Cowen* v. *Evans* (1893), 22 S.C.R. 331.

Argument.

All statutes of procedure are not retroactive; Endlich on Interpretation of Statutes 333. Section 84 of the Supreme Court Act, R.S.B.C. 1897, Cap. 56, goes on speaking and protects us—it governs the new section 73.

Wilson, Q.C., in reply: The right of appeal is not affected, but it is only a question as to where the appeal should be heard. It is a question of procedure; see Maxwell, 3rd Ed. 314, and Interpretation Act, R.S.B.C. 1897, Cap. 1, at p. 10. The substantive right of appeal is not a matter of procedure, but the manner in which an appeal shall be carried on is. He cited *Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. at p. 564; *The Queen* v. *Taylor* (1877), 1 S.C.R. 65; *Lopez* v. *Burslem* (1843), 4 Moo. P.C. at p. 305. (*Graham* v. *Temperance and General Life Assurance Co. of North America* (1896), 17 P.R. 271; *In re Roden and the City of Toronto* (1898), 25 A.R. 12; *In re Athlumney*

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(1898), 2 Q.B. at p. 552; *The Queen* v. *The Leeds and Bradford Railway Company* (1852), 18 A. & E. (N.S.) 343; and *Koksilah* v. *The Queen* (1897), 5 B.C. 600, were also referred to during the argument.)

13th March, 1899.

WALKEM J.: This is an appeal from an interpleader order made by Mr. Justice IRVING on the 18th of February last. Under the law as it then stood, the appellants had thirty days from the date of the order within which to appeal; but on the 27th of February an Act amending the Supreme Court Act was passed which cut the period of thirty days down to eight. (See Section 17). As it happened, the appellants gave notice of appeal on the 27th, that is to say, on the day that the new Act became law. The general rule that a statute takes effect from the commencement of the day on which it is passed is subject to the exception that "Courts will look at fractions of a day in order that they shall not give statutes an *ex post facto* effect." (*Hurtubise* v. *Desmarteau* (1891), 19 S.C.R. per Strong, J., at p. 564). But we have no evidence in the present case as to the exact time on the 27th, when the notice of appeal was served, or the Act was assented to. Hence, the presumption is in favour of the general rule, and we must hold that the notice was given subsequent to the passing of the Act. I mention this because the objection has been taken, as a preliminary one, that the notice of appeal is a day too late, as the eight days prescribed by the amending Act expired on the 26th, and as that Act is retrospective inasmuch as it relates to procedure. Such, in substance, is Mr. *Wilson's* contention. On the other hand it is said that the provision cutting down the time limit for appeal is not a matter of procedure, but is one which deals with the right of appeal, and as such is not, on general prin-

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ciples, retrospective. The creation of a right of appeal is an act which requires legislative authority, and is, in consequence, not a matter of procedure *Attorney-General* v. *Sillem* (1864), 10 H. L. Cas. at p. 704. Where, however, the right of appeal is given, the question of the time within which it is to be brought is wholly a matter of procedure; per Lord Campbell in *Lopez* v. *Burslem* (1843), 4 Moo. P.C. at p. 305.

Whether an Act relating to procedure is retrospective or not is a question which depends upon the circumstances of each case.

In the case of the *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. at p. 69, Lord Justice Mellish observed that "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done." Lord Blackburn expressed similar views in *Gardner* v. *Lucas* (1878), 3 App. Cas. at p. 603; "Alterations," he said, "in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." In *Ings* v. *Bank of P.E. Island* (1885), 11 S.C.R. at p. 271, it was held by Strong, J., that "an *ex post facto* construction will never be adopted when substantial rights are affected, even in respect to matters of procedure."

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In the present case, the time-limit for appealing under section 17 of the new Act would have been the 26th of February if a retrospective effect were given to the section, and it would follow that the notice of appeal given next day was too late, and the right to appeal, consequently, gone. This would, obviously, be unjust to the appellants; hence, we are of opinion that a retrospective effect ought not to be given to the section. The appeal is, therefore, in time.

With respect to the next question, namely, whether the appeal should be heard here or in Vancouver, section 14 of

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the Amending Act should be followed, as its retrospective application to this case works no injustice.

The appeal is therefore remitted for hearing to Vancouver, and the papers connected with it must be transferred to that Registry.

The costs so far incurred on the argument of this preliminary objection should abide the event of the appeal.

Judgment of DRAKE, J.

DRAKE, J.: The order here appealed against was made and perfected on the 18th of February; under the Supreme Court Act then in force the parties had thirty days in which to give notice of appeal. On the 27th of February a notice of appeal was given to the Supreme Court sitting in Victoria. On that day an Act amending the Supreme Court Act was passed, curtailing the time for appealing to eight days, and enacting that in all actions commenced in the Registry of Vancouver the appeal should be heard at a sitting of the Full Court to be held there. The respondent claims, first, the appeal is not in time, as eight days had elapsed after judgment before the notice of appeal was given; and secondly, that if it should be held as given in time, it was given for the wrong sittings.

In my opinion the appeal was in time. The doctrine of retroactive operation of a statute is based either on a clear enactment to that effect, which must be literally obeyed, or on the nature of the subject dealt with, and it has been held that matters connected with procedure are generally retroactive; but there is no cast iron rule that all acts dealing with procedures are retroactive, or that if retroactive it is applicable to all cases. The maxim *nova constitutio futuris formam imponere debet non præteritis* denotes the principle upon which such acts should be construed.

In *Gardner* v. *Lucas* (1878), 3 App. Cas. 603, Lord Blackburn says: "Alterations in form of procedure are always retrospective unless there is some good reason or other why they should not be." See also *The Queen* v. *The Leeds &*

Bradford Railway Company (1852), 18 A. & E. (N.S.) 343, where Lord Campbell applies the same language as Lord Blackburn; and see Maxwell, page 273. There is a good reason here why a right of appeal given by the Act, and which is not taken away by the amendment, should not be taken away in fact by construing the amendment as limiting the right of appeal to eight days, which period had expired before the amendment came into operation. In addition to this the appellants can, I think, invoke the operation of section 84.

As regards the Court to which it ought to be given, as there is no injustice to the appellants, I think the Court, unless parties consent to be heard here, should direct the papers to be removed to Vancouver to be heard there. This is part of the appeal and should be treated as such, and the costs abide the result.

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MARTIN, J., concurred with WALKEM, J.

Order accordingly.

NOTE—See *Budgett* v. *Budgett* (1894) 2 Chy. 555, referred to in *Koksilah* v. *The Queen* (1897), 5 B.C. 600, as to question of expiry of time for appeal.

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(CONTINUED.)

Admiralty—Goods in possession of receiver—Seizure under fi. fa. by sheriff—Jurisdiction of Supreme Court to direct interpleader—Practice.

Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action *in rem* in the Exchequer Court to enforce a mortgage of the ship, such property cannot be seized by a sheriff under a writ of *fieri facias* issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors.

Statement.

PURSUANT to the above order of the Full Court, see page 485 *ante*, the appeal came on for argument at Vancouver on 20th March, 1899, before MCCOLL, C.J., DRAKE and MARTIN, JJ.

On 21st September, 1898, R. Williamson & Son commenced an action *in rem* in the Exchequer Court of Canada, British Columbia Admiralty District, against the ship Manauense, to enforce a mortgage of the ship and her equipment, including two steam launches known as Vera and May. The ship and launches were thereupon arrested by the marshal of the Court of Admiralty, and on 13th January, 1899, an order was made by the Local Judge in Admiralty (MCCOLL, C.J.), appointing W. A. Ward receiver to take possession of the said ship and launches, and on 19th January, another order was made for the sale of the ship and launches. On 12th January, 1899, the sheriff for the County of Vancouver seized the launches under a writ

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of execution dated 7th January, 1899, issued in an action in the Supreme Court of British Columbia, in which the Bank of Montreal was plaintiff and T. T. Edwards the registered owner of the ship, was the defendant; and upon a claim being made by the receiver, the sheriff applied for and obtained from IRVING, J., on the 26th of January, 1899, an order directing the trial of an interpleader issue in the Supreme Court, in which Williamson & Son should be plaintiffs and the Bank of Montreal defendant. The order provided that the issue to be tried should be whether at the time of the seizure by the sheriff the goods seized were the property of the plaintiffs as against the Bank and that it should be delivered by the plaintiffs within thirty days. On 25th February, 1899, an order was made in the interpleader proceedings by IRVING, J., on the application of the Bank of Montreal restraining the receiver in Admiralty from proceeding with the sale of the launches until the hearing of the interpleader issue. The issue not having been delivered in accordance with the order of the 26th of January, 1899, the defendant (the Bank of Montreal) obtained judgment barring the receiver from prosecuting any claim against the launches.

Williamson & Son appealed against the orders of 26th January, 1899, and 25th February, 1899.

Argument

G. A. S. Potts (*Gilmour* with him), for appellants, cited *Place* v. *Potts* (1855), 5 H.L. Cas. 383; *Ladbroke* v. *Crickett* (1788), 1 R.R. 571; Abbott, 13th Ed. 886; Maude & Pollock, 4th Ed. 577; *Russell* v. *East Anglian Railway Company* (1850), 20 L.J., Chy. 257.

Wilson, Q.C., for respondent: The interpleader order is for the benefit of the sheriff. There is no appeal from the Admiralty Court and we are entitled to raise here the question of the validity of the proceedings in that Court. The appellants acquiesced in the making of the interpleader order.

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Potts, in reply: We did not acquiesce; we did not deliver the issue under the interpleader order.

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McCOLL, C.J.: On 21st December, 1898, an action in Admiralty was begun by the Williamsons as mortgagees of the steamer Manauense and her equipment, including two steam launches which, or rather now part of the proceeds of the sale of which in the proceedings in Admiralty, are the subject of this litigation.

The ship and launches having been arrested were in the possession of the marshal on 12th January, 1899, when the launches were seized by the sheriff of Vancouver County, under a writ of *fieri facias* issued out of this Court upon a judgment obtained by the Bank against one Edwards, the owner of the ship, subject to the mortgage.

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The seizure by the sheriff was made to test whether the mortgage included the launches.

On 13th January, 1899, an order was made in the Admiralty action appointing Ward receiver of the ship and launches and the marshal gave up possession to him.

The seizure by the sheriff seems to have been merely formal.

That the possession authorized in Admiralty was by the marshal at the time of the sheriff's seizure is immaterial.

On 19th January, 1899, an order was made in Admiralty for the sale by the receiver of the ship and launches on the 27th of February. No attempt was made by the Bank to intervene in the Admiralty action until the 11th day of February, 1899.

On the 24th of January, 1899, the sheriff took out an interpleader summons in this Court calling upon the Bank and the Williamsons to appear and maintain or relinquish their

claims to the launches, and on the 26th of January, an order was made for the trial of an issue between the parties, the sum of $1,349.54 to be brought into Court within thirty days, the same time being fixed for the delivery of the issue. The order was in the usual form, except that the receiver was added as a party to the proceedings at his own instance. For some reason not given, this order was not entered until the 18th of February. Neither the Williamsons nor the receiver paid the money into Court, or complied in any respect with the order, but on the 27th of February, they appealed from it on the ground of want of jurisdiction. Meanwhile the Bank applied on 11th February in the Admiralty action to be added as a defendant for the purpose of appealing against the order for sale of 19th January, but no order was made.

The application having come before me as Local Judge in Admiralty, I think it right to state what occurred. There was no suggestion that the making of the interpleader order had been opposed ; indeed its existence was relied upon by the counsel for the plaintiffs as a sufficient reason for refusing the application which the counsel for the Bank urged ought to be granted lest the Bank might be prejudiced by the order at the trial of the interpleader issue.

Judgment of McColl, C.J.

Believing that the parties had chosen to settle their dispute by the proceedings in this Court, I saw no reason why the Bank should interfere in the Admiralty action, but I retained the application pending the proceedings in this Court in case anything might occur to make some order proper. The matter was not again mentioned to me.

But in this Court on 25th February an order was made on the Bank's application restraining the sale provided for by the order in Admiralty of 19th January, and on 3rd March, the Bank obtained an order barring the plaintiffs from prosecuting any claim to the launches for default in not complying with the interpleader order. On 6th March, the sale was confirmed by me in the Admiralty

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action. At the time I was not aware that the plaintiffs had not complied with the interpleader order, or of the appeal from it, nor did I know of the orders of 25th February, and 3rd March, though I was informed that some order had been made in this Court restraining the receiver from completing the sale, and that notice of the application to confirm the sale had been given to the Bank, but as no one appeared for the Bank (because of some misunderstanding as I was afterwards informed) I considered that the rights of the Bank would be sufficiently protected by providing that the purchase money of the launches which realized more than the Bank's claim, should be held subject to the order of either Court. There was of course at no time any intended conflict between the two Courts, and if applied to after the difficulty had arisen I would have made such order in the Admiralty action as might have appeared necessary.

In the extraordinary position thus brought about the present rights of the parties have to be considered. The interpleader order seems to me to have been made by consent, though not so expressed, and therefore to be binding even if made without jurisdiction. Chitty's Practice 11th Ed., p. 1398. And if so the order of 3rd March barring the plaintiffs is final and conclusive unless by special leave. Order LVII., Rule 11 (665.) But I do not see why it was not competent for the parties to agree to try the question between them in this Court, for if the money had been paid into Court pursuant to the interpleader order no possible proceeding in this Court could have come into conflict with the proceedings in the Admiralty action ; *Kotchie* v. *Golden Sovereigns, Limited* (1898), 2 Q.B. 164 (C.A.)

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This Court had of course no jurisdiction to interfere with the proceedings in Admiralty ; *Russell* v. *East Anglian Railway Company* (1850), 20 L.J. Chy. p. 260.

The Admiralty action being *in rem* the judgment in it is conclusive against the Bank as to the status of the *res*.

Ladbroke v. *Crickett* (1788), 1 R.R. 571 ; *Place* v. *Potts*

(1855), 5 H.L. Cas. 383. But it is not binding upon the Bank as regards the reasons for judgment; *Ballantyne* v. *Mackinnon* (1896), 2 Q.B. 455. The duty of the sheriff finding the marshal in possession was to make a special return; Williams & Bruce's Ad. Pr. 2nd Ed., p. 252, note (q) and cases there cited.

The Bank should then have applied in Admiralty. But in the circumstances I think the present appeal would be properly disposed of by requiring the appellants to bring into Court the amount provided for by the interpleader order, and thereupon discharging the orders in appeal without costs, leaving the parties to continue their controversy in this Court. My learned brothers think otherwise, however, and I am not inclined to quarrel with their view, if the Bank has not lost the right to resort to the other Court.

In my judgment the proceeds of the launches being still subject to the order of that Court, the Bank's right is not gone. I think that the Bank may yet be made a party to the Admiralty action as being interested in it within the meaning of Rule 30. See remarks of Jessel, M. R., in *Carr* v. *Metropolitan Board of Works* (1880), 14 Ch. D. at p. 815. If this rule does not apply then the practice in England governs—Rule 228: and Order XVI., Rule 11, would seem sufficient authority. See *Debenture Corporation* v. *De Murrieta* (1892), 8 T.L.R. 496, and other cases cited in the Annual Practice. But if necessary the old procedure and practice in Admiralty may be resorted to. Jud. Act (E) 1875, Sec. 21 and Order LXXII., Rule 2 (E); *The Mona* (1894), P.D. 265; and *The Marechal Suchet* (1896), P.D. 233, and the case of *The Markland* (1871), 24 L.T.N.S. 596 shews that justice may yet be done.

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If the question which the Bank seeks to raise had been concluded in its absence, as happened to a person interested in the case of *Markham* v. *Markham* (1880), 16 Ch. D. 1, leave to appeal may be given. But as no such question was raised, and the circumstances, if any, entitling the

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Bank to the relief asked, were not before the Court an appeal may not be necessary. *Burrell and Sons* v. *Read* (1894), 11 T.L.R. 36. I refer also to *The Duke of Buccleuch* (1892), P.D. judgment of Fry, L.J., at p. 212; and *Wallis* v. *Smith* (1882), 46 L.T.N.S. 473. I therefore do not dissent from the majority of the Court.

DRAKE, J.: The facts are shortly these—Messrs. Williamson sued in Admiralty as mortgagees of the Manauense, including two steam launches, known as Vera and May, on the 23rd of December.

The vessels were arrested by the marshal of the Court of Admiralty, and on the 13th of January, an order was made appointing W. A. Ward receiver.

On the 19th of January, an order was made for the sale, and a direction was given that out of the proceeds of the sale $78,671.91 was to be paid to Messrs. Williamson, and the balance into Court.

On the 7th of January, a writ of *fi. fa.* was placed in the sheriff's hands in respect of a judgment recovered by the Bank of Montreal against Edwards, the registered owner of the Manauense.

On the 12th of January, while the vessels were in custody of the marshal, the sheriff seized, and on claim being made by the marshal, the sheriff applied for an interpleader order, which he obtained. In obtaining this order I think the learned Judge was in error. The property seized was in custody of the Court of Exchequer, a Court of co-ordinate jurisdiction with the Supreme Court, and whose proceedings cannot be questioned by this Court. The sheriff should have returned *nulla bona* and gone out, and the plaintiffs in the action could have applied in the Admiralty proceedings to be entitled to rank as a judgment creditor against any proceeds arising from the sale of the vessel, after satisfying the maritime liens, or, if as suggested, the proceedings in that Court were informal or irregular, they could have intervened and raised the question there.

The sheriff's proceedings, after he found the vessels were in the custody of the Admiralty Court, were a contempt of that Court, and the cases are numerous to shew that the Admiralty Court is extremely jealous of its jurisdiction, and will not permit any interference therewith. It is only necessary to cite a few cases. *The Petrel* (1836), 3 Hagg. 300, where a vessel was taken possession of and removed after arrest. *The Bure* (1850), 14 Jurist, 1123, where a person was attached for dispossessing the officer in charge, notwithstanding bail had been given, if no supersideas had been issued.

The next step which the plaintiffs took was to move the Supreme Court for an injunction to restrain Mr. Ward, the receiver, from selling the launches Vera and May. This was granted on the 25th of February. Mr. Ward was represented by counsel. This was a most unusual proceeding. Mr. Ward as receiver was an officer of the Exchequer Court, acting under the authority of that Court, a Court over which the Supreme Court has not the slightest control, and whose proceedings cannot be reversed by this Court.

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What would be the effect of this order? If Mr. Ward sold he would be liable to attachment by the Supreme Court, and if he did not sell he would be liable to attachment by the Exchequer Court. Here I think it became the duty of the Williamsons to apply at once to the Exchequer Court to put an end to the proceedings which resulted in such an absurdity. Instead of doing so they allowed the Bank of Montreal to go on to the trial of an issue at which they did not appear, and obtain a judgment barring the receiver of the Exchequer Court from prosecuting any claim against the said vessels.

The jurisdiction of the Admiralty Court in Canada is co-extensive with that of the High Court of Admiralty in England, except as restricted by the Colonial Courts Admiralty Act, 1890, and the Admiralty Act, 1891. Such being the extent of the jurisdiction, it was held in the case

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of *The Flora* (1824), 1 Hagg. 298, that where a sheriff was in possession of a ship, an action for wages subsequently commenced in the Admiralty Court took precedence. The vessel in that case was sold under the Admiralty process, and the sheriff's claim was only allowed against the surplus. The reason is that maritime liens always take precedence of ordinary debts, and are only recoverable in Admiralty.

In my opinion the interpleader order and the injunction must be set aside, and all subsequent proceedings therein.

With regard to the costs, we think there should be no costs of the application made in Victoria by Mr. *Wilson* with reference to the notice of appeal and place of hearing, as both parties were partly right and partly wrong. The claimants are entitled to the costs of the appeal; but as regards the costs in the Court below we think that claimants should have proceeded at once in the Admiralty Court, and had the matter dealt with there. We therefore make no order as to those costs.

MARTIN, J., concurred with DRAKE, J.

Appeal allowed.

DANIEL v. GOLD HILL MINING COMPANY (FOREIGN) *ET AL.*

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DANIEL v. GOLD HILL MINING COMPANY ET AL.

Company—Assets of—Fraudulent sale by Directors—Collusion—Inadequate consideration—Companies Act Amendment Act, 1893—Enabling, not restrictive.

In an action to set aside a sale of a mineral claim on the ground that the sale was a sham sale for the benefit of the purchaser and the Directors, and that the stated consideration was not paid and the trial Judge found that the sale was made at a price so inadequate as to shew an intention to benefit the purchaser at the expense of the shareholders.

Held, on appeal that on the finding of the trial Judge the sale should be set aside.

Per IRVING and MARTIN, JJ.: The provisions of section 2 of the Companies Act Amendment Act, 1893, respecting the mode of sale of a Company's assets are enabling and not restrictive.

Statement.

ACTION in which Richard T. Daniel, who sued on behalf of himself and all the shareholders in the Gold Hill Mining Company (Foreign), and the said Company were plaintiffs, and Michael Doneen, E. J. Dyer, George Comegys, Fred Davidson, Edward Welch, E. J. Doneen, and the said Gold Hill Mining Company were defendants, for a declaration that a certain sale of the Gold Hill mine to the defendant, E. J. Doneen, was null and void.

In July, 1895, the Gold Hill mineral claim, situate in the Trail Creek Mining Division of British Columbia, was owned by the defendant Welch, who sold a half interest to the plaintiff Daniel, and a quarter interest to the defendant Michael Doneen. In September, 1895, the Company was formed under the laws of the State of Washington; the capital stock was $500,000.00, divided into 500,000 shares of $1.00 each. The Company acquired the Gold Hill min-

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eral claim, the plaintiff Daniel receiving for his interest in the claim, 200,000 shares in the Company, and the defendants M. Doneen and Welch, receiving 100,000 shares each, and 100,000 shares were put in the treasury for the working of the mine. The treasury stock with the exception of a few hundred shares, was sold for about $5,500.00, which was spent in development work and then the Company was at the end of its resources. The defendant Michael Doneen, one of the Directors of the Company, having become responsible to a contractor for $432.00 for work done on the mine, borrowed that amount from his brother, the defendant, E. J. Doneen, who held 138,900 shares in the Company, and then the defendants M. Doneen, Welch, Comegys and Davidson, Directors of the Company, sold the mine to E. J. Doneen for $1,250.00. The plaintiff was a Director of the Company, but did not attend the meeting at which the resolution was passed authorizing the sale—it was a regular monthly meeting and the plaintiff had notice of it, but not of the fact that the mine was to be sold. Subsequently the transaction was ratified by a general meeting of the shareholders.

Statement.

The particulars of fraud alleged were that the sale to E. J. Doneen was made collusively with the intent to pass the title of the said mine to the said defendants so that each should share in the benefits to be derived from any future sale and for the purpose of defeating the plaintiff and other stockholders, other than the defendants from obtaining any gain from the development and future sale of the property, and that the stated consideration of $1,250.00 was never in fact paid.

The action was tried at Nelson before DRAKE, J., on the 18th of September, 1897. The remaining facts sufficiently appear in the judgment.

F. M. McLeod, for plaintiffs.

Bowes, for defendants.

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DRAKE, J.: The defendant Company was incorporated at Spokane, State of Washington, for numerous purposes; amongst others, to purchase, sell and work mining claims in British Columbia. The capital was $500,000.00 in 500,000 shares of $1.00 each. As a matter of fact the capital was divided up between the owners of the Gold Hill mine and they agreed to contribute and did contribute 100,000 shares for the working of the mine. The mine was surveyed and it was found to contain more land than the Mining Act allowed and the extra portion was thereupon staked and recorded and a Crown grant eventually given for the Gold Hill and the fraction known as the Ohio. The mine stood in the plaintiff's name and he transferred it to the Company on obtaining a Crown grant. It is not necessary to discuss the rights and liabilities of the persons who thus divided up the shares between themselves as the point in issue is of a different character. After the Company had expended some $5,000.00 in development work they came to the end of their resources, and Michael Doneen, one of the Directors, having become responsible to the contractor for work done on the mine, borrowed some $432.00 from his brother, E. J. Doneen, who held 138,900 shares in the Company, and on the 15th of June, 1896, the defendants M. Doneen, Edward Welch, George Comegys and F. C. Davidson agreed to sell to E. J. Doneen the Gold Hill mine for $1,250.00. E. J. Doneen paid the contractor and took an assignment of the debt against the Company. He gave a note for $607.23, which has not yet been taken up, and the balance was paid in cash. The minutes shew that a resolution was passed by the Directors authorizing the President and Secretary of the Company to execute a deed of conveyance to E. J. Doneen of the mine. The plaintiff claims that this sale was fraudulent, made without lawful authority and without adequate consideration. Mr. E. J. Doneen frankly stated that he bought hoping to get even on his in-

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vestment, as he was a holder of a large number of shares. Whether his shares cost him more than the price of the paper they were printed on was not shewn; nominally they were worth $138,900.00. The plaintiff produced evidence to shew that at the time of the sale the property was saleable at from $7,000.00 to $10,000.00 cash and was worth under present circumstances $5,000.00, a witness having been called who was willing to give that for it. On the other hand the defendants produced a witness who said the mine was worth nothing, not even the $1,250.00 given for it by the defendant E. J. Doneen. Mr. E. J. Doneen being a large shareholder and interested in the mine would not be likely to part with cash for absolutely worthless property; therefore the evidence that the mine was worthless does not impress me, and I prefer to rely on the evidence of a man able and willing to give $5,000.00 for it as a better criterion of the value than Mr. E. J. Doneen's price. The whole transaction is peculiar. Mr. M. Doneen says he borrowed the sum of $432.00 to pay the contractor from Mr. E. J. Doneen, while the latter says he paid the workmen himself and got an assignment of the claim to himself, the latter I believe to be the true transaction. From this evidence I come to the conclusion that the price paid was inadequate, so much so as to shew a collusive arrangement between the Directors and E. J. Doneen to benefit the latter at the expense of the shareholders. But a further objection was taken to the transaction and that is that the Companies Act Amendment Act, 1893, has been ignored. This Company as I have pointed out was incorporated in the State of Washington. By the law of that State, as explained by Mr. G. W. Belt, the Directors have all the powers of the corporation and can deal with the corporate property as they please, even against the express wish of the majority of the shareholders, therefore by law of the State no legal fault can be found with the action of the Directors in the transaction above detailed; but this Company has been regis-

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tered under Part IV., of the Companies Act, 1888, and by the Amending Act, 1893, any corporation registered under the Companies Act may dispose of the whole or any portion of its assets by resolution duly passed at a general or special meeting of the shareholders representing at least two-thirds in value of the paid up capital stock of the corporation, which meeting shall be held in the Province, and one month's notice published in the Gazette and some newspaper. No regard has been paid to this enactment, the contention being that it is merely permissive and not compulsory and does not affect a foreign corporation acting within its statutory powers. So far as it affects assets out of jurisdiction this Court cannot control the act of the Company if done within the scope of its power; but the Act is one that is applicable to assets within the Province, and the term "may" there used is an indication that a company, in disposing of its assets in whole or in part, must take steps which in ordinary circumstances would not be necessary, for by the common law a corporation can sell its corporate property; the Directors can also dispose of the whole of the assets of the Company if done *bona fide*. See *Wilson* v. *Miers* (1861), 10 C.B.N.S. 348. In this case the Company has taken powers to buy and sell mines, etc. But the facts shew the property in question was not purchased for sale, but was bought for the purpose of opening and developing a mine and the whole money realized by the sale of shares was devoted to this one purpose and there is no capital left for any other objects; it therefore is not a sale in the ordinary course of business. See *Ernest* v. *Nicholls* (1857), 6 H.L. Cas. 401.

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Mr. *Bowes* raised the objection that the action was wrongly brought, the alleged cause of action being a matter relating to the internal management of the Company by which a dissentient minority were bound and could not question the act in Court; if it was a question of management, even although the letter of the law had not been strictly

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complied with, the Court would not interfere at the instance of a shareholder, though it might at the instance of a creditor; but the question here is whether the act of the Directors was *ultra vires* or not. In the first place the Directors cannot execute a conveyance of real estate belonging to a corporation, the property being situate in this Province. In the next place the requirements of the Act have not been complied with and a shareholder is therefore entitled to bring an action on behalf of himself and the other shareholders: See *Atwool* v. *Merryweather* (1868), L.R. 5 Eq. 464; *Mason* v. *Harris* (1879), 11 Ch. D. 97.

A further objection raised by Mr. *Bowes*, was that the Company should be dismissed from the action. I think they are properly parties defendant. The evidence discloses that they could not be made plaintiffs, as the defendants are the Directors and hold a controlling interest in the Company and therefore it would be difficult to obtain their consent. See *Silber Light Company* v. *Silber et al.* (1879), 27 W.R. 427, where the Company were struck out as plaintiffs with liberty to add them as defendants.

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Judgment will therefore be for the plaintiffs with costs. Declare the deed of transfer to E. J. Doneen void and order it to be delivered up to be cancelled. Restrain the defendants from selling or disposing of the said mine except in accordance with the statute.

From this judgment the defendants appealed to the Full Court and the appeal was argued at Victoria on 28th November, 1898, before WALKEM, IRVING and MARTIN, JJ.

Argument.

Duff, for appellants: The sale to E. J. Doneen was attacked on the grounds (1) that the trustees had no power or authority to sell and (2) that it was a sham sale. As to the power of the trustees: Section 2 of Cap. 9, B.C. Stat. 1893, is permissive and enabling. By the Interpretation Act, C.S.B.C. 1888, Cap. 1, Sec. 8 (2), *shall* is imperative

and *may* is permissive. He cited Palmer's Company Law, 44, and *Simpson* v. *Westminster Palace Hotel Company* (1860), 8 H.L. Cas. at p. 719. The Courts will always construe a statute so as to interfere as little as possible with the existing state of law. Hardcastle, 138-9; *Madden* v. *Nelson and Fort Sheppard Railway Company* (1897), 5 B.C. 544. The sale was valid by the laws of the State of Washington in which the transaction took place and the capacity of the Company to contract is limited only by the law of the State of Washington. See Dicey's Conflict of Laws, 485; Storey's Conflict of Laws, 8th Ed., 175; Lindley, 910, 913; *Canadian Pacific Railway Company et al.* v. *Western Union Telegraph Company* (1889), 17 S.C.R. 151; *Clarke* v. *Union Fire Insurance Company* (1883), 10 P.R. 318.

As to fraud: The other side must rest on their pleadings which allege that there was no sale, whereas the trial Judge finds that the sale was made at an inadequate price for the benefit of the purchaser, thus affirming that the sale was a real and not a sham one. It is essential that the fraud alleged be set forth specifically and in detail, and the finding must be *secundum allegata et probata:* See Kerr on Fraud and Mistake, 2nd Ed., 425; *Cargill* v. *Bower* (1878), 10 Ch. D. 516; *Webster* v. *Power* (1868), L.R. 2 P.C. 81; *Davy* v. *Garrett* (1878), 7 Ch. D. 489. There is no finding which brings the case within the particulars alleged. To set aside the transaction the inadequacy of price must be so great that a man of common sense would utter an exclamation on hearing it, and besides the plaintiff must prove more than mere inadequacy—it should be shewn that the Directors and the purchaser conspired to cheat the shareholders by a sale at a known inadequate price. See *Gwynne* v. *Heaton* (1778), 1 Bro. C.C. 9, and *Jacker* v. *The International Cable Company, Limited* (1888), 5 T.L.R. 13.

Argument

W. J. Taylor, for the respondents: If it was a *bona fide* transaction; the sale fixed the value at $500,000.00 and until here is evidence to the contrary this is the presumptive

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value and will continue to be so regarded until evidence of change of circumstances be given. If it was not a valid transaction the shareholders are liable to assessment on the shares they took. The *lex situs* governs the Company in regard to the formalities necessary to the validity of the sale; Dicey's Conflict of Laws, 769. If the statute of 1893 is enabling, then it gives a right which did not formerly exist. See *Attorney-General* v. *Theobald* (1890), 24 Q.B.D. 557, and *Attorney-General* v. *Hertford* (1845), 14 M. & W. 284. The trial Judge finds collusion as a fact as set out in the particulars.

Argument.

Duff, in reply: Mere collusion is no ground for setting aside a contract, but there must be a finding of fraudulent intent. And this finding must be based on evidence which demonstrates such intent. *Burns* v. *Mackay* (1885), 10 Ont. 170; *Thurtell* v. *Shackell* (1834), 6 C. & P. 475. See also *North West Transportation Company, Limited* v. *Beatty* (1887), 12 A.C. 589.

Cur. adv. vult.

20th January, 1899.

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WALKEM, J.: On the ground of fraud irrespectively of any other ground the judgment of the Court below must be sustained and the appeal dismissed with costs.

Judgment of IRVING, J.

IRVING, J.: In 1898, we are called upon to construe an Act passed on the 12th of April, 1893. Under the last mentioned Act it is contended all sales made by companies of their assets are void unless made in compliance of the terms prescribed by the Act. It seems an extraordinary thing that an Act dealing with an everyday affair should not have come up for consideration at an earlier date.

We know that in 1893, and prior thereto, there were a great many companies—both registered and incorporated—doing business in this Province. We also know that the right of these companies to sell their assets depended on

the provisions contained in their memorandum of association, or other incorporating document. We also know that many of these had provided for the making of such sale, and we may take it for granted—even if we don't know it for a fact—that some of these companies had omitted to provide for such a contingency.

Then in 1893, the Act in question was passed. It is said that the Act is restrictive, and in supporting that view the suggestion was made that possibly the Legislature desired to establish a uniform system throughout the Province. It strikes me that would have been an arbitrary course for the Legislature to adopt. That that body should have interfered with the terms of incorporation of the many bodies doing business in the Province, and imposed upon them all one and the same set of conditions, seems to me to be so unreasonable that in the absence of some words shewing such an intention we should not adopt that view.

In my opinion if we read section 1 alone, or if we read it together with section 2—see *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493—it is an enabling Act to give a capacity where the capacity did not exist before, and to provide a procedure where no procedure was before laid down.

If the Legislature in 1893 meant to say that in future no sale should be made except upon a resolution duly passed, etc., etc., in the words of the Act, all that I can say is it has not said so, and were I on this statute to hold that every sale by a corporation of the whole or any portion of its assets must be conducted after satisfying all the requirements of this section, I feel that I would be applying an arbitrary rule not warranted by the language made use of.

On the finding of fraud I agree with the learned Judge who tried the case. I therefore think the appeal should be dismissed.

MARTIN, J.: There are two main grounds of the defendants' appeal: (1) that the finding, adverse to them, of the

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learned trial Judge on the question of fraud is against evidence, and (2) that he should have held Chapter 9 of the Companies Act Amendment Act, 1893, to be not a restrictive but an enabling statute, giving an additional power of sale to companies, and that the Directors had power to sell under this Company's by-laws irrespective of said statutory provisions.

Taking the second point first, I agree with my brother IRVING that the defendants' contention is the correct one, for the reasons given in his judgment; but as I think the learned trial Judge's finding on the second question (*i.e.*, fraud) should be supported, the appeal must be dismissed with costs.

Appeal dismissed.

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Contract—Proposal in writing—Acceptance by parol—Evidence as to terms—Whether admissible.

D. delivered to H. a document containing written instructions to sell a coal mine on certain terms and a promise to pay H. a commission of five per cent. on the selling price, the commission to include all expenses: H. proceeded to sell the mine and incurred certain expenses.

Held, *per* WALKEM, J., that evidence was admissible to shew that contemporaneously with the delivery of the document to H. he stated that the mine could not be sold at the price named, and that D. agreed to pay his expenses if a sale was not made.

Held, (on new trial) *per* MCCOLL, J., that such evidence was inconsistent with the written instructions, and therefore not admissible.

Held, on appeal, that the question whether the written instructions constituted the whole contract should have been submitted to the jury.

Statement.

ACTION by a real estate agent against the owner of the Wellington collieries for $24,047.00 for services as agent in and about the obtaining of a purchaser for the collieries and for cash disbursed on defendant's account in procuring surveys, and for travelling and other expenses.

The plaintiff never assented in writing to these letters, but at the time he got the letters, he and defendant had a conversation in which Harris alleged he told the defendant that they would not be able to sell for all cash and that to bring about a sale would entail a very large expense as there would have to be a proper report, etc., and defendant said to him, "go ahead and do the best you can, I will see you all right in the matter." Harris said he took defendant's word that she would pay him a fair compensation for his time and expenses in case the sale did not go through. The facts sufficiently appear in the verdict and judgment.

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The trial took place at Victoria on 29th and 30th July, 1896, before WALKEM, J., and a special jury who returned the following verdict:

1. "Did the plaintiff, Mr. Harris, accept and act upon the terms contained in defendant's letter of the 18th of September, as constituting the complete contract between the defendant and himself as principal and agent? A. No.

2. "If not, did the defendant verbally authorize the plaintiff to do his best to effect a sale of the mine, plant, etc., in the event of his being unable to find a purchaser within the time and upon the terms mentioned in the written instructions, and was such authority intended by both parties to be considered as incidental to the written instructions and as part of the contract between them as principal and agent? A. Yes.

3. "Were the terms mentioned in the defendant's letter of the 18th of January, 1892, intended to be a modification of the written instructions of the 18th of September, 1890, and were they so treated by both parties? A. Yes.

Statement.

4. "Were these terms accepted and acted upon by the plaintiff as the complete contract between them? A. No.

5. "If not, did the defendant verbally authorize the plaintiff to do his best, etc., (same as question 2). A. Yes.

6. "Did the plaintiff procure a purchaser for the mine upon the terms and within the time limit mentioned in the written instructions of the 18th of Janury, 1892, (as modified in March, 1892), by the defendant agreeing to throw in the colliery steamers and vary the terms of payment; (b) and if so, was the completion of the negotiations within the time limit prevented without just cause by the defendant? A. Yes.

7. "In the event of the plaintiff being entitled to damages, what is the amount? A. $19,377.00."

Bodwell and *Duff*, for plaintiff.

Richards, Q.C., and *Pooley, Q.C.*, for defendant.

WALKEM, J.: Mr. Harris, who constitutes the firm of Lowenberg, Harris & Co., is the plaintiff in this action. He is a real estate agent in this city, and the defendant, Mrs. Dunsmuir, is the owner of the Wellington collieries.

This action was brought to recover $24,047.00 for alleged agency services, and moneys expended in endeavours to effect a sale of the collieries, and was tried before myself and a special jury, who found a verdict in favour of the plaintiff for $19,377.00. At the conclusion of the opening statement of the plaintiff's case, a motion to non-suit was made, but was refused as being premature (see *Fletcher* v. *London and North Western Railway Company* (1891), 61 L.J., Q.B. 24). At the close of the plaintiff's case the motion was renewed; but I directed it to stand over until after the trial, so that in the event of my granting it, and of its being subsequently set aside, the Full Court should have before it all the materials necessary to enable it to give a final judgment one way or the other, and thereby save the expense of a reference to a second jury. The motion has now been argued; and it having been conceded that in the event of its being refused the plaintiff's concurrent motion for judgment on his verdict should be allowed, it follows that the only question I have to consider is the one of non-suit.

Judgment of WALKEM, J.

The plaintiff's evidence is, in substance, that at an interview between him and Mrs. Dunsmuir, at the office of her solicitor, Mr. *Pooley*, the following documents, as the result of previous interviews, were drawn up by Mr. *Pooley* and handed to him.

VICTORIA, B.C., 18th September, 1890.

Dennis R. Harris, Esq., Victoria:

"DEAR SIR:—I appoint you my agent and authorize you to sell the property known as the Wellington Mines, with the plant and appliances for working the same, for the sum of $2,600,000.00.

Yours truly,

J. O. DUNSMUIR.

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VICTORIA, B.C., 18th September, 1890.

Dennis R. Harris, Esq., Victoria:

DEAR SIR:—I allow you twelve months in which to sell the Wellington Mines, and I agree to allow you a commission of five per cent. on the sale should you accomplish it, such commission to include all expenses, you to pay me the net sum of $2,470,000.00.

Terms of sale as follows: One million dollars to be paid down at time of sale; one million dollars to be paid at one year from date of sale; and balance at two years from date of sale; such deferred payments to bear interest at six per cent. per annum. If purchasers are desirous of paying at once or at shorter dates, they will be allowed to do so.

Yours truly,
J. O. DUNSMUIR.

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The above time limit having expired without a sale having been effected, the following further authority to sell was given to the plaintiff:

18th January, 1892.

D. R. Harris, Esq., Victoria:

DEAR SIR:—I appoint you my agent and authorize you to sell the property known as the Wellington Mines, with the plant and appliances for working the same, for the sum of four hundred and thirty thousand pounds sterling. This authority to continue six months from date.

Yours truly,
J. O. DUNSMUIR.

LANGLEY STREET, VICTORIA, B.C.,
18th Jan., 1892.

D. R. Harris, Esq., Victoria:

DEAR SIR:—I allow you six months in which to sell the Wellington Mines, and I agree to allow you a commission of five per cent. upon the sale should you accomplish it, such commission to include all expenses; terms of sale as

follows: Two hundred thousand pounds to be paid down, one hundred thousand pounds to be paid at the end of one year from sale, and the balance at the end of two years from date of sale; but you are allowed to take for me in any company that may be formed for the purchase of the mines, shares to the value of one hundred thousand pounds. This taking of shares in a company shall not in any way affect the first two payments, which are to be made in cash. All deferred payments to bear interest at six per cent. per annum.

If purchasers are desirous of paying at once or at shorter dates they will be allowed to do so.

Yours truly,

J. O. DUNSMUIR.

According to the plaintiff's pleadings, he acted upon both sets of documents; this, therefore, gave them the force of an agreement. (*Hotson* v. *Browne* (1860), 9 C.B.N.S. 443).

He further relied at the trial upon a verbal arrangement made, as he stated, with the defendant to the effect that if he failed to sell he should be compensated for his services and outlay—his counsel contending that this was a collateral arrangement, inasmuch as the payment by commission was contingent on a sale, whereas the latter arrangement was for payment in case of no sale. Counsel for the defendant objected to any evidence of this being admitted, on the ground that the arrangement was equivalent to an attempted alteration of the documents—which, as he contended, became in effect, a written agreement the moment they were acted upon. But such proposals or instructions do not become written agreements or contracts unless assented to in writing. In *Stones* v. *Dowler* (1860), 29 L.J., Ex. 122, Martin, B., makes the following observations on the same point: "There was no contract in writing; there was a mere proposal in writing; and if it had been accepted, the entire agreement would have been in writing, and could

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not have been added to, diminished or altered by parol evidence. But when the agreement is not in writing, the jury have a right to look at all the circumstances of the case, before and after the bargain, for the purpose of ascertaining what was the real contract between the parties." In the same case, Channel, B., remarked: "The bargain commenced by a proposal in writing; then, being a proposal, it did not constitute a contract until it was accepted and the acceptance having been by parol, the evidence must be looked at to see what was the contract between the parties." Hence at the trial, it was open to the present plaintiff to shew, as he endeavoured to do, what the real agreement between him and the defendant was—and that, too, independently of his pleadings, for when the evidence and pleadings differ, the matter pleaded must be adapted to the matter proved—*Clough* v. *The London and North Western Railway Company* (1871), L.R. 7 Ex. 30.

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In his evidence he denied having assented to the instructions or proposals of September, 1890. He says: "I told them" (the defendant and her solicitor) "it was impossible to sell a thing like that under those instructions." He also says that he stated that the price in cash could not be got and that he objected to the time limit for selling as being too short, to the commission as being insufficient "to float a thing like that;" and to the provision that it should cover all expenses as he knew that he could not make a sale "under such instructions." All this has only one meaning, namely, that he objected to the instructions from end to end. Q. "Did you tell her I am to have something in this matter? Yes." Q. "You objected then to the document in *toto*? Practically;" and in another part of his evidence he says he has merely used it "as a guide" and that he had only done so as the defendant had requested him, in reply to his objections, to do the best he could.

His evidence on cross-examination in reference to the second instructions is as follows:

"When you received these, did you act under them?" "Yes."

"You communicated with Mr. Brodie under these last documents?" "I objected to them first."

"To whom did you object?" "Mrs. Dunsmuir. I told her the time was too short—six months."

"Nevertheless you acted under them?" "Yes. She said do the best you can."

"When you got that document, Mr. Harris, you did not expect that you were going to charge commission and expenses both, did you?" "No, if it was not sold I was to get my expenses."

"If it was not sold you were to get your expenses?" "Yes, expenses for all the trouble I went to."

"When was any agreement made for that?" "There was an agreement, that was the understanding of it."

"That was the understanding you had with Mrs. Dunsmuir?" "Yes, the purport of it—'do your best.'"

"Where did you have the understanding with Mrs. Dunsmuir?" "Over at her house."

This and the previous evidence had to be left to the jury as it was for them to ascertain what the real contract was. Again the plaintiff's main complaint was that the defendant so obstructed him as to cause an impending sale to fall through, and consequently to cause him the loss of his commission; and on that ground he based his claim to a *quantum meruit*. Now, whether the complaint was well founded or not in view of his evidence, was, obviously, a question of facts. Thus three different issues of fact—whether or not the first instructions had been accepted—whether or not the second had been accepted, and, lastly, whether or not the plaintiff's efforts to sell had been obstructed as alleged, had to be determined by the jury. Under such circumstances, a non-suit would be unwarrantable; and the plaintiff is accordingly entitled to judgment on his verdict with costs.

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The defendant appealed to the Full Court and the appeal was argued 2nd March, 1897, before McCREIGHT, DRAKE and McCOLL, JJ.

Pooley, Q.C., and *Wilson, Q.C.*, for the appellant.
Duff, for the respondent.

The Court, holding the plaintiff was not entitled to judgment on the findings of the jury, ordered a new trial.

Statement. Pursuant to the above order of the Full Court the action came on for trial before McCOLL, J., and a special jury on 6th, 7th and 8th December, 1897. After the evidence of Harris was taken the plaintiff rested his case.

Argument. *Wilson, Q.C.*, (*Pooley, Q.C.*, with him), for defendant, moved for a non-suit.

Bodwell, (*Duff* with him), for the plaintiff, moved to amend the pleadings to conform to the evidence.

The Court allowed the amendment and then heard the arguments of counsel on the motion for non-suit, the jury being dismissed until the next day.

On 8th December, judgment as follows was delivered by

Judgment of McCOLL, J. McCOLL, J.: It was contended for plaintiff, (1) that Harris found a purchaser in accordance with the agreement between him and the defendant and that the non-completion of the sale was owing to her default; (2) alternatively that by a collateral agreement made between them he was to be entitled in the event of no sale being effected to a reasonable sum for his services and his disbursements, or at least to the latter; and (3) that in any case the plaintiff is entitled to payment for services rendered by him before his appointment as agent.

As I understand the evidence there never was a time when any concluded agreement was made by Harris with any intending purchaser nor was the defendant ever in de-

fault in any way with reference to any proposed sale upon terms authorized by her. The plaintiff's case upon the alleged collateral agreement I think wholly fails, firstly, because the written agreements as I construe them shew in themselves that they were meant to contain the whole that was intended to be binding upon the parties ; see Erle, C.J., in *Lindley* v. *Lacey* (1864), 34 L.J., C.P. at p. 7. The suggested agreement that Harris was to be paid for his services including disbursements even if no sale should be made is not such a "distinct collateral matter" as alone could be the subject of an oral co-existing agreement. Nor would the difficulty disappear if the alleged agreement could be confined to the disbursements. The written instrument must be construed with reference to the well known usage that an agent's commission indemnifies him for all his expenses and that payment of the commission pre-supposes success. If the writings had simply fixed the rate of commission they would have had to be read as if these conditions had been written in and there is nothing in the language used to shew that anything different was intended. It would be very mischievous in a matter of this kind to allow evidence of an understanding contrary to this usage as well as to the express terms of the writing. I was referred to the case of *Stones* v. *Dowler* (1860), 29 L.J., Ex. 122 ; but this was the case of a written proposal merely, and the decision so far as it applies is against the plaintiff. Nor is there anything in the other case referred to of *Gillespie Brothers & Co.* v. *Cheney, Eggar & Co.* (1896), 2 Q.B. 62, to assist the plaintiff. In the second place it seems to me that Harris' evidence shews at most, merely a promise too vague to amount to a contract. The nearest approach to anything definite upon this subject is in cross-examination and it was strongly pressed upon me that the jury might properly have regard to a portion only of the evidence and so find for the plaintiff according to the opinion expressed by Lord Blackburn in 3 App. Cas. at p. 1201. But it is, I think,

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manifest that his observations cannot apply to the evidence of a plaintiff, and that it must be taken as a whole. I am of opinion that Harris' conduct throughout, and particularly in writing the letter in which he made the only attempt to get payment for anything which he ever did make before the commencement of this action—a letter written after he had full professional advice as to his position and long after as he admits, all business and other relations between himself and the defendant had ceased, is not only utterly inconsistent with the existence of any such contract as is now put forward, but shews clearly that the question of payment by the defendant was one merely for her generosity and that the "jury receiving the whole of the evidence reasonably could not find" otherwise. This being so the plaintiff ought to be non-suited; *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand* (1896), A.C. 372.

Judgment of McCOLL, J.

Any expenses which may have been incurred before Harris' actual appointment, must, I think, be referred solely to the agreement.

Bodwell having stated that the plaintiff would not consent to a non-suit, the jury, under the direction of the Court, found a verdict for defendant and judgment was entered accordingly.

The plaintiff moved against the judgment and for a new trial, and the motion came on at Victoria before the Full Court, consisting of WALKEM, DRAKE and MARTIN, JJ., on the 7th of March, 1899.

Argument.

Bodwell (*Duff* with him), for the motion: The ground on which the trial Judge decided against the plaintiff was that the writings must be taken as the whole agreement, whereas the plaintiff's case was that certain portions of the agreement were contained in a verbal understanding that Harris should be paid his expenses and a fair remuneration

for services if the sale was not carried out. Whether or not there was verbal evidence was a question of fact and should have been left to the jury. A verbal contract of this kind can be proved and when it is attempted to be proved it is a question of fact for the jury. See *Stones* v. *Dowler* (1860), L.J., Ex. 122; *Ellis* v. *Abell* (1884), 10 A.R. 240; *Harris* v. *Rickett* (1859), 4 H. & N. at p. 6; *Mann* v. *Nunn* (1874), 30 L.T.N.S. at p. 527; *Stucley* v. *Baily* (1862), 1 H. & C. 404 at p. 413; *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 585; *Erskine* v. *Adeane* (1873), 8 Chy. App. 756; *Grand Trunk Railway Company of Canada* v. *Fitzgerald* (1881), 5 S.C.R. 204; and *McMullen* v. *Williams* (1880), 5 A.R. at p. 521.

Pooley, Q.C., for defendant: There may have been some evidence to go to the jury, but in the opinion of the trial Judge a verdict for the plaintiff could not reasonably be found and he would not have been justified in leaving the case to the jury. *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand* (1896), A.C. 372; *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. 32. The plaintiff relies on an illusory contract. They are not entitled to a *quantum meruit*; *Simpson* v. *Lamb* (1856), 17 C.B. 614. He cited also *Reuss* v. *Picksley* (1866), L.R. 1 Ex. 342, and *Taylor* v. *Brewer* (1813), 1 M. & Sel. 290.

Argument.

Wilson, Q.C., on the same side: A verbal acceptance of a written offer or acting on it constitutes a written agreement. Evidence of a contemporaneous agreement to vary cannot be received. See *Hotson* v. *Browne* (1860), 9 C.B. N.S. 443, and *Ellis* v. *Abell* (1884), 10 A.R. 226. See also *Giblin* v. *McMullen* (1868), L.R. 2 P.C. at p. 335, and *Kerr & Begg* v. *Cotton* (1892), 2 B.C. 246. As to contract with commission agent, see *McLeod* v. *Artola Brothers* (1889), 6 T.L.R. 68. Our position is that even if the jury gave a verdict for the plaintiff this Court would have to set it aside.

Bodwell, in reply: *Hotson* v. *Browne* is distinguishable as it enunciated the principle that where a proposal in writing is accepted *simpliciter* the terms of the contract would

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certainly have been in writing, but where variations are made and the acceptance is by parol the evidence must be looked at to see what was the contract between the parties. See judgment of Channel, B., in *Stones* v. *Dowler* (1860), 29 L.J., Ex. 122 at p. 125. There was a collateral agreement and the question of the credibility of the witness should have been left to the jury. As to verdict and duty of Judge not to find facts, see *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 A.C. at p. 1201. The whole point is, was Harris telling the truth? And that is a question for the jury.

5th April, 1899.

Judgment of DRAKE, J.

DRAKE, J.: This is an appeal from the judgment of Mr. Justice MCCOLL directing the jury to find a verdict for the defendant, he having arrived at the conclusion that the written proposal of Mrs. Dunsmuir, which was accepted and acted on by Harris, was in fact the whole contract. It was strongly contended that the appointment of agent, and letter of instructions of the 18th of September, 1890, did not make a contract, because Harris had not assented thereto in writing, and thus all the surrounding conversations became admissible, and therefore the alleged agreement set up by Harris to pay for expenses and time in case of no sale, was to be treated as a separate and independent contract for which the plaintiff was entitled to sue. Harris, in his statement of claim, relies on his appointment as agent under the documents of the 18th of September, 1890, and he alleges that he went to England in October, 1890, in pursuance of such appointment. This is hardly consistent with the present contention that the contract was not accepted and acted upon.

The grounds of complaint as appear by the claim are that the defendant wrongfully prevented him from earning his commission by refusing to accept the terms which he had obtained. Not one word about any claim on an inde-

pendent contract that under any circumstances he should be paid for time and expenses in case of failure.

The case opened for the plaintiff was based on this alleged independent contract. The Court allowed the amendment as if made, but did not require it to be formulated, and in consequence we are left in the dark as to the exact terms of this alleged independent contract relied on. The Chief Justice appears to have come to the conclusion that this alleged promise to pay for time and expenses in case of no sale was an addition to, or variation from the original.

In *Rogers* v. *Hadley*, 2 H. & C. 249, Baron Bramwell states the principle thus: "Where the parties to an agreement have professed to set down their agreement in writing, they cannot add to it, or subtract from it, or vary it in any way by parol evidence; otherwise they would defeat that which was their primary intention in committing it to writing." The question whether this alleged agreement was a parol variation of the written agreement may become a question for the Court, but whether or not the defendant so acted as to prevent the plaintiff earning his commission is a question on which the plaintiff, I think, is entitled to have the opinion of the jury. But without discussing the evidence it is sufficient to say that there are questions raised on the pleadings which it might be advisable to take the opinion of the jury on. We think, therefore, that there should be a new trial, the costs of the previous trial and of this application to abide the event. At the same time we think both parties should have leave to amend without further order.

We must remark that we think it inadvisable to allow verbal amendments in cases such as this, where a different cause of action is set up than that alleged in the pleadings. If the parties are allowed to amend in such a case, they should formulate the amendments so that the other side may have an opportunity of considering them. We do not wish in any way to restrict the right of amendments so that the issue to be tried may

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clearly be placed before the jury, but in order to do so Rule 170 should be borne in mind, and see *Edevain* v. *Cohen* (1889), 43 Ch. D. 187, where facts of which the defendant had knowledge but had refused to plead were not allowed to be raised by way of amendment.

WALKEM, J., concurred in granting a new trial.

MARTIN, J.: I agree with my learned brothers that there should be a new trial.

Though, as it turns out, it would have been more convenient to have had the amendments formulated, particularly after the new trial had been ordered, yet the broad scope of those amendments sufficiently appears at pages 96 and 101-2 of the Appeal Book.

Judgment of MARTIN, J.

The grounds taken by the appellant at the trial, and his counsel's objection to the course there adopted by the learned Judge in directing the jury to find a verdict against him on his own evidence are set out at pages 241-4 of the Appeal Book. In the opinion of the trial Judge the independent parol agreement largely relied on by the appellant was "not only utterly inconsistent" with the written contract and the appellant's conduct and subsequent letter, "but shews clearly that the question of payment by the defendant was one merely for her generosity, and that the jury receiving the whole of the evidence reasonably could not properly find otherwise."

The appellant's case is that the whole agreement was not in writing, and that (1) he did practically obtain an offer under it as written; or (2) alternatively, he was prevented by the conduct of the defendant from so doing; and (3) that he is, in any event, entitled under the whole agreement to be paid his expenses and some remuneration for services rendered in connection with the abortive sale.

In the case of *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand* (1896), A.C. 372, the Judicial Committee of the Privy Council accepted the rule laid down

in *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. 32, as being correct, *i.e.*, there must be some evidence to go to the jury on which they could reasonably give a verdict (376); a scintilla of evidence would clearly not justify the Judge in leaving the case to the jury.

Now is there evidence here on which the jury could reasonably have found for the plaintiff? That is the question before us, and counsel have referred elaborately to the notes of evidence in support of their opposing contentions. It is unnecessary for me here to review these references in detail, or express an opinion regarding the weakness or strength of the plaintiff's case, which he is, in my opinion, as a matter of law entitled to set up.

I have come to the conclusion, reviewing the transaction as a whole (and with the greatest respect for the opinion of the learned trial Judge), that there is evidence on which the jury might reasonably have found for the plaintiff.

Judgment of MARTIN, J.

New trial ordered.

HANEY v. DUNLOP.

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Adverse action—Writ of summons—Renewal of—Mineral Act, Sec. 37.

The plaintiff in an adverse action issued a writ on 5th August, 1897, and not having served it, obtained on 2nd August, 1898, upon an *ex parte* application, an order for renewal; the order was on the application of the defendant set aside.

Held, on appeal to the Full Court that no reasonable explanation of the delay being given the order for renewal was properly set aside; but that section 37 of the Mineral Act does not enable a defendant to get rid of an action by applying in a summary way when not authorized by the ordinary practice of the Court.

Statement. THIS was an appeal to the Full Court from an order of WALKEM, J., reported *ante* at page 451. The appeal was argued at Victoria on 1st May, 1899, before MCCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.

Argument. *A. E. McPhillips*, for appellant, cited *Howland* v. *Dominion Bank* (1892), 15 P.R. 56, at pp. 59, 61 and 62, and 22 S.C.R. 130; *St. Louis* v. *O'Callaghan et al.* (1889), 13 P.R. 322, at p. 326. It might be urged that the plaintiff should have obtained an order for substituted service, but the answer to that was, that it is a difficult thing to establish the right to substituted service. Where a solicitor makes a mistake the Court should relieve unless it is shewn that other equities intervene and here the solicitor thought his client's rights would be preserved as the same ground was in dispute in another action.

Duff, for respondent, cited *Hewett* v. *Barr* (1891), 1 Q.B.

pp. 98 and 100, and *Barrett* v. *Day* (1890), 43 Ch. D. 449; *Re Gedye* (1852), 15 Beav. 254.

2nd May, 1899.

McColl, C.J.: The writ of summons was issued on the 5th of August, 1897, and admittedly no attempt was made to serve it until the 26th of July, 1898.

The only reasonable explanation (if any) of the delay is contained in the affidavit of Mr. *Elliott*, the plaintiff's solicitor, sworn on the 1st of March, 1899.

In view of the dates of the various proceedings to which he refers, I am unable to say that a "good reason" has been given within the meaning of the rule, and a defendant has the same right to move against an order of this kind as against any other order affecting him.

I agree that the enactment mentioned in the reasons for the judgment appealed from, ought not to be disregarded whenever effect can be given to it, but I cannot accede to the proposition that it enables a defendant to get rid of an action by applying in a summary way, when not authorized by the ordinary practice of the Court.

Drake, Irving and Martin, JJ., concurred.

Appeal dismissed.

McCOLL, L.J.A. 1899. May 4.

SUNBACK v. SAGA

IN THE EXCHEQUER COURT—B.C. ADMIRALTY DISTRICT.

SUNBACK v. THE SHIP SAGA: CARLSSON v. THE SHIP SAGA.

Costs—Marshal's possession fees—Taxation.

Where in an Admiralty action a marshal is in possession of a ship simultaneously under warrants issued in different actions, more than one set of possession fees will not be allowed.

Statement. ACTIONS in the Exchequer Court, British Columbia Admiralty District, against the ship Saga. The marshal had been in possession of the ship simultaneously under warrants issued in each case, and on the taxation of his costs it was claimed that under the scale of fees he was entitled to a double set of possession fees. The Registrar allowed only one set of fees, and the matter was referred to the Judge.

Belyea, for the marshal.

Spencer, *contra*, cited *The Rio Lima* (1873), L.R. 4 A. & E. 157.

Judgment. McCOLL, L.J.A.: I think only one set of fees should be allowed, and that the Registrar's ruling is correct.

CALLAHAN v. COPLEN.

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CALLAHAN v. COPLEN

Mineral claim—Defects in location of—No. 2 post—Mistake in giving approximate compass bearing of—Whether cured by subsequent certificate of work.

The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded and certificates of work were issued in respect of it regularly since.

The plaintiff in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act.

Held, that the irregularity in locating was cured by the defendant's recording his last certificate of work.

ACTION of adverse claim tried at Rossland before MARTIN, J., on 14th February, 1899, and following days. The facts sufficiently appear in the judgment. Statement.

Sir C. H. Tupper, Q.C., for plaintiff.
Hamilton, for defendant.

MARTIN, J.: On the 24th of May, 1892, the defendant located, and subsequently recorded, the Cube Lode mineral claim on the divide between Cody and Sandon Creeks, in the Slocan Mining District. Over four years afterwards the plaintiff located, on 3rd August, 1896, the Cody Fraction mineral claim, and on the 27th of September, 1896, the Joker Fraction mineral claim, and duly recorded them. The Cube Lode claim as now surveyed, would occupy most of the ground claimed as that of the Cody and Joker Fractions. Judgment.

It is contended on behalf of the plaintiff, first, that the present situation of the Cube Lode is not according to its original location, or, in other words, that the defendant has

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fraudulently "swung" the posts of the Cube Lode, so as to place it, practically, on the wrong (eastern) side of the divide. This, of course, is an allegation of a very serious character, and to substantiate it I must be satisfied beyond doubt that the defendant has deliberately committed what is tantamount to a criminal offence. In view of the positive assertion of the defendant that the location line at the top of the divide, which the plaintiff took to be that of the Cube Lode, was really that of the Summit claim, also located by the defendant on the same day as the Cube Lode, and that someone has changed the name of the claim and the name of the locator, and the corroborative testimony as to the original location of the Cube Lode, I feel I would not be justified in giving preponderating weight to the evidence offered on behalf of the plaintiff on this point, though without explanation it was a strong case of circumstantial evidence. I might say here that it was a pleasant feature of this case that I had no reason to believe from anything in the demeanor of the principal parties concerned that there was any intention to deceive the Court, or that anything other than a straight story was being told; there is practically no direct conflict of evidence.

Judgment.

Second, the defendant contends that in any event the present location of the Cube Lode is invalid, because upon No. 1 post, the initial post, the "approximate compass bearing" of No. 2 post is not given as required by the Act. On his cross-examination the defendant admitted that the compass bearing "south-easterly," which is written on No. 1 post, does not give the true direction, and said that instead of being south-easterly the bearing should be a "little north of east." While admitting that the compass bearing is misleading, he states that it would be very easy to find the location line because of the reference in the record to the adjoining Freddy Lee claim. He explains his mistake by saying that he had no compass at the time; the answer to that is that he should have had one. The plaintiff con-

tends that the proper bearing is "north-easterly," and, according to the evidence of Mr. Heyland, P.L.S., who made the survey for the defendant, the compass bearing, that is magnetic (under which he states surveys according to the Mineral Act are always made), would have been N. 74 degrees, 9 min. east. I have come to the conclusion that "south-easterly" is not the "approximate compass bearing" within the contemplation of the Act, and it is quite clear that the plaintiff in this case was misled by that description. Further, I do not think that where an approximate compass bearing is not given this plain requirement of the Act can be cured by a reference in the record to another claim.

But the defendant claims the benefit of sub-section (g.) of section 16 as amended by the Mineral Act Amendment Act, 1898. Assuming for the moment that the defendant is otherwise entitled to the benefit of this section, so as to cure his "non-observance of the formalities required," I am of opinion that in this particular case he does not come within the scope of the section, because I find the non-observance was "of a character calculated to mislead other persons desiring to locate in the vicinity," and did in fact mislead them.

But he also claims the benefit of section 28 as curing the irregularity. This section is as follows:

"28. Upon any dispute as to the title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud."

It is shewn on the part of the defendant that for several years before the plaintiff located his claim he, the defendant, had recorded certificates of work, and has continued to do so up to the present time. The plaintiff has also duly recorded his certificates of work, and he likewise claims

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that this section places him in as good a position as the defendant. As pointed out by Mr. Justice DRAKE in *Fero* v. *Hall* (1898), 6 B.C. 421, the position is one of difficulty, and I reserved judgment largely on this ground. On mature reflection I have, with some diffidence, come to the conclusion that the defendant is entitled to the benefit of the section. If effect is to be given to it at all, the irregularity complained of was cured by his recording his last certificate of work, for I am directed in positive terms by the statute to "assume that up to that date the title to such claim was perfect;" nothing could be stronger. The same remarks apply to the plaintiff's case, but with this exception, that other things being equal the defendant has the prior location (now cured of all irregularity) by over four years. As Mr. Justice DRAKE said in *Fero* v. *Hall*, under such circumstances "the Court has to fall back upon prior location and record," and I feel this is the only safe rule to be guided by. It is in accord with the legal maxim, *Qui prior est tempore, potior est jure*, which seems particularly applicable to mining titles.

The action will be dismissed with costs.

Action dismissed.

CORDINGLEY v. MACARTHUR.

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FULL COURT At Victoria.

May 3.

CORDINGLEY v. MACARTHUR

Fraudulent bill of sale—Husband and wife.

C. in 1896, gave his wife $600 00, which she kept in the house and he shortly after commenced to receive it back in small portions and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement and he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture.

Held, (reversing MARTIN, J.), that there was no legal obligation binding upon the husband to repay the $600.00, and that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale and was therefore void.

THIS was an interpleader issue in which Georgina Cordingley was plaintiff, and MacArthur & Co., were defendants, and the question to be tried was whether certain goods seized were the property of the plaintiff as against the defendants, who were execution creditors of the plaintiff's husband. The following statement of facts is taken from the judgment of MCCOLL, C.J.: "The evidence of the husband and wife is that he having received a legacy from his father, voluntarily gave her $600.00 of the amount; that it was not given for any particular purpose; that she kept it in the house where they both resided; and that within a month, without any objection on her part, she not having made up her mind to what use she would put the money, and not having dealt with it as her own (unless the mere keeping of it physically in her possession, subject to his control, and handing it back to him as he asked for it, can be considered such a dealing), he had drawn upon it until it was all spent, in what way does not appear, except that he was

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'hard up' as he expresses it, and out of employment at the time and needed money 'to go on with;' the household expenses being paid by himself.

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"There was no promise by the husband to repay the wife, who did not even take any written acknowledgment from him for any part of the money, and nothing seems to have been said by either of them about the matter for nearly three years, when the husband, being in financial difficulties, gave to her the bill of sale in question in consideration of this sum of $600.00 on his household furniture, which was not exempt from seizure under execution, not having been paid for, and MacArthur & Co. having then to the wife's knowledge, commenced their action to recover the price of it, which was owing to them."

Statement.

The trial took place at Nelson before MARTIN, J., on 23rd February, 1899.

Galliher, for plaintiff.
W. A. Macdonald, Q.C., for defendants.

29th March, 1899.

MARTIN, J.: After further consideration of the evidence I am of the opinion that this interpleader issue should be decided in favour of the plaintiff. Were it not for the demand for payment made by plaintiff in March, before the difficulties with the defendants had arisen and the promise to secure her, given by her husband in response to that demand, I should have had to set aside this bill of sale, but taking this uncontradicted evidence as it stands I feel that I would not be justified in so doing. The transaction was, as counsel for the defendants contended, loose and unbusinesslike, but it was not fraudulent or otherwise illegal. I have arrived at this view with some hesitation, but there is enough to turn the scale in favour of the plaintiff.

Judgment of MARTIN, J.

I might add that I was not favourably impressed by the manner in which the two witnesses for the defence gave

their evidence. I refer to the defendant MacArthur in particular.

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Judgment for the plaintiff.

The defendants appealed to the Full Court and the appeal was argued at Victoria before McColl, C.J., Drake and Irving, JJ., on 2nd May, 1899.

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Duff (*W. A. Macdonald, Q.C.*, with him), for appellants: To support such a transaction as this between husband and wife most cogent evidence is necessary, and the reality and *bona fides* of the transaction should not be rested on the uncorroborated evidence of the parties to the impeached transaction. *Douglas* v. *Ward* (1864), 11 Gr. 39; *Ball* v. *Ballantyne* (1865), 11 Gr. 199; and *Merchants Bank of Canada* v. *Clarke* (1871), 18 Gr. 594. The contract to repay is not sufficiently shewn. It never was the intention of the parties to create the relation of creditor and debtor between them, but the wife was simply made the custodian of the money for the common benefit of the family. See *Osborne* v. *Carey* (1888), 5 Man. 237; *Hopkins* v. *Hopkins* (1883), 7 Ont. 224; *Dufresne* v. *Dufresne et al.* (1885), 10 Ont. 773; and *Re Miller* (1877), 1 A.R. 393 at p. 396.

Argument.

[He was stopped by the Court].

A. E. McPhillips, for respondent: The gift to the wife was good. *Ramsay* v. *Margrett* (1894), 2 Q.B. 18. The Ontario cases cited are not relative, as here the question is not whether or not the husband is liable to the wife. How could corroborative evidence be obtained when only the parties to the transaction know of it? He cited *In re Dillon* (1890), 44 Ch. D. 80; *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523; *Coghlan* v. *Cumberland* (1898), 1 Chy. 704; *Derry* v. *Peek* (1889), 14 A.C. 337. Because the parties are husband and wife their evidence should not be weighed on a different scale from that of others.

[The Chief Justice: It is a pure question of fact].

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We are entitled to the benefit of the finding of the trial Judge who found that there was a debt, that the wife demanded security, that the defendant paid by the bill of sale, and that the transaction was not fraudulent. Even if on the evidence your Lordships would yourselves have come to a different conclusion, the finding of the trial Judge, who has seen and heard the witnesses, ought not to be reversed. He cited *Brown* v. *Jowett* (1895), 4 B.C. 48; and *Wright* v. *Sanderson* (1884), 9 P.D. 149.

On 3rd May, 1899, the judgment of the Court was delivered by

McCOLL, C.J. (After stating the facts.): It was contended for the execution creditors, upon the authority of decisions in the Courts of Ontario and Manitoba, that such a transaction as this between husband and wife cannot stand as against an execution creditor without corroboration of their evidence.

For the wife it was strongly urged that there is no such rule recognized in England, the authorities there being, it was claimed, the other way, and that the cases cited not being binding upon this Court ought not to be followed; and further, that the trial Judge having decided in the wife's favour, his finding upon the facts should not be interfered with.

Judgment of McCOLL, C.J.

In my opinion it is impossible, even if full credit be given to the evidence of the husband and wife, to hold that there was in the circumstances any legal obligation binding upon the husband to pay to his wife the $600.00 as a loan advanced by her, and the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of its execution.

I do not think that any question of false swearing by either the husband or the wife is necessarily involved.

It is quite conceivable that they may have thought themselves entitled to speak of the money as a loan. It is a too

common practice that persons, even when not blinded by self interest, will swear to conclusions rather than to facts.

The learned Judge having found for the wife with hesitation (as I suppose because of his natural reluctance to discredit her evidence), and there being no dispute upon the facts, I think the appeal must be allowed.

Appeal allowed.

CONNELL v. MADDEN.

Mineral law--Mineral Act, 1894, Sec. 4—No. 1 post in U.S.A.

It appearing that the No. 1 post of a mineral claim was upon the United States side of the International boundary line:

Held, that the location was invalid.

APPEAL to the Full Court from the judgment of WALKEM, J. (reported *ante* at page 76), argued before McCOLL, C.J., IRVING and MARTIN, JJ., at Victoria, on 1st and 2nd December, 1898.

Statement.

W. J. Taylor, for appellant: The holder of a mineral claim is a leaseholder, and his claim can only be attacked by the Crown. The difference between the Mining Acts of the United States, Australia, and British Columbia, is that in the United States and Australian Statutes there is not only a clause declaring a claim vacant, but a re-entry

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clause also. Our Act does not say who shall have the right to bring an adverse action. He cited *Anthony* v. *Jillson* (1890), 16 Morr. 26; *Delmonte* v. *Last Chance* (1898), 18 Sup. Ct. Rep. 895; Armstrong's Gold Mining, 62, 65; *Bulmer* v. *The Queen* (1893), 23 S.C.R. 488; *White* v. *Neaylon* (1886), 11 App. Cas. 171; *Myers* v. *Spooner* (1880), 9 Morr. 520; *Meydenbauer* v. *Stevens et al* (1897), 78 Fed. Rep. 787, at p. 792; *Brainerd* v. *Arnold et al* (1858), 8 Morr. 478; *The Golden Terra Mining Co.* v. *Mahler* (1879), 4 Morr. 390; *Erhardt* v. *Boaro* (1885), 15 Morr. 473.

Bodwell, for respondent.

On 9th January, 1899, the judgment of the Court was delivered, dismissing the appeal with costs, the following written judgment being delivered by

Judgment of MARTIN, J.

MARTIN, J.: I agree with the learned trial Judge that the initial post of the Sheep Creek Star claim having been planted in the United States of America, instead of within the boundaries of this Province, the whole location is invalid. The Mineral Act of British Columbia does not contemplate the existence of a claim which takes its root, *i.e.*, has its initial post, in a foreign soil, and, as I regard it, the whole location is void *ab initio*, or, to put it in another way, there never was in law such a claim as the Sheep Creek Star.

The appeal must be dismissed with costs.

Appeal dismissed.

LENZ & LEISER v. KIRSCHBERG.

DRAKE, J.
[In Chambers.]

1899.

March 11.

LENZ & LEISER v. KIRSCHBERG

Arrest—Ca. re.—Affidavit—Statement of cause of action—Partners—New firm suing on cause of action which accrued to old firm—Practice—Rule 104.

K. in 1895 gave two promissory notes to the firm of Lenz & Leiser, and in 1896 one member of the firm died, and the partnership business was continued under the same firm name by the surviving partner and the dead partner's widow. In 1898 the firm sued K. on the notes, and he was arrested on a writ of *ca. re.*, the affidavit leading to the order being made by the surviving partner, who swore that he was a member of the firm of Lenz & Leiser, and that K. was indebted to the firm on the notes, but no mention was made of the notes having been given to the old firm.

Held, on summons to discharge the defendant from custody, that the affidavit was insufficient, as it did not disclose that the firm of Lenz & Leiser is a new and different firm from that in existence when the cause of action accrued.

SUMMONS for an order discharging the defendant out of custody. In 1895, the defendant gave to the firm of Lenz & Leiser, then consisting of Moses Lenz and Gustav Leiser, two promissory notes payable three and four months after their dates. On 5th December, 1896, Gustav Leiser died, and the firm business has since been carried on under the old firm name by Moses Lenz and Sophia Leiser, widow of Gustav Leiser. The notes not having been paid, the firm issued a writ against the defendant on 16th December, 1898, and on 8th February, 1899, an order was made giving the plaintiffs liberty to issue against the defendant a writ of capias endorsed to hold him to bail for $1,045.06.

Statement.

The material parts of the affidavit of Moses Lenz used on the application for the order were as follows:

"1. That I am a member of the firm of Lenz & Leiser, the above named plaintiffs, who carry on business as wholesale dry goods merchants at No. 11 Yates Street, in the said City of Victoria.

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"2. Samuel Kirschberg, the above named defendant, is justly and truly indebted to my said firm in the sum of $1,045.06 for money due and payable by the defendant to the plaintiffs, whereof $874.60 is for principal money and $170 46 for interest due upon two several promissory notes dated, etc."

No mention was made of the notes having been given to the old firm.

The defendant was arrested under a writ of capias on 11th February, 1899.

Schultz, for the summons.
Fell, contra.

11th March, 1899.

DRAKE, J.: The defendant, according to his affidavit, was arrested on a *ca. re.* on the 11th of February, in respect of a cause of action arising out of the non-payment of two promissory notes, both dated 27th May, 1895, and payable respectively three and four months after date. The plaintiffs appear in the writ to be Lenz & Leiser.

The firm of Lenz & Leiser consisted at the date the notes became due of Moses Lenz and Gustav Leiser. The latter died on the 5th of December, 1896, and thereupon the partnership terminated, but it was reconstituted by Sophia Leiser being taken into partnership with Moses Lenz. The name of the firm was not changed.

Judgment.

The affidavit to hold to bail, sworn the 8th of February last, was made by Moses Lenz, who there deposes that he is a member of the firm of Lenz & Leiser, and that the defendant is indebted to his firm in $1,045.06, as to $874.60 for principal and $170.46 for interest on the promissory notes above mentioned, payable to the order of the plaintiffs at the Bank of British Columbia, whereby the defendant promised to pay to the plaintiffs or order on the dates aforesaid the sum of $874.60 as aforesaid.

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On this affidavit of the 8th of February an order was made to hold the defendant to bail, and he was arrested on the 11th of February, and is still in custody.

The defendant now applies to be discharged on several grounds, amongst others, that the affidavit does not disclose correctly the cause of action, and that Rule 104 does not permit an action to be brought in the name of the firm under the circumstances disclosed. As to the affidavit. It is, I think, clear that the affidavit is incorrect, it does not disclose that the firm of Lenz & Leiser is a new and a different firm from the firm to whom the cause of action accrued. When a surviving partner makes an affidavit of debt, he has to shew that his partner, to whom the debt was due jointly with himself, was dead. See *Edgar* v. *Watt* (1835), 1 H. & W. 108; *Morrell* v. *Parker* (1837), 6 Dow. 123. The plaintiffs here are not the persons to whom the note was given, the affidavit alleges that the notes were made by the defendant, payable to the order of the plaintiffs; evidently meaning the existing firm of Lenz & Leiser; and the plaintiff Lenz states that he is a member of the firm of the plaintiffs. The firm of which the deponent is a member is not the same firm as the firm to whom the notes were given, although the affidavit so alleges; and it is not shewn that the plaintiffs hold the notes as indorsees from the original firm. On the other point, the Rule 104 authorizes a firm to sue in the partnership name when such persons were partners at the time of the accruing of the cause of action. The firm existing at the time of the accruing of the cause of action are not now in existence, the mere fact that the same name is continued makes, in my opinion, no difference. There is only one partner existing of that firm, and unless there are two or more persons existing of such a firm, the right to sue in the partnership name is not given.

Judgment.

For these reasons the order for arrest must be set aside with costs, and the defendant discharged out of custody.

FULL COURT
At Victoria.

1899.

Jan. 20.

IN RE B.C. IRON WORKS COMPANY

IN RE B.C. IRON WORKS COMPANY, LIMITED LIABILITY.

Winding Up Acts—Winding Up Amendment Act, 1889 (Dominion)—Application of to Provincial Company.

A Company incorporated under the Companies Act, 1890 (B.C.), may be put into compulsory liquidation and wound up under the Dominion Winding Up Amendment Act of 1889.

Statement.

THIS was an appeal by the Bank of British North America, a creditor of the Company, from an order of IRVING, J., entered 25th November, 1898, winding up the British Columbia Iron Works Company, Limited Liability, and made upon the petition of a shareholder in the said Company, the petition shewing that the capital stock of the Company was impaired to a greater extent than twenty-five per cent. thereof, and that the lost capital would not likely be restored within one year. The Company was a Provincial one, incorporated under the Companies Act, 1890. Section 4 (d) of the Winding Up Amendment Act, 1889 (Dominion), provides that the Court may make a winding up order "when the capital stock of the Company is impaired to the extent of twenty-five per cent. thereof, and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year."

The appeal came on for argument at Victoria on 11th January, 1899, before MCCOLL, C.J., WALKEM, DRAKE and MARTIN, JJ.

Argument.

Godfrey, for the appeal: The petition was presented under the provisions of the Winding Up Amendment Act, 1889 (Dominion), Sec. 4 (d), which Act is applicable only to corporations "whose incorporation and the affairs

whereof are subject to the legislative authority of the Parliament of Canada," and this Company is a Provincial one, and its incorporation and affairs are not subject to such authority and could not be wound up under the Dominion Act. He cited *Shoolbred* v. *Clarke, In re Union Fire Insurance Company* (1890), 17 S.C.R. at p. 275 ; *Macdonald* v. *Noxon Brothers Manufacturing Company, Limited* (1888), 16 Ont. 368 ; and *Re Ontario Forge and Bolt Company, Limited* (1894), 25 Ont. 407. A Provincial Company can only be wound up in the case of bankruptcy or insolvency.

Argument.

Davis, Q.C., for respondent: Section 44 of the Companies Act, 1890, was introduced for the purpose of giving a shareholder a chance to wind up a Company in such a case as this, and the only Act that it could have been intended to introduce by it was the Dominion Act of 1889. He referred to B.C. Stats. 1898, Cap. 13, Sec. 14.

20th January, 1899.

McColl, C.J.: The appellant creditor appeals on the ground that the Dominion Act under which the winding up order was made does not apply to this Company, which was incorporated under the Companies Act, 1890 (Provincial). By section 44 of this Act it is provided :

Judgment of McColl, C.J.

" 44. The provisions of any Act for the time being in force in this Province relating to the winding up of Companies shall apply to all Companies and Associations which shall be incorporated under this Act, or which have been or hereafter shall be incorporated by or under any Act or Ordinance of or in force in this Province, or of or in the late Colonies of Vancouver Island and British Columbia, or either of them, except to Companies registered and incorporated under the Companies Act, 1878, or Part II., Companies Act, 1878 (Provincial)."

This, I think, clearly brought into force the provisions of the Winding Up Amendment Act, 1889 (Dominion), which enables a Company to be wound up in the circum-

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stances of the present Company. By the Act of 60 Vict. Cap. 2, Sec. 153, the Dominion Acts relating to the winding up of Companies are expressly brought into force as regards Companies incorporated under the Act. By section 160 of the same Act the Companies Act, 1890, was repealed, subject to the saving clause contained in sub-section (a) of the section, which is as follows:

"(a) That such repeal shall not be held or taken to in any way alter, limit or affect the corporate existence, rights, privileges, powers and liabilities of any company incorporated under the said repealed Acts, or any or either of them."

This did not of course preserve the machinery of the Dominion Acts for the purpose of winding up Companies incorporated under that Act, and left them without any means of being wound up in the circumstances of the present Company until the passage of the Act 61 Vict. Cap. 13, Sec. 14, which amends sub-section (a) referred to by adding thereto the following:

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"And the Companies thereby incorporated shall, except as in this Act is specially provided, continue to be governed by the provisions of the said repealed Acts to them respectively applicable."

The result is that the order was rightly made, and the appeal must be dismissed with costs.

DRAKE, J.: I concur.

Judgment of MARTIN, J.

MARTIN, J.: Section 14 of the Companies Act Amendment Act, 1898, is authority for the order appealed from herein, and renders a discussion of the scope of sub-section (a) of section 160 of the Companies Act, 1897, unnecessary.

Appeal dismissed.

TOWNEND v. GRAHAM.

MARTIN, J.

1899.

April 13.

TOWNEND v. GRAHAM

Purchase by instalments—Investigation of title during term of credit —Lis pendens—Cloud on title.

On a purchase of land, the balance of the purchase price for which is payable by instalments, the purchaser may require his vendor to shew a good title before parting with the first instalment.

A *lis pendens* registered against real estate is a cloud upon the title and as such a purchaser is entitled to have it removed from the Registry.

The mere fact that the purchaser made some improvements on the property does not constitute a waiver of his right of an inquiry as to title.

ACTION tried at Nelson before MARTIN, J., on 23rd February, 1899.

The following statement of facts is taken from the judgment:

"This action is brought to rescind an agreement for sale, dated July 18th, 1898, whereby the plaintiff agreed to sell and the defendant to purchase certain brewing premises in Grand Forks for $1,400.00, of which $300.00 were paid on execution, and the balance arranged to be paid in subsequent monthly instalments of $100.00 each." The agreement further provided:

Statement.

"Now it is hereby agreed between the parties aforesaid in manner following, that is to say: The said party of the second part, for himself, his heirs, executors and administrators, doth covenant, promise and agree, to and with the said party of the first part, his heirs, executors, administrators and assigns, that he or they shall and will, well and truly pay or cause to be paid to the said party of the first part, his heirs, executors, administrators or assigns, the said sum of money, on the days and times and manner

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above mentioned; and also shall and will pay and discharge all taxes, rates and assessments wherewith the said land may be rated or charged from and after this date. In consideration whereof, and on payment of the said sum of money as aforesaid, in manner aforesaid, the said party of the first part, doth for himself, his heirs, executors, administrators or assigns, covenant, promise and agree to and with the said party of the second part, his heirs, executors, administrators or assigns, to convey and assure, or cause to be conveyed and assured to the said party of the second part, his heirs and assigns, by a good and sufficient deed in fee simple, with the usual covenants of warranty, the said piece or parcel of land, with the appurtenances, freed and discharged from all encumbrances, but subject to the conditions and reservations expressed in the original grant from the Crown, and shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default be made in the payment of the said sum of money, or any part thereof, on the days and times, and in the manner above mentioned, subject, nevertheless, to impeachment for voluntary or permissive waste. And it is expressly understood that time is to be considered the essence of the agreement, and unless the payments are punctually made, the said property herein described shall revert to the party of the first part.

Statement.

"On the ground that the vendor could not shew a good title (produce a deed in his favour, as the defendant put it), the purchaser refused to pay the first instalment, which became due on the 18th of August, 1898, though otherwise ready and willing to do so, whereupon this action was commenced.

"The day following the refusal to pay the defendant was garnished at the suit of one Jones, a creditor of the plaintiff, and subsequently paid the $100.00 instalment into the County Court under the garnishee order."

At the time of the execution of the said agreement and

of the refusal to pay the said instalment a *lis pendens* was registered against the property.

Bowes and *Wragge*, for plaintiff.
W. A. Macdonald, Q.C., for defendant.

13th April, 1899.

MARTIN, J. (after stating the facts): It will be seen that this agreement differs materially from that set out in *Foot* v. *Mason* (1894), 3 B.C. 377, in that the purchaser is given occupation and enjoyment; it is more like that in *Cameron* v. *Carter* (1885), 9 Ont. 426, in this important respect. . . . . It is admitted that at the time of the execution of the said agreement, and of the refusal to pay the said instalment, a *lis pendens* had been registered against the property, and the question I am asked to determine is whether the defendant was, under such circumstances, justified in refusing to pay on the 18th of August, before this cloud had been removed from the title. This *lis pendens* was subsequently removed by an order of Court, dated November 25th, 1898, whereby the Land Registrar was directed to register a conveyance, dated October 1st, 1897, from John A. Manley to the plaintiff *et al.*, of the lands in question, and issue a certificate of title to the plaintiff *et al.*; this conveyance was necessary to complete the chain of the vendor's title, and its non-production on the 18th of August, when a good title was demanded by the purchaser, is also relied on by the defence. The defendant was unable to register his agreement because of the *lis pendens*, and the conveyance to the plaintiff also could not be registered for the same cause, assuming that the plaintiff then had it in his possession or control.

Judgment.

It is now settled that such a *lis pendens* is a cloud on the title which a purchaser is entitled to have removed: *Re Bobier and Ontario Investment Association* (1888), 16 Ont. 259; Armour on Titles, 2nd Ed., 175. These authorities I

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do not find alluded to in *Manson* v. *Howison* (1894), 4 B.C. 404.

Here, no abstract of title was demanded or delivered; nothing was said about title; and the parties acted without the intervention of a solicitor; it is clear that the litigation which has arisen is mainly due to that last fact, because the first inquiry of a solicitor would have been as to encumbrances. Possibly the parties were unable to obtain professional services, but however that may be, I quote with approval the following remarks of Vice-Chancellor Spragge in the case of *Mitcheltree* v. *Irwin* (1867), 13 Gr. at p. 541:

"I have come to the conclusion that the purchaser has not disentitled himself to his ordinary right to have an inquiry as to his vendor's title. It should be borne in mind that contracts of sale, investigations of title and conveyances, are not in this country conducted as a general rule with the same care and solemnity, or through the intervention of a solicitor, as is the case in England; and it would often be a mistake to attribute to an act done by a vendor or purchaser here, the same intention as is properly attributable to the like act in England; and it would consequently often operate unjustly to visit it with the same consequences."

Judgment.

These remarks in my opinion are particularly appropriate to newly opened up districts in this Province.

Under the agreement the purchaser entered into possession of the premises, and carried on the brewing business, which theretofore had, as appears by paragraphs 3 and 5 of the statement of claim, been carried on by the plaintiff and others.

The question now before me was, according to Vice-Chancellor Spragge, raised for the first time in Ontario in the case of *Thompson* v. *Brunskill* (1859), 7 Gr. pp. 542 to 544. That case supports the defendant's contention, and the judgment of the learned Vice-Chancellor deals fully

with the matter. I will content myself with quoting from pages 547 and 548, as follows:

"To hold otherwise would indeed work great wrong in many cases. In most contracts for the sale of land, when time is given for payment, the purchase money is made payable by instalments. To hold that the purchaser is bound to go on year after year, making his payments, leaving him to the last payment, perhaps a tithe of the whole, before he can demand that a good title be shewn, would be a practical negation of his ordinary equity to have a good title shewn, before he parts with his purchase money; and to leave him to his personal remedy against the vendor would often be a remedy only in name. It cannot be said that his contract has subjected him to all this, for there is nothing in the contract one way or the other, at least nothing expressed, and what is implied as against him here, is only a circumstance, the time for the payment of part of the purchase money (or in some few cases of the whole of it), but that circumstance in no way affects the principle upon which the equity is founded."

Judgment.

This case was followed by Vice-Chancellor Esten in *Gamble* v. *Gummerson* (1862), 9 Gr. 193. I refer to page 198, where it is stated that a purchaser "may insist that all incumbrances should be discharged before he pays any part of his purchase money;" and also to page 200: "It would be extremely mischievous to hold that where the purchase money is to be paid by instalments, and when it is paid the estate is to be conveyed, the purchaser could be compelled to pay all his purchase money without having a good title shewn, and without the estate being discharged from incumbrances. The result would be in nine cases out of ten that when the purchase money had all been paid and spent, the vendor would be unable to shew a good title or discharge the incumbrances, and the purchaser would be in an unfortunate condition. When an estate is subject to incumbrances, the fact ought to be mentioned by the ven-

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dor, and the purchaser will either decline to purchase, or make some special agreement. But when an estate is offered generally for sale, the purchaser has a right to assume that the title is good, and that it is free from incumbrances, and he has a right to require this to be shewn before he can be compelled to pay any part of his purchase money or accept a conveyance. If he is prudent he will look into the title at once. Too often, however, purchasers enter into possession and pay part of their purchase money, and postpone the investigation of the title. But they may, I apprehend, at any time, require a good title to be shewn, and incumbrances to be discharged, and refuse to proceed until this is done; . . ."

This last case was also in turn followed in *Cameron* v. *Carter*, *supra*. Chancellor Boyd says at page 430, "I agree entirely with the views stated by Esten, V.C. . . . I think that the rule has often been recognized in this Court, and when the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment."

Judgment.

I do not think the judgment of the learned Judge in *Foot* v. *Mason*, goes so far as the head-note would imply. At page 383 stress is laid on the fact that the defendant there was a solicitor, and the circumstances otherwise differ from those in this case, which remark also applies to the case of *Guthrie* v. *Clark* (1886), 3 Man. 318. I might further say that in neither *Guthrie* v. *Clark* nor in *Foot* v. *Mason*, were the cases which I have above considered alluded to.

It is urged on the part of the plaintiff that as the defendant stated at the trial he had made considerable improvements on the property, and that he had made some changes even after his complaint as to title, therefore he has waived his right to object to the title. Waiver is clearly a question of intention: *Thompson* v. *Brunskill*, *supra*, 549; *Mitcheltree* v. *Irwin*, *supra*, 542; see also *Crooks* v. *Glenn* (1860), 8 Gr. 239; and *Darby* v. *Greenlees* (1865), 11 Gr. 351. This

agreement and the circumstances under which it was executed contemplate the business being carried on as a going concern; there is no evidence to shew the extent or nature of the changes; that they are prejudicial to the vendor, or other than might be expected in the natural expansion or conduct of business. On the facts I find that there was no waiver, and the case is clearly distinguishable from *The Commercial Bank* v. *McConnell* (1859), 7 Gr. 323, and *Denison* v. *Fuller* (1864), 10 Gr. 498.

I do not think there is any necessity for a reference as to title in view of the single point under consideration. I am given to understand by both counsel that the matter has really come down to a question of costs, and that the parties have agreed to a dismissal of the action and to treat the contract as a subsisting one subject to my direction as to costs. I think that in view of the *lis pendens* the purchaser was entitled to take the stand he did on the 18th of August, and that he should have his costs of this action.

Judgment.

Judgment accordingly.

FULL COURT
At Vancouver.

1899.
June 27.

COQUITLAM v. HOY.

Taxes—Municipality assessment roll—Person on roll not owner of property—Liability of—Municipal Clauses Act, Secs. 134 and 155.

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The mere fact that a person is named in the assessment roll of a Municipality as the owner of certain real estate does not make him personally liable for the amount of the assessment.

Sections 134 and 155 of the Municipal Clauses Act considered.

Quære, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed.

Where an assessor exceeds his jurisdiction the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes.

Statement.

APPEAL by plaintiff from the judgment of MCCOLL, C.J., reported *ante* at page 458, argued before WALKEM, DRAKE and MARTIN, JJ., at Vancouver, on 18th May, 1899.

Argument.

Dockrill, for appellant: The personal liability to pay taxes is fixed by the assessment roll and the assessment is binding from the time the assessor gives notice of the assessment and the person assessed becomes chargeable. *Devanney et al* v. *Dorr et al* (1883), 4 Ont. 206 at pp. 210-11. The defendant should have appealed against the assessment to the Court of Revision, but having failed to do so the roll is final and he cannot now dispute his liability. He cited *Nicholls* v. *Cumming* (1877), 1 S.C.R. 395; *Municipality of London* v. *Great Western Railway Company* (1860), 17 U.C.Q.B. 262 at pp. 268-9; *Confederation Life Association* v. *City of Toronto* (1895), 22 A.R. 166; *McCarrall* v. *Watkins et al* (1860), 19 U.C.Q.B. 248; *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51; *London Mutual Insurance Company* v. *City of*

London (1887), 15 A.R. 629; *Scragg* v. *The Corporation of the City of London* (1867), 26 U.C.Q.B. 263.

Reid, for respondent: The statute must be construed strictly. In cases in which the assessor had jurisdiction the proper procedure would be to appeal to the Court of Revision, but if he taxes or assumes to tax where he has no power the person affected may dispute the assessment by any collateral proceeding. Our Act only authorizes the assessment of owners.

As to the meaning of "bind all parties concerned," see *The Municipality of Berlin* v. *Grange* (1856), 1 E. & A. 279, which shews that these words refer to persons rightfully on the roll as owners. In *McCarrall* v. *Watkins et al., supra*, the person assessed had been a tenant and properly assessed as an occupier. He referred to *Watt* v. *The City of London* (1892), 19 A.R. 675; *The Corporation of the City of Brantford* v. *The Ontario Investment Company* (1888), 15 A.R. 605; *Meehan* v. *Pears* (1899), 35 C.L.J. 281; Cooley on Taxation, 2nd Ed., 435.

Argument.

Jenns, on the same side.

Dockrill, in reply.

Cur. adv. vult.

27th June, 1899.

WALKEM, J.: This is an appeal from the judgment of the learned Chief Justice, in which the facts of the case are fully set out. The judgment is in favour of the defendant, and in my opinion could not be otherwise. It is clear from the Municipal Act that the assessment roll should only contain the names of residents or non-residents having taxable property within the Municipality; and it is the duty of the assessor to take every precaution to see that the roll is correct. It is true that a person wrongly assessed has the right of appeal to the Court of Revision. In this case, however, the person assessed, viz., the defendant, has no

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taxable property; hence, the assessor exceeded his jurisdiction in placing him on the roll. Again, the revised roll, according to the statute, is only to affect such persons as are "concerned." The defendant not being a person "concerned" cannot therefore be affected by the improper entry of his name on the roll. On the hearing of this appeal I pointed out that if a judgment were, by default or otherwise, obtained against him in this action, it would be fruitless as far as the land for which he was assessed is concerned inasmuch as it could not be registered in the Land Registry Office, as he had no title to the land. The case of *The Corporation of the City of Brantford* v. *The Ontario Investment Company* (1888), 15 A.R. 605, is one which shews that where the assessor exceeds his jurisdiction the defendant is not bound to appeal, but may successfully raise the question of his liability, as has been done in this case, in an action for the assessed taxes.

The appeal must therefore be dismissed with costs.

Judgment of DRAKE, J.

DRAKE, J.: The defendant is not and never was an owner of land in the plaintiff's Municipality. He received some notices of assessment but paid no attention to them. The plaintiffs (appellants) bring their action under section 155 of the Municipal Clauses Act, Cap. 144. That section says taxes payable by any person may be recovered as a debt due to the Municipality. The production of the collector's roll shall be *prima facie* evidence of debt. The collector's roll is made up from the assessment roll, see section 141. The assessment roll is to contain the names of all persons having taxable property in the Municipality and resident therein; the names of non-residents taxable in the Municipality and description of all taxable property. By section 117 notice is to be sent to every person assessed for land. The roll is to be revised and by section 134, when revised is to be binding on all parties "concerned," notwithstanding any defect or error or omission of notice.

The first duty of the assessor is to insert the names of all persons having taxable property in the Municipality. The insertion of a name of a person not having taxable property will not give a right of action against such person. The revised roll only affects all persons concerned. This does not mean persons who are not concerned, such as strangers, whose names, owing to carelessness of the assessor have improperly been put on the roll.

There is no question before us as to the liability of the land to be taxed, and of the remedy which in such a case the Municipality is entitled to take against the land. In my opinion the non-appeal by the defendant can make no difference. He knew he was not legally assessed as he had never been an owner of land in the Municipality. To admit that when once a name is on the roll a liability attaches unless a person appeals would render the assessors very careless in the performance of their duties, and would open the door to all sorts of fraud. If a judgment could have been obtained against the defendant it would not affect the land for which he was wrongfully assessed ; as by the Land Registry Act, Sec. 33, a judgment only binds the lands belonging to the judgment debtor, and as the assessment roll is no evidence of title the lands on the assessment roll would not be bound by a judgment against one who was not owner.

Judgment of DRAKE, J.

In *The Municipality of Berlin* v. *Grange* (1856), 1 E. & A. 279, the defendant allowed judgment by default, and damages were assessed. The defendant moved in arrest of judgment and the Court held that the description was insufficient in not averring that the defendant desired to be placed on the assessment roll, he being a non-resident. Although the point raised was not the same as that which arises here, yet it is pointed out that as the desire of a non-resident to be assessed lies at the root of an action of debt against him, so here the ownership of land within the Municipality lies at the root of the right to assess. See also

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The Corporation of the City of Brantford v. *The Ontario Investment Company* (1888), 15 A.R. 605, where it was held the defendants having been assessed without jurisdiction were not bound to appeal, but might raise the question in the action.

I think the appeal must be dismissed with costs.

Judgment of MARTIN, J.

MARTIN, J.: In spite of the full and careful argument of the appellant's counsel, I cannot take the view that the judgment of the learned Chief Justice is erroneous. Without seeking to add anything to his reasons, the matter may shortly be disposed of on the ground that no one can be a party "concerned" in a roll when he has not now and never had any interest in the property mentioned therein. How can anyone be, in a legal sense, "concerned" about a matter in which he has absolutely no interest?

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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HOWAY AND REID v. DOMINION PERMANENT LOAN CO.

Practice—Stay of proceedings—Agreement to bring action in the Courts of Ontario—Arbitration Act, Sec. 5—County Court Act, Sec. 34—Waiver.

Where a defendant under section 34 of the County Court Act objects to an action being tried in the County Court, and an order is made directing that the plaint stand as a writ and that an appearance be entered thereto in five days, he waives his right to object to the jurisdiction of the Court to try the action on the ground that the parties have agreed that any action brought in respect of the cause of action sued upon shall be tried in another forum.

ACTION by shareholders in defendant Company for $584.72, alleged overpayment on a mortgage of shares.

In 1891, J. A. Forin and Aulay Morrison, each held ten shares in the defendant Company (then called the Dominion Building & Loan Association). On 10th September, 1892, they borrowed from the Company $2,000.00, the Company taking as security an assignment of the shares and a mortgage of some real estate in New Westminster. On 21st July, 1893, Morrison assigned his shares to Forin, and on 20th September, 1895, Forin assigned and transferred his interest in the said shares to the plaintiffs, who agreed to accept the shares and to be bound by the terms and conditions as provided by the Rules and By-laws of the Company, Article 5, section 5, of which provided that " In case of any suit or claim being made by a shareholder against the Association, action for recovery of the same must be brought at the City of Toronto, in the Province of Ontario." The action was commenced in November, 1898, in the County Court, and on 4th January, 1899, the defendant's solicitor, pursuant to section 34 of the County Court Act,

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gave notice that the defendant objected to the action being tried in the County Court and had therefore given security for the amount claimed and the costs of the trial in the Supreme Court. On 23rd January, BOLE, L.J., on application of the plaintiffs made the following order: "Upon hearing Mr. Reid for the plaintiffs and Mr. Morrison for the defendants and upon reading the affidavit of R. L. Reid, sworn herein the 17th day of January, 1899:

"I do order that this action be carried on in the Supreme Court of British Columbia, the defendants having given notice under section 34 of the County Court Act and given security thereunder.

"And I do further order that the plaint issued in this action do stand as a writ and that the defendants enter an appearance thereto within five days from this date and that thereafter pleadings be delivered and all proceedings taken according to the practice of the Supreme Court and that the costs of and incidental to this application be costs in the cause."

Statement.

On 6th February, a conditional appearance was entered and on 20th February defendant applied to the Chief Justice for an order that the plaint standing as a writ be set aside or that proceedings be stayed for want of jurisdiction on the part of the Court over the subject matter of the action. The application was dismissed, the learned Chief Justice holding that by removing the proceedings from the County Court into the Supreme Court the defendant had waived its right to have the terms of Article 5 enforced.

The defendant appealed to the Full Court and the appeal was argued at Vancouver on 18th May, 1899, before WALKEM, DRAKE and MARTIN, JJ.

Argument.

Davis, Q.C. (*Cowan* with him), for the appeal: The By-law has the same effect as a submission to arbitration and under section 5 of the Arbitration Act, R.S.B.C. 1897, Cap. 9, there could be no waiver until after appearance. We

wished to get the decision of the Supreme Court and not the County Court on this important question and we had the right to get the proceedings into the Supreme Court for the purpose of getting the required adjudication. Apart from the statute the jurisdiction of the Court cannot be ousted, but the Court may stay proceedings and refer to the forum chosen, here the Courts in Ontario. To select a particular Court is a submission to arbitration. *Law* v. *Garrett* (1877), 8 Ch. D. 26 at p. 33. He referred to *Hoerler* v. *Hanover Caoutchouc, Gutta Percha and Telegraph Works* (1893), 10 T.L.R. 22, where the submission to the Court in Hanover was only permissive, but here the language is obligatory—"must be brought, etc." We applied for a stay at the earliest possible stage. Until the stage for waiver is reached there can be none. He cited *Ford's Hotel Company, Limited* v. *Bartlett* (1896), A.C. 1.

Wilson, Q.C. (*Reid* with him), for respondents: It was open to the defendant to raise the question in the County Court, so when it chose to act under section 34 of the County Court Act it took a step in the action and comes within the decision in *Ford's Hotel Company, Limited* v. *Bartlett, supra*. The order directing that the plaint stand as a writ and appearance within five days still stands and has never been appealed from. We deny that there is an agreement to refer to arbitration and we must not be deprived of the right to deny the actual making of the agreement and all the subsequent facts. Unless the defendant Company can shew that it is within the Arbitration Act it must raise the question as to jurisdiction in the pleadings.

Argument.

Davis, Q.C., in reply.

Cur. adv. vult.

27th June, 1899.

Judgment of WALKEM, J.

WALKEM, J.: The plaintiffs own certain shares in the defendants' Company, which were mortgaged to the Company to secure payment of a loan made on them. Having,

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as they allege, made an overpayment on the mortgage of $584.72, they commenced proceedings in the County Court, in November, 1898, to recover that sum.

On the 4th of January following, the Company's solicitor notified them that the Company objected "to the action being tried in the County Court," and had therefore given security, as provided by section 34 of the County Court Act "for the amount claimed and the costs of trial in the Supreme Court."

On the 18th of January, the plaintiffs took out a summons in the Supreme Court, supported by an affidavit stating the above facts, for a formal order for the removal of the action to that Court, and for leave to deliver a statement of claim. No objection seems to have been taken by the Company's solicitor on the hearing of the summons to the jurisdiction of the Court; and on the 23rd of January, the following order was made. [See statement.]

This order was not appealed from; hence it is a subsisting and valid order. Although the time limited by it for appearance has expired, leave to appear can be given, and, speaking for myself, that leave should now be given.

Judgment of WALKEM, J.

On the 6th of February, following, a conditional appearance was entered by the Company's solicitor in view of an intended application on their behalf to have the writ or plaint set aside, or the action stayed for want of jurisdiction on the part of the Court over the subject matter of the action. The application was heard about the 20th of February, by the learned Chief Justice and dismissed. The alleged want of jurisdiction was based upon the following language of Article 5 of the Company's By-laws:

"In case of any suit or claim being made by a shareholder against the association, action for the recovery of the same must be brought at the City of Toronto, in the Province of Ontario."

But the learned Chief Justice held, as we have been informed by counsel, that the Company, by removing the

proceedings from the County Court into the Supreme Court, waived their right to have the terms of the Article enforced. Hence this appeal.

In my opinion the learned Chief Justice was right. The Company might have applied when the action was pending in the County Court for a stay; but instead of doing so they merely objected to its being tried in that Court, and, in effect, notified the plaintiffs that for that purpose they preferred the Supreme Court, and had consequently given security, not only for the amount of the plaintiffs' claim, but for the costs of a trial in the latter Court. It appears to me that this is the meaning of what was done, and that the intention of the Company at the time was to have the action tried in the Supreme Court, and not otherwise dealt with.

Again, when the plaintiffs brought on their application on the 18th of January, in the Supreme Court, as above mentioned, the Company might have entered a conditional appearance and then objected, as they now do, to the jurisdiction of the Court; but not having done so they waived their right to take the objection afterwards. But even if this were not so, can it be doubted that they waived that right when they allowed the order on the 23rd of January, to stand without appeal. Under such circumstances, it must be assumed that they accepted the order. At any rate, it has been binding on them ever since it was made; and, as a subsisting order of this Court, it is, in my opinion, of itself an insuperable obstacle to the granting of the application dismissed by the learned Chief Justice.

Section 5 of the Arbitration Act can have no bearing on such a case as the present one—a case entered in one Court for trial, and then removed to a higher Court for the same purpose, in consequence of steps taken by the defendants themselves, under section 34 of the County Court Act. The question of waiver, as presented to us, does not arise under

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any of the sections of the Arbitration Act. The appeal must be dismissed with costs.

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DRAKE, J.: The plaintiffs brought a plaint in the County Court against the defendant for money had and received. The defendant obtained an order removing the proceedings to the Supreme Court, and gave security as required by the County Court Act, R.S.B.C. 1897, and the County Court Judge ordered that the plaint should be treated as a statement of claim and the defendant should enter an appearance in five days. The defendant entered a conditional appearance, and then applied for an order to dismiss the action, or stay proceedings as by the By-law of the defendant's Association, in case of any suit or claim made by a shareholder against the Association action for recovery of the same must be brought at the City of Toronto, in the Province of Ontario.

The language of this By-law is vague in the extreme. To what class of actions does it refer? Are the initiatory proceedings to be commenced in Toronto, or tried there? The learned Chief Justice on the summons to stay proceedings, dismissed the same on the ground of waiver by the defendant. It is conceded that the Courts of this Province have jurisdiction over the cause of action unless the parties have agreed that some other forum alone should take cognizance of it. Mr. *Davis*, for the defendant, contended that under section 5 of the Arbitration Act, Cap. 9, R.S.B.C. 1897, there could be no waiver until after appearance, and that this By-law had the same effect as a submission to arbitration. If the By-law is valid it may be a defence to the action, but that question will have to be decided on the pleadings. The Arbitration Act has no bearing on this question, and the argument from analogy will not bear examination.

Judgment of DRAKE, J.

The plaintiffs had a right to proceed in the County Court, and the defendant had a right to remove the action

into the Supreme Court. By so removing they have taken a step in the action and have made the Supreme Court their ultimate tribunal. The appeal will be dismissed with costs.

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MARTIN, J.: What this Court is asked to do is to stay the proceedings herein on the ground that the plaintiffs are shareholders of the defendant Company, and by Article 5, section 5, of the By-laws and Rules, it is provided:

"In case of any suit or claim being made by a shareholder against the Association, action for recovery of the same must be brought at the City of Toronto, in the Province of Ontario."

On the hearing of the appeal counsel for the respondents stated that they now denied, and proposed in their pleadings to deny, the actual making of this agreement, but for the purposes of this application it is too late to do that; no material has been filed in answer to the affidavit of the defendant's manager, filed in support of the original application, wherein the circumstances are fully, and we must assume, correctly set out.

It is argued that the agreement here is one to refer to arbitration, and the case of *Law* v. *Garrett* (1877), 8 Ch. D. 26, supports that contention. In Russell on Awards, 7th Ed., 50, a rule extracted from *Law* v. *Garrett* is: "It is no reason for refusing to stay proceedings that the reference of the disputes is to a foreign Court."

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The question then arises whether or not this clause of reference is obligatory.

In *Hoerler* v. *Hanover Caoutchouc, Gutta Percha and Telegraph Works* (1893), 10 T.L.R. 22, a clause reading: "In case of disputes the firm of Mumm submit to the laws in force in Hanover, and jurisdiction," was construed not to confer exclusive jurisdiction, but simply that the parties should not be precluded from the Court in Hanover; otherwise the case is an authority in favour of the defendant. But in the case of *Hamlin and Co.* v. *The Talisker Distillery*

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Company (1894), at p. 479 of the same volume, a clause in a Scotch contract reading: "Any dispute arising out of this contract to be settled by two members of the London Corn Exchange," was held to be a declaration of the intention of the parties that the contract should be interpreted according to the rules of English law. In giving the judgment of the House of Lords it may be noted that Lord Watson stated: "The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential consideration of public policy." In the case before us the language is even more obligatory, the words used being, "action for recovery of the same must be brought at the City of Toronto, etc." This language is more like that used in *Law* v. *Garrett*, viz.: "Such disputes . . . . shall be referred to the St. Petersburg Commercial Court, or to any Court which may have taken its place, etc."

Judgment of MARTIN, J.

In my opinion it is quite clear that the parties here intended that the Courts of Ontario at Toronto should be exclusively resorted to as the forum for the settlement of disputes. But it is urged that this action having been originally commenced in the County Court, and the defendant having before appearance given notice of objection to the action being tried in that Court, and furnished security as provided by section 34 of the County Court Act, therefore the defendant had taken a step in the proceedings within the meaning of section 5 of the Arbitration Act, thereby waiving its rights and depriving itself of the benefit of that last named section. After the defendant had given the said notice, the plaintiffs took out, in this Court, a summons on the 18th of January, 1899, to remove the cause into this Court; and an order was made on the 26th of January, 1899, that the action be carried on in this Court, and that the plaint in the County Court action should stand as a writ herein, and that the defendant should enter an appearance within five days. In accordance with this order

the defendant entered a conditional appearance "without prejudice to an application to set aside the writ and service thereof for want of jurisdiction in this Honourable Court over the subject matter of the action." Subsequently the defendant moved before the Chief Justice to set aside the plaint as a writ, or to stay proceedings. This application was refused on the ground, as we are informed, that the defendant had by its proceedings under said section 34 waived any exception to the jurisdiction.

The argument which we have heard as to the effect of section 5 of the Arbitration Act, was not addressed to the learned Judge below, though it is the principal point in the case. As to what constitutes "taking a step in the proceedings" under said section 5 (which is section 4 in the English Act of 1889), the case of *Ford's Hotel Company, Limited* v. *Bartlett* (1896), A.C. 1, has been cited, and I would also refer to *Zalinoff* v. *Hammond* (1898), 2 Chy. 92, where the former case was considered. It was held in the latter case that by a "step in the proceedings" is meant "a substantive step taken by a party. It may be that a very limited application—such as taking out a summons for extension of time—would be enough;" but the mere filing of affidavits in defence to a motion for a receiver did not come within the scope of the language used in the Act.

It must be remembered that whatever the defendant did here in the County Court was done before appearance, and that all it did was to exercise a statutory right to object to the County Court trying the action, preferring to have the opinion of the Supreme Court on a question which certainly is not unimportant. The application which was made by summons to remove the cause into, and carry it on in this Court was made by the plaintiffs, not by the defendant. I cannot see how the defendant's exercise of a statutory option can be regarded as any intention to waive an exception to the jurisdiction. The effect of section 34 is to give a defendant in certain cases the right to elect in

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which of two Courts the plaintiff may continue the proceedings; the defendant here objects to the County Court, so the plaintiffs had to proceed in the Supreme Court, but surely that cannot be regarded as a waiver of the right of the defendant to get the adjudication of the Supreme Court on the question as to whether the plaintiffs' action should not have been brought in either Court. The circumstances are entirely different from those in *Ford's Hotel Company, Limited* v. *Bartlett*, or *Zalinoff* v. *Hammond*, *supra*.

It is admitted that since the action was removed into this Court the defendant applied for a stay "after appearance and before delivering any pleadings or taking any other steps in the proceedings," and as I do not think the stage for waiver was reached in the County Court the appeal should be allowed, but without costs, for the reason that the turning point of the case was not taken below.

Appeal dismissed.

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WOOD v. CANADIAN PACIFIC RAILWAY COMPANY

Railways—Master and servant—Personal injuries—Action for negligence—Precautions against accident—Fellow-servant.

The plaintiff, a conductor in employ of defendant Company was injured while uncoupling cars on a side track, the accident being caused by the plaintiff's foot becoming entangled in the long grass which had been allowed to grow on the track. The Company had a section-man and roadmaster whose duties were to keep the road in order.

Held, in a common law action for damages that the Company was not liable.

A Railway Company is not liable for personal injuries sustained by an employee by reason of a defect in the track, provided the track was properly constructed and competent workmen were employed to keep it in order.

ACTION at common law for damages sustained by plaintiff while employed as a conductor by defendant Company and engaged in uncoupling cars on a side track at Abbotsford, the accident having occurred, as the jury found, by reason of the long grass having been allowed to grow on the side track.

The trial took place at Vancouver on the 14th, 15th and 16th of March, 1899, before IRVING, J., and a special jury, who returned the following verdict: Statement.

1. Have the defendants, or their servants done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? If so, what was it? Yes.

2. Have the defendants or their servants by such act of commission or omission caused injury to the plaintiff? Yes.

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3. Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? No.

4. If you find in answering the first question that the Company or their servants are guilty of any act or omission, who was the person, if any, who did such act, or made such omission? The defendants.

5. Did the plaintiff, knowing the danger of shunting, including the condition of the ground, and fully appreciating the risk of accident he ran by placing himself between the cars under the circumstances, voluntarily assume to take such risk upon himself? No.

6. Was train in motion when Wood went between the cars to uncouple? Yes, slowly.

Statement.

7. Did Wood go between the cars to uncouple without communicating his intention to Macdonald, the brakeman? Yes.

8. Was there a safer way of uncoupling the cars than that accepted by Wood? No.

9. Damages, if any? $6,500.00.

On the motion for judgment his Lordship delivered judgment as follows:

Judgment of IRVING, J.

This is a common law action against the defendants, brought by a conductor in their employ, for damages for injuries sustained by him while engaged in uncoupling some cars, by reason of the defective condition of the defendants' railroad track. The particulars delivered of the defective condition of the track were as follows: "The track bed was overgrown with weeds or long grass or other undergrowth which was negligently and wrongfully allowed to grow and accumulate on their said track." It is not alleged in the statement of claim that the defendants knew of the condition of the track, nor does the statement of claim allege that the plaintiff was ignorant of its condition,

nor did the plaintiff in his case give any evidence shewing that he was ignorant of, or that the defendants were aware of the state of the track. In *Griffiths* v. *The London and St. Katharine Docks Company* (1884), 12 Q.B.D. 493, affirmed on appeal by Brett, M.R., Bowen, L.J., and Fry, J., in 13 Q.B.D. 259, it was held that in an action for negligence brought by a servant against his master for personal injury resulting from the unsafe state of premises upon which he is employed the statement of claim must allege not only that the master knew but also that the servant was ignorant of the danger. That case has been acted upon by the Manitoba Court in appeal in *Rajotte* v. *The Canadian Pacific Railway Co.* (1889), 5 Man. 372-79. There a switchman had been run over by a train in consequence of his foot getting caught in a frog. This was prior to the passage of the Railway Act which requires frogs to be packed. Taylor, C.J., said at page 372: "It was essential for the plaintiffs to prove that the deceased was ignorant of the danger and that the defendants knew of it." Killam, J., at page 380, concurring, said: "We must take it as settled upon sufficient authority that the plaintiff—the representative of the deceased—should, as part of his original case, negative the servant's knowledge of the defect." I cite the Manitoba case as it is so similar to the case in hand, but other cases to the same effect were cited during argument. The allegation that the danger was known to the master and unknown to the plaintiff is a material fact which must be stated (Bullen & Leake, 5th Ed., p. 470, and Odgers on Pleading, 3rd Ed., p. 56) and consequently proved, and if either of those allegations is omitted there is no cause of action. This flows from *Priestley* v. *Fowler* 3 M. & W. 1, decided in 1837. The reason of the matter is thus stated by Mr. Justice Day in *Griffiths' Case* (1884), 12 Q.B.D. at p. 495: "If a master employs a servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequences of any danger there may be in it.

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The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. If the master requires the servant to do something out of the ordinary course of his employment and dangerous, the servant may disobey him. It is clearly the duty of the master to communicate a danger which he knows, and which the servant does not. It is necessary to allege that the servant does not know of the danger, because if the servant knows of the danger and does the act which may and does cause injury to him, he has nothing to complain of, and cannot bring an action for the damage sustained. He may be justified in declining to perform a particular act, not in the course of his employment; but, if it is in the course of his employment, he undertook to do that dangerous thing. Many employments are very dangerous, and the servants who enter into them are induced to do so by the wages to be earned. The master is liable if he is cognizant and the servant is not cognizant of danger." The absence of these allegations from the record leaves the verdict of the jury "in the air," and however valuable to the plaintiff the findings of neglect of duty, etc., would otherwise be, unless and until it is established that the defendants did and the plaintiff did not know of the dangerous condition of the premises, the defendants cannot be held liable. To put it in another way the plaintiff not having alleged that the defendants, by reason of their knowledge and his ignorance, owed a duty to him, the verdict has no foundation upon which it can rest. The *Attorney-General's* argument was that the Company had no right to think that their premises were in proper condition, and if they had examined them they would have found it was not so, citing *Brydon* v. *Stewart* (1855), 2 Macq. (H.L. Sc.) 30. This same argument was pressed in *Groves* v. *Fuller*, but Mr. Baron Pollock interrupted "that is a case always

cited for plaintiffs, but it has not been followed in this country. We must follow the decision of the Court of Appeal," *i.e.*, *Griffiths* v. *The London and St. Katharine Docks Company* (1884), 12 Q.B.D. 493; *Groves* v. *Fuller* (1888), 4 T.L.R. p. 474. For the above reasons I cannot enter judgment for the plaintiff. I therefore give judgment for the defendants with costs, including those of special jury.

At the close of the argument Mr. *Macneill* asked in the event of my giving judgment for plaintiff, leave to move for judgment of non-suit (or its modern equivalent *Argent* v. *Donigan* (1892), 8 T.L.R. 432; *Peters* v. *Perry and Co.* (1894), 10 T.L.R. 366), before the Full Court, citing *Patterson* v. *The Corporation of the City of Victoria* (1897), 5 B.C. 628. If leave is required and the Full Court disagree with the conclusion I have arrived at and it thereby becomes necessary to discuss the other points raised I grant such leave.

From this judgment the plaintiff appealed to the Full Court and the appeal came on for argument at Vancouver on 16th May, 1899, before McColl, C.J., Drake and Martin, JJ.

Martin, Q.C., A.-G., for appellant: When a master employs a servant it is part of the contractual relationship that he should supply fit and proper tools to work with and fit, proper and safe premises to work upon; this is a personal obligation which he cannot evade by saying he has employed capable and reliable fellow-workers of the injured person. The plaintiff's case is that the defendant Company was directly negligent in allowing its premises to become dangerous; it would practically become impossible in the great majority of cases for injured persons to recover, if it is necessary to shew that the master had knowledge. He cited Beven on Negligence, 2nd Ed., pp. 734, *et seq*; *Paterson* v. *Wallace* (1854), 1 Macq. (H.L.Sc.) 748; *Brydon* v. *Stewart* (1855), 2 Macq. (H.L.Sc.) 30; *Webb* v. *Rennie* (1865), 4 F. & F. 608; *Murphy* v. *Phillips* (1876), 35 L.T.N.S.

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477 ; *Fairweather* v. *The Owen Sound Stone Quarry Company* (1895), 26 Ont. 604-6 ; *Citizens' Light and Power Company* v. *Lepitre* (1898), 18 C.L.T. 350 ; *Foley* v. *Webster* (1892), 2 B.C. 138 ; 21 S.C.R. 580 ; *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402 at p. 409 ; *Washington & Georgetown Railway Company* v. *McDade* (1890), 135 U.S. 554 ; Smith's Master and Servant 262. As to the general principles of the law see judgments in *Smith* v. *Baker & Sons* (1891), A.C. 325 at pp. 339, 356, 359 and 362. The Judge below relied on *Griffiths* v. *The London and St. Katharine Docks Company* (1884), 13 Q.B.D. 259, but that case is not applicable where the master employs a servant to work for him in doing a particular work, such as the conductor of a train. As to *Rajotte* v. *The Canadian Pacific Railway Co.* (1889), 5 Man. 355 (also relied on by the trial Judge), it is not good law ; the Manitoba Court followed *Griffiths* v. *The London and St. Katharine Docks Company, supra.*

Argument.

Davis, Q.C., for respondent : I assume that we are now in exactly the same position as at the close of our case, despite the findings of the jury, and that the Full Court is in a position now to give judgment unhampered by the verdict if there is no evidence that can reasonably support it. The railway was properly constructed; the side track had nothing wrong with it in the spring of the year, but later the grass grew up. It would be the negligence of the Company if it appointed no one to keep the track in repair, or if it appointed an incompetent person, but the evidence shews that a competent roadmaster was employed to look after and take care of the road. In one hundred different ways every day something might go wrong owing to the negligence of the men in charge and owing to that negligence someone in the employ of the Company would be injured. Now if it were an outside person injured the Company would be responsible, but if it were an employee of the Company it would not be liable because no employer is bound, as against his employee, to guarantee the perfection of his

premises and his appliances and tools. The Scottish cases relied on by the other side are not binding in England or here and anyhow in a subsequent Scottish case, *Wilson* v. *Merry* (1868), L.R. 1 Sc. App. 326 at p. 332, the duty of an employer is thus stated: "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen."

If there was negligence it was negligence of the section-man or of the roadmaster or of both; and an employer is not responsible for a negligent act of a competent man unless he knew a negligent act was going to be performed. There was a finding in *Foley* v. *Webster*, *supra*, that the owner had knowledge of the defect. The *ratio decidendi* in *Murphy* v. *Phillips*, *supra*, is that the defendant had not employed a competent man to examine the chain. *Webb* v. *Rennie*, *Fairweather* v. *The Owen Sound Stone Quarry Company*, and *Groves* v. *Lord Wimborne*, *supra*, are not against us. There is no question here of a statutory duty. He cited *Curran* v. *Grand Trunk Railway Company* (1898), 25 A.R. 407; *Rajotte* v. *Canadian Pacific Railway Co.*, *supra*; *Matthews* v. *The Hamilton Powder Company* (1887), 14 A.R. 261. *Priestley* v. *Fowler* (1837), 3 M. & W. 1, has been added to, but the principle has never varied. See also *Groves* v. *Fuller* (1888), 4 T.L.R. 474, *Brown* v. *The Accrington Cotton-Spinning and Manufacturing Company, Limited* (1865), 34

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L.J., Ex. 209, in both of which *Brydon* v. *Stewart*, *supra*, was not followed.

Martin, *Q.C.*, *A.-G.*, in reply: The servant is entitled not only to have appliances originally good, but to have them maintained in that state; even if a competent man had been sent to cut that grass and had not done so, the Company would be liable because the accident arose from the breach of the antecedent duty to keep the premises safe; the employer being personally bound to see to this cannot shield himself behind another servant; the defence of a common employment only arises when the negligence arises from act of a fellow-employee; the Company is an absolute insurer, just as much as if there were a statutory obligation. I distinguish *Wilson* v. *Merry* (1868), L.R. 1 Sc. App. 326, on that ground. See Beven 806; *Smith* v. *Baker & Sons* (1891), A.C. at p. 362. *Rajotte* v. *The Canadian Pacific Railway Co.*, *supra*, is merely *obiter* on this point and *Griffiths* v. *The London and St. Katharine Docks Company*, *supra*, does not go so far as the Manitoba Court thought. He cited also *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335.

Argument.

Cur. adv. vult.

30th June, 1899.

McCOLL, C.J.: I have had the advantage of reading the opinions of the other members of the Court, who discuss fully the arguments and authorities, and I shall therefore merely state briefly my reasons for agreeing that the appeal should be dismissed.

The plaintiff claims damages for injuries sustained by him because of an admitted defect in the condition of the way of the defendant caused by the natural growth upon it of grass negligently permitted to remain by the servants whose duty was to remove it. The plaintiff was a servant of the Company at the time and the rule applicable between them is thus stated by Lord Herschell in *Smith* v. *Baker & Sons* (1891), A.C. at p. 362. "It is quite clear that the con-

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tract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." And in my opinion the authorities are to the effect thus stated in Beven on Negligence, 2nd Ed., at p. 776. "Now cases like *Griffiths* v. *The London and St. Katharine Docks Company* (1884), 13 Q.B.D. 259, shew that where the risk is existing before the entering into an agreement, the onus is on the servant to shew his master's knowledge and his own ignorance of it. In such cases then the knowledge of the servant is presumed and also that he is willing to undertake the risk. But where the risk is superadded to the employment the presumption is altogether different. Here there is a variation of the contract originally entered into, caused by the addition of the risk." In this case the negligence of the servants was not the negligence of the Company, the common master. See *Howells* v. *The Landore Siemens Steel Company, Limited* (1874), L.R. 10 Q.B. 62, and admittedly the Company did take reasonable care to guard against the defect complained of by employing competent servants to prevent it. The authorities being conclusive against the plaintiff's contention that the Company was under an absolute duty to maintain the way in a safe condition, the plaintiff's action fails.

Judgment of McColl, C.J.

The question being, as I think, concluded by authority, it is not necessary to inquire into the principle which, indeed, appears to me too clear to require any discussion.

DRAKE, J.: The only point argued on this appeal is whether the overgrowth of the defendant's track by weeds and long grass, which, as the jury find, was the cause of the accident to the plaintiff, was owing to the neglect of the defendant so as to give rise to a cause of action, or whether the defendant having undisputedly taken all reasonable

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precautions by the employment of competent persons as roadmasters and sectionmen, with the necessary apparatus to keep the railway track in good order and condition, the accident did not in fact arise from a default of a fellow-workman in neglecting his duty.

The *Attorney-General* on behalf of the plaintiff contended that it was an antecedent duty devolving on the defendant to have the railway track in good order, and that the subsequent neglect of its servants in not cutting the grass will not relieve the defendant of that responsibility. There is no evidence that the track and sidings were not originally properly constructed; the growth of grass and weeds is an annually recurring incident, and has nothing to do with the original duty of the defendant to properly construct the railway.

I cannot accede to this view. The argument amounts to this, that a railway company in constructing a railway are responsible for the workmanship over the whole line, and are insurers of the safety of the whole of their employees, not only against the ordinary risks of their employment, but also against the neglect or breach of orders of their fellow-servants.

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It is plain from the evidence that the state and condition of the track when the accident happened was known to the plaintiff, but there is no evidence to shew it was known to the defendant.

The duty of the employer is to have the machinery, buildings and apparatus which are necessary for the prosecution of his work in such a condition that his employees run no unnecessary risk, and for that purpose to take care to have the work superintended by competent workmen in a fit and proper manner. He is not bound to take unusual or extraordinary precautions. The workman on his part takes the risk of his employment and is remunerated accordingly. See *Weems* v. *Mathieson*, 4 Macq. (H.L. Sc.) 226.

If the employer engages competent men to keep the works

in order he discharges his duty to his workmen: *Tarrant* v. *Webb* (1856), 25 L.J., C.P. 261. An employer himself is probably incompetent to do the work which is required, or perhaps even to know if it has been properly done. It therefore comes to this that there is no such antecedent duty devolving on the employer which cannot be discharged by the brains and hands of others. If the employer requires machinery he does not make it himself, if he requires a railway to be kept in order he does not do the work himself, but employs fit and competent servants for the purpose.

The cases are numerous beginning with *Priestley* v. *Fowler*, 3 M. & W. 1; and followed by *Waller* v. *The South-eastern Railway Company* (1863), 32 L.J., Ex. 205; *Morgan* v. *The Vale of Neath Railway Company* (1865), L.R. 1 Q.B. 149, and others. In the latter case it was decided that the master was exempt although the employment on which the injured man was engaged was very dissimilar from that which the fellow-servant (through whose negligence he was injured) was engaged, and it was one of the risks he incurred in consequence of his employment. The rule laid down by Erle, C.J., in *Tunney* v. *The Midland Railway Company*, L.R. 1 C.P. 291, at p. 296, is "that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both."

Wilson v. *Merry* (1868), L.R. 1 Sc. App. 326, summarizes the law on this head as follows: "That fellow-workmen are not limited to the ordinary meaning we give to that word, but include others who are not all equal in point of station or authority. That the duty of masters is to select proper and competent men to superintend and to furnish adequate materials and if the persons so selected are guilty of negligence the master is not responsible."

Therefore to establish negligence against the defendant the

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plaintiff must prove that the defendant undertook personally to superintend and direct the works or that the persons they employed were incompetent, or that the means and resources which the defendant supplied for the purpose were unsuitable. *Allen* v. *The New Gas Company* (1876), 1 Ex. D. 251. If the plaintiff fails in this he fails to establish negligence.

The negligence here relied on is the non-removal of weeds and grass from the siding. The plaintiff does not attempt to say that the roadmaster and sectionmen employed by the defendant to keep the track and sidings in order were not competent. If owing to their neglect the weeds and grass were not removed then it becomes the negligence of a fellow-workman, and the defendant is not liable. In my opinion the appeal fails and should be dismissed with costs.

Judgment of MARTIN, J.

MARTIN, J.: At the close of the plaintiff's case counsel for the defence applied to the learned trial Judge to direct the jury to enter a verdict in favour of the defendant on the ground that no cause of action had been shewn, and, this motion not being then granted, a similar one was made at the close of the defendant's case. The learned Judge, however, adopted the convenient and well established practice of allowing the case to go to the jury, reserving the legal question to be disposed of on the subsequent motion for judgment. The jury having found a verdict on questions submitted, in favour of the plaintiff for $6,500.00, each party moved for judgment, which was ultimately directed to be entered in favour of the defendant Company. The plaintiff appeals.

The statement of claim sets out that the plaintiff was a conductor in the defendant's service, that part of his duty was to couple and uncouple cars, that for such purpose it was necessary to stand between the cars, that on the occasion when the accident happened he attempted to uncouple two

cars and "while the plaintiff in performance of his duty as aforesaid was between the cars . . . . . the train was backed up and in attempting to get out from between the cars the plaintiff's foot became entangled in long grass or undergrowth of weeds which the defendants negligently and wrongfully allowed to grow and accumulate on their said tracks, and the train of the defendants struck the plaintiff," etc., etc.

"4. By reason of the negligent and unskilful management of the defendant's train and by reason of the defective condition of the defendant's railroad tracks, the plaintiff suffered," etc.

The questions submitted to the jury and the answers thereto are as follows: [Questions and answers here.] In his own words the contention of the plaintiff's (appellant's) counsel is as follows: "When a master employs a servant it is part of the contractual relationship that he should supply fit and proper tools to work with and fit and proper and safe premises to work upon; this is a personal obligation which he cannot evade by saying he has employed capable and reliable fellow-workers of the injured party. The Company was directly negligent in allowing its premises to become dangerous; such being the case it would practically become impossible in the great majority of cases for injured persons to recover, if it is necessary to shew that the master had knowledge. The servant is entitled not only to have appliances originally good, but to have them maintained in that state; even if a competent man had been sent to cut that grass and had not done so, the Company would be liable because the accident arose from the breach of the antecedent duty to keep the premises safe; the employer being personally bound to see to this cannot shield himself behind another servant; the defence of common employment only arises when the negligence arises from act of a fellow-employee; the Company is an absolute insurer, just as much as if there were a statutory obligation: I distin-

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guish *Wilson* v. *Merry* (1868), L.R. 1 Sc. App. 326, on that ground."

I have given these extracts from my notes because it is important to keep in mind the exact contention of the *Attorney-General.*

In support of this proposition we are referred to Beven on Negligence, 2nd Ed., pp. 734-42, 756-8-9; *Webb* v. *Rennie* (1865), 4 F. & F. 608; *Murphy* v. *Phillips* (1876), 35 L.T.N.S. 477; *Fairweather* v. *The Owen Sound Stone Quarry Company* (1895), 26 Ont. 604-6; *Citizens' Light and Power Co.* v. *Lepitre* (1898), 18 C.L.T. 350; and *Foley* v. *Webster* (1892), 2 B.C. 138, 21 S.C.R. 580, judgment of Mr. Justice Strong; *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402 at 409.

Special reliance was placed on two Scotch cases quoted in Beven: *Paterson* v. *Wallace* (1854), 1 Macq. (H.L. Sc.) 748, and *Brydon* v. *Stewart* (1855), 2 Macq. (H.L. Sc.) 30, and I feel somewhat handicapped in arriving at a satisfactory conclusion in the absence of these reports, which are not in the Law Society's library, nor in any private library in this Province, so far as I know. They are not noted in the present (1893) edition of Addison on Torts, or Pollock. It is significant that *Brydon* v. *Stewart* was, as appears in the argument of counsel in *Brown* v. *The Accrington Cotton-Spinning and Manufacturing Company, Limited* (1865), 34 L.J., Ex. 209, formerly cited in the 2nd edition of Addison, but it was not followed in that case. In *Fowler* v. *Lock* (1872), L.R. 7 C.P. at p. 280, Mr. Justice Grove makes the following statement on their authority: "Even in the case of master and servant, the House of Lords has held, in appeals from Scotland, that the master is bound to take all reasonable precautions for the safety of his workmen, and is liable for accidents occasioned by his neglect towards those whom he employs; and the law of England is there stated (*obiter*) to be the same as that of Scotland."

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In a later case, referred to by the learned trial Judge, *Groves* v. *Fuller* (1888), 4 T.L.R. 474, Mr. Baron Pollock re-

marked when counsel quoted *Brydon* v. *Stewart*: "That is a case always cited for plaintiffs, but it has not been followed in this country. We must follow the decision of the Court of Appeal," *i.e.*, *Griffiths* v. *The London and St. Katharine Docks Company* (1884), 13 Q.B.D. 259. These Scotch cases were not cited in *Foley* v. *Webster*, though *Paterson* v. *Wallace* was in *Rajotte* v. *The Canadian Pacific Railway Co.* (1889), 5 Man. 365, but not considered in the judgments given. In Smith on Master and Servant, Secs. 262-263, both cases are quoted in support of the principle that "where a master employs his servants in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition." In Beven on Negligence, p. 740, after reviewing the two cases the learned author states: "The principle established by these cases is that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks; *or* as the law was expressed by Lord Wensleydale in another Scotch case in the House of Lords; (*Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266). 'All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner.'"

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The learned author before coming to this conclusion had in mind (Note 1, p. 735) *Groves* v. *Fuller* and *Griffiths* v. *The London and St. Katharine Docks Company*, *supra*.

In a note (1) to the principle above set out the author quotes Mr. Justice Byles in *Searle* v. *Lindsay* (1861), 11 C.B.N.S. at p. 439, as follows: "That is the extent of the master's responsibility. The obligation the law casts upon him is to take due and proper care that his machinery is sufficient and his workmen reasonably competent."

Before proceeding to consider *Paterson* v. *Wallace* and *Brydon* v. *Stewart*, Mr. Beven says (736): "Two cautions, given

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on page 735, should be borne in mind; viz.: That there are two presumptions made in actions arising out of alleged breach of duty by the master to the servant in the circumstances of his work; (1) that the master has discharged his duty by providing suitable appliances for the business; (2) that the servant has assumed all the usual and ordinary hazards of the business, and until one of these at least is displaced by evidence an action cannot be maintained by a servant against a master for injury in the course of his employment; that is, such an action cannot be maintained at common law independent of statutory modification." I must say that, to my mind, there is some uncertainty as to exactly what principle Mr. Beven deduces from these cases.

In *Foley* v. *Webster*, *supra*, in the Supreme Court, Mr. Justice Strong said the only question was "whether or not it was incumbent on the plaintiff to prove that the defendants had notice of the dangerous nature of the rolling and chock blocks at which he had to work," and on the "very high authority" of Lord Watson in *Smith* v. *Baker & Sons* (1891), A.C. 325, at p. 353 the question was answered in the negative. Lord Watson said: "It does not appear to me to admit of dispute that, at common law, a master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act, that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect itself."

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Now does this extend to allowing a natural and annual growth of grass to attain such a height as to render a siding unsafe or dangerous on which to couple cars? For the

defence reliance is placed on *Rajotte* v. *The Canadian Pacific Railway Co.*, *supra*, a case very like the present, wherein the deceased lost his life while coupling cars, owing to his foot catching in a frog which had originally been properly "blocked," but owing to the wear of traffic had become dangerous. Under such circumstances the defendant Company was held not to be liable, there being no evidence that the system of blocking was imperfect, or that the men employed by the Company to keep the frogs blocked were incompetent.

The appellant's counsel contends that this case is not sound law, and that in any event it was unnecessary for the Manitoba Court to determine the question raised here. The present case is a stronger one for the defendant than was *Rajotte* v. *The Canadian Pacific Railway Co.*, for here a few weeks before the accident the siding was in a safe condition and it got into the state complained of by the growth of the grass in the course of the seasons—nature—while in *Rajotte's* case it was a piece of construction and the wearing away of material that caused the accident.

The latest case I have been able to find on the question of this common law liability is *Smithwhite* v. *Moore & Sons, Limited* (1898), 14 T.L.R. 461, wherein the plaintiff, an infant (suing by his father), employed at the Chesire Cheese in Fleet Street, was sent by the head waiter between 6 and 7 in the evening (November 6th) to clean the windows in a room on the fourth floor. The room was imperfectly lighted and the plaintiff did not observe a crack in one of the panes, and while cleaning the pane the glass fell out and his wrist was severely cut, the nerve being severed. There was no evidence that the managing director of the Company (the proprietor) knew that the window was cracked, and the point was taken for the defence that if there was any negligence it was that of the fellow-servant, the head waiter. For the plaintiff it was urged, on the authority of *Griffiths* v. *The London and St. Katharine Docks Company* and *Smith*

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v. *Baker & Sons*, that the defendant Company was responsible, but it was held that the plaintiff had no claim at law.

Now in what particular is the plaintiff's case stronger in principle than the one just cited? There the youth was sent into an imperfectly lighted room to clean the windows and there was, unknown to him, a cracked pane of glass by reason of which he was severely cut. Here, because the defendant did not, so to speak, arrest the course of nature though it provided ample and presumably competent men for that purpose, the plaintiff was injured. If the plaintiff's argument should succeed here, it should *a fortiori* have succeeded in the Cheshire Cheese case, for reliance in each was placed on the same authority—*Smith* v. *Baker & Sons*, and the element of putting an employee to work in unsafe premises or in a position of danger, enters into both. As I read the case of *Webb* v. *Rennie*, *supra*, it is rather an authority for the defendant than for the plaintiff.

From the best consideration I have been able to give the case I have arrived at the conclusion that though there is not, perhaps, a direct decision on the point raised, yet in principle it is not distinguishable from such cases as *Brown* v. *Accrington Cotton-Spinning and Manufacturing Company, Limited*, *supra*; *Potts* v. *The Port Carlisle Dock and Railway Company* (1860), 8 W.R. 524 (wherein *Paterson* v. *Wallace* and *Brydon* v. *Stewart* were cited); *Wilson* v. *Merry*, *supra*; *Matthews* v. *Hamilton Powder Company* (1887), 14 A.R. 261, following the last named case, and *Rajotte* v. *Canadian Pacific Railway Co.*

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If a perusal of the full report of the two Scotch cases relied upon should shew that they do conflict with those later decisions, then in such case they must be regarded as overruled. Though I have arrived at the above conclusion, yet it is not easy to satisfactorily reconcile the various decisions and I regard the point raised as one on which it would be

desirable to have the opinion of a higher court. The appeal should be dismissed with costs.

Appeal dismissed.

STAMER v. HALL MINES.

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Master and servant—Employers' Liability Act, R.S.B.C. 1897, Cap. 69—Miner going from one part of mine to another—Proximate cause of accident—Conjecture as to—Negligence.

Way—Winze—Defect—Inspection of Metalliferous Mines Act, R.S B.C. 1897, Cap. 134, Sec. 25, Rule 18.

The plaintiff in an action under the Employers' Liability Act, for damages caused by a defect in his employers' "works and ways" cannot succeed if on the facts proved the jury can only conjecture how the injury occurred.

Rule 18, of Section 25, Cap. 134, R.S.B.C. 1897, does not require that a winze extending through several levels of a metalliferous mine shall be protected at each level; the rule is sufficiently complied with if the winze is protected at the top level only.

ACTION under the Employers' Liability Act for damages for injuries sustained by the plaintiff in falling down a winze in defendant's mine, in which he was engaged as a miner. The trial took place at Nelson before IRVING, J., and a special jury, who returned the following verdict:

(a). Was the personal injury to plaintiff caused by reason of any defect in the condition or arrangement of one of the ways? The jury are unanimous in the opinion that the injury to the plaintiff was caused by reason of the lack of proper guard rails round the east side of the shaft or winze.

Statement.

(b). Did the defect referred to in your answer to (a) arise from, or had it not been discovered or remedied owing to the negligence (that is, absence of care under the circumstances) on the part of the defendants or of some person in their service, entrusted by them with the duty of seeing that the condition or arrangement of the ways were proper? Yes.

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(c). If the injury was caused by any defect (as referred to in answer to (a)—or negligence (as referred to in (b)—did the plaintiff know of such defect or negligence) and did he fail without reasonable excuse to give or cause to be given within a reasonable time, information of such defect or negligence to the defendants or to some person superior to himself (the plaintiff) in the service of the defendants? First part, yes; second part, no.

(d). Did the defendants or some person in their service superior to the plaintiff, know of the defect or negligence prior to the accident, and was the plaintiff aware that they had this knowledge? Yes.

(e). Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill under the circumstances would have done, and thereby contribute to the accident? No.

(f). If the cause of the accident was the absence of a guard rail, did the plaintiff know of its absence, and run the risk of attempting to pass, knowing and appreciating the danger of so attempting? Yes. He was passing in the ordinary course of his duty.

Statement.

(g). If the plaintiff is entitled to damages, what sum do you fix? $700.00.

(h). What sum is equivalent to the estimated earning during the three years preceding the 22nd of January, 1898, by a person employed in the same grade as plaintiff during those years in the like employment within this Province? $2,700.00.

The following are extracts from the Judge's charge to the jury: "The parties have agreed that I should say that the passage way on the hanging (wall) side was the only passage way intended for use." And further: "The plaintiff himself cannot tell you if he went on the foot wall side or not. He says that if he went on the foot wall side he went on a place where he had no business to go."

On the verdict judgment was given for the plaintiff.

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The defendant appealed to the Full Court and the appeal came on for argument at Victoria on 3rd May, 1899, before McColl, C.J., Drake and Martin, JJ.

McPhillips, *Q.C.*, for appellant: Assuming that the winze should have been guarded, it has not been shewn that the accident arose from an omission in that respect. The cause of the accident is not proved—it is only conjectured. Upon the plaintiff's own case there should be a non-suit, because the plaintiff was bound to prove the cause of accident and he has not done so. See *Wakelin* v. *London and South Western Railway Company* (1886), 12 A.C. 41 at p. 44; *Badgerow* v. *Grand Trunk Railway Company* (1890), 19 Ont. 191; *Montreal Rolling Mills Company* v. *Corcoran* (1896), 26 S.C.R. 595; *Farmer* v. *Grand Trunk Railway Company* (1891), 21 Ont. 299. There should be a non-suit, because on the plaintiff's own evidence he shewed that he should have been particularly careful and he admitted that he was not particularly careful. Pollock on Torts, 5th Ed., at p. 429.

Argument.

On the findings and admissions there should be a judgment for the defendant, because the jury found that the plaintiff appreciated the risk knowing of defendant's negligence—that he admitted that he should not be on the foot wall side—that the jury found that he fell in from the foot wall side and that therefore the negligence of the defendant as found by the jury was not the proximate cause of the accident because the plaintiff was bound to avoid the danger and he could have done so had he been reasonably careful, while he admits that he was not careful. See *Headford* v. *The McClary Manufacturing Company* (1893), 23 Ont. 335; (1894), 21 A.R. 164; and (1895), 24 S.C.R. 291; *Smith* v. *Baker & Sons* (1891), A.C. 325.

Duff (*W. A. Macdonald*, *Q.C.*, with him), for respondent: The defendant Company was guilty of a breach of statutory

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duty in not having the top of the winze protected by a cover or a guard rail as required by R.S.B.C. 1897, Cap. 134, Sec. 25 (18) (Inspection of Metalliferous Mines Act). It is plain that if there had been a guard rail the accident could not have happened. See *Radley* v. *London and North Western Railway Company* (1876), 1 App. Cas. 754. There is no suggestion that plaintiff was rushing along carelessly or not looking where he was going. The plaintiff was going the only way he could to approach the place where his business was. It is for the defence to prove contributory negligence, and as the jury did not so find, the Court cannot say now that there was contributory negligence. See *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (1878), 3 App. Cas. 1155 at p. 1201. As the defendant Company was guilty of a breach of a statutory duty the doctrine of *volenti non fit injuria* has no application. *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423.

[MARTIN, J., referred to *McCloherty* v. *Gale Manufacturing Company* (1892), 19 A.R. 117, and *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402.]

Argument.

See also R.S.B.C. 1897, Cap. 69, Sec. 6; *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; *Greenhalgh* v. *Cwmaman Coal Company* (1891), 8 T.L.R. 31; *Smith* v. *Baker & Sons* (1891), A.C. 325; *Sanders* v. *Barker* (1890), 6 T.L.R. 324; *Osborne* v. *London and North Western Railway Company* (1888), 21 Q.B.D. 220. He distinguished *Headford* v. *McClary Manufacturing Company*, *supra*, as there the plaintiff had he been looking could easily have seen the hole into which he fell.

McPhillips, Q.C., in reply: The statute does not say that the winze must be covered on each level, but only at the top, therefore there is no breach of a statutory duty and the doctrine of *volenti non fit injuria* does apply.

Cur. adv. vult.

22nd May, 1899.

DRAKE, J.: This action was brought under the Employ-

ers' Liability Act for recovery of damages arising from an accident to the plaintiff who fell down a winze and injured himself. The case was tried by a jury, and before the case went to the jury, counsel agreed that the learned Judge who tried the case should state that the passage way on the hanging wall side was the only passage way intended for use. The mine is worked on a level, the width of which extends from the hanging wall to the foot wall, about eighteen or twenty feet wide. This level is divided lengthways by pillars six feet apart and about four feet from the foot wall.

The mine where the accident happened is worked in three stories ; the ore from the upper stories is shot down to the ground or sill floor in what is described as winzes, being open holes leading down to a chute from which the ore is loaded into cars. These winzes are all made along the foot wall, and they are three in number on the second floor where the accident happened. The distance from the foot wall to the pillars is about four feet, and it is in this space of four feet that the winzes are constructed, thus dividing the slope and leaving the space between these pillars and the hanging wall for a passage way intended for use of the miners as agreed to by the counsel and referred to in the learned Judge's charge. This passage was covered with a flooring of lagging.

Judgment of DRAKE, J.

The plaintiff was sent by the foreman to give a message to some men working on the second floor some distance to the east of the winze. He gave the message and then proceeded towards the west on other business. Whether in going west he took what the parties agreed to was the only passage way intended for use, or whether he went along the foot wall to the north of the posts is not clear. He does not know himself. He says in going west he stepped into the winze, and attributed his accident to the want of a guard rail. He had the usual light, a candle, which all miners carry. There was evidence of a brace across the whole

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slope about four feet high, consisting of a stout piece of timber. This was stated by the plaintiff's witnesses to be on the west side of the winze, and by the defendant's on the east side. Whichever side it was no one could pass it without stooping. The jury did not find directly whether the accident happened on the east side of the winze, or whether on the south side, but they say that the plaintiff's injury was caused by lack of guard rails on the east side of the winze. The defendants were not negligent in not protecting the east side of the winze as the plaintiff had no business to approach the winze on that side. The only passage way was agreed to be on the south side of the winze, and no negligence is found in not putting a guard rail on that side, the deduction being that it was sufficiently protected. If the meaning of this finding is that the accident happened from the plaintiff falling in on the east side then he was where he had no business to be. It is shewn that the plaintiff was no stranger to the mine, but passed by this place daily during the previous month. It is admitted that this part of the mine is dangerous and requires care on the part of the miners, and the plaintiff, as well as all others, knew of the necessity of using care. The jury also find that the plaintiff knew of the defect of no guard rail on the east and so did the defendant. They also find that the plaintiff did not contribute to the accident by want of ordinary care, and that he knew of the absence of the rail, but was passing in his ordinary duty.

Judgment of DRAKE, J.

There is no objection taken to the learned Judge's charge to the jury, and the question we have to decide is whether under these findings the plaintiff is entitled to recover. The jury have not found how the accident occurred, and it is a mere conjecture that they meant to find that the plaintiff fell from the east side of the winze. See *Farmer* v. *Grand Trunk Railway Company* (1891), 21 Ont. 299. In this case owing to the death of the injured party it was a mere conjecture how the accident arose. The same state of circum-

stances does not exist here, but the plaintiff can give no direct evidence how the accident happened and there is no other testimony which can assist him. To send the case back for a new trial will not enable this point to be cleared up. See also *Badgerow* v. *Grand Trunk Railway Company* (1890), 19 Ont. 191.

If the accident occurred owing to the plaintiff being where he had no right to be and where his duty did not call him the neglect of the defendant will not excuse him, and in this view see the case of *Headford* v. *McClary Manufacturing Company* (1893), 23 Ont. 355; (1895), 24 S.C.R. 291, when the plaintiff familiar with the ordinary passage instead of following it walked into a hoist hole and was injured, the hole being ten or twelve feet away from the passage way, it was held that he could not recover as the accident was wholly caused by the unfortunate man himself.

The plaintiff contends that rule 18 of section 25 of Cap. 134, R.S.B.C. 1897, shews that the defendant neglected a statutory duty. That each winze extending from one level to another should be protected by a cover or guard rail, and owing to such neglect, even if the plaintiff was guilty of negligence he is entitled to recover.

The breach of a statutory duty does not give a right of action for damages to the person injured, even if he had no civil remedy the duty is enforced by the imposition of a penalty and is in the nature of police regulations, see *Wilson* v. *Merry* (1868), L.R. 1 (H.L. Sc.) 341. Here the plaintiff's right of action, if he has one, is independent of the Metalliferous Mines Act and is not governed by that Act.

One other contention which was pressed upon us was that the way was encumbered with lagging, but the evidence is insufficient for us to arrive at the conclusion that the plaintiff was of necessity compelled to pass along the foot wall in order to avoid the obstacles in the ordinary passage way,

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and there is no finding of the jury with reference to this condition of the passage way.

MARTIN, J.: It is contended on the part of the plaintiff that it was the duty of the defendant to protect the winze or ore chute under rule 18 of section 25 of the Inspection of Metalliferous Mines Act, R.S.B.C. 1897, Cap. 134, which provides: "Each winze or mill-hole extending from one level or drift to another level or drift shall be protected at the top by a cover or guard rail."

The defendant takes the point that all the Act requires is that the winze should be covered "at the top" and that there is nothing compelling it to "cover" an opening on an intermediate level, such as the one in question here. In my opinion this is the correct reading of the rule, which in order to embrace the present case should read "protected at the top and any other opening," or words to a like effect. Consequently the plaintiff cannot rely on the rule laid down in *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, that a breach of a statutory duty gives a cause of action to anyone injured by reason thereof; I find, I might say, that that case was followed in Ontario in *McCloherty* v. *The Gale Manufacturing Company* (1892), 19 A.R. 117; see also *Groves* v. *Lord Wimborne* (1898), 2 Q.B. 402; Mayne on Damages, 5th Ed., 73, note (r).

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In the opening sentence of his charge to the jury (p. 165) the learned trial Judge stated: "The parties have agreed that I should say that the passage way on the hanging (wall) side was the only passage way intended for use." And further at page 170: "The plaintiff himself cannot tell you if he went on the foot wall side or not. He says that if he went on the foot wall side he went on a place where he had no business to go." The jury in answer to question (a) found, in effect, that the plaintiff did go on the foot wall side, because they found that "the injury to the plaintiff was caused by reason of the lack of proper guard rails round

the east side of the shaft or winze." He must have been on the foot wall side in order to have fallen in on the east side of the opening; at least that is the only inference I can draw in the absence of a direct finding on the point.

Question (f) and the reply are as follows: "If the cause of the accident was the absence of a guard rail did plaintiff know of its absence, and run the risk of attempting to pass knowing and appreciating the danger of so attempting? A. Yes. He was passing on the ordinary course of his duty."

This finding coupled with the agreement extracted from the charge above quoted render it impossible, in the view I take of it, for the plaintiff to successfully maintain his action.

On the argument a contest between counsel arose as to the meaning of the extracts above given from the charge, divergent views being taken. If there were any objections to the important statement of the learned trial Judge they should have been taken at the time, and an opportunity given to him to correct it, if it were incorrect. It is regrettable that such a question should have arisen, but in my opinion, the only safe plan for this Court to adopt is to give the words their plain meaning. We cannot go behind them. The appeal should be allowed with costs.

Judgment of MARTIN, J.

McColl, C.J., concurred in allowing the appeal.

Appeal allowed.

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Railway—Waters and watercourses—Flooding of adjoining land caused by construction of railway embankment—Damages—Negligence—B.C. Stat. 1887, Cap. 36.

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The plaintiffs were the owners of land having a slope and natural drainage towards the sea. The defendants under authority of an Act of Parliament had constructed a line of railway through this land (which was then owned by the plaintiffs' predecessors in title) and had thereby cut off the ditches which had been constructed on the lands in question for the purposes of drainage. The defendants, for the purpose of protecting their line cut a ditch parallel with the embankment on which the line was built and cutting across the ditches on the plaintiffs' lands, which thereafter emptied into the defendants' ditch. The defendants constructed a flood gate for their ditch, and the flood gate being insufficient to carry off the water accumulated in the defendants' ditch, the plaintiffs' lands were flooded.

Held, that under the defendants' special Act (incorporating section 16 of the Railway Clauses Consolidation Act, 1845) the construction of the embankment and ditch were authorized by the Legislature and that the plaintiffs could not complain of the flooding of their lands caused by the construction of the embankment.

Held, also (reversing the judgment of IRVING, J.), that no duty or obligation was imposed on the defendants to see that the plaintiffs had an outlet through their ditch for the water which collected on their lands.

THIS was an appeal from the judgment of IRVING, J., pronounced on the 4th of August, 1898, awarding the plaintiffs $1,549.00 damages and costs. The following statement of facts is taken from the judgment of DRAKE, J.: "This is an action for damages sustained by the plaintiffs owing to their land having been flooded by water, arising, as the plaintiffs allege, from the defendants having unlawfully, improperly and insufficiently constructed a flood gate at

Statement.

the mouth of their ditch into the Nicomekl River. The plaintiffs admit that if there had been no flood gates, and damage had ensued, they would have no case. The plaintiffs say they suffer from trespass, and they do not base their action on negligence, because if they sued for negligence they would have to prove that a duty of some sort was cast upon the defendants to prevent the water in the ditch from backing up and flooding the land of the plaintiffs.

It is admitted that there was no such duty, because the ditch was constructed by the defendants on their own land in order to protect their line of rail, and the damage was caused not by flooding from the Nicomekl River, but by an excessive rain fall and water coming from the higher lands, which was more than the ditch could carry off, in consequence, it is said, of the flood gates not being of sufficient capacity to carry off the water that came into the ditch. The facts stated, and not disputed, are that the land is nearly a dead flat. In constructing the railway the embankment acted as a dike, and prevented the surface water from flowing in its accustomed manner to the south of the line. The plaintiffs had three or four ditches on their land which the railway line cut off. The defendants, apparently finding themselves inconvenienced by the water accumulating against their embankment, cut a ditch on their own land parallel to the line of railway into the river, and the plaintiffs' ditches all ran into this ditch. Three of these ditches had flood gates, one had not. Statement.

The plaintiffs allege that before a flood gate was put in by the defendants no damage ensued, but after the flood gate was erected, the water could not escape so freely as before, and in consequence backed up in the plaintiffs' ditches and flooded their land and crops. This is not a case of the defendants bringing a foreign substance on their land and thereby injuring the plaintiffs, but they were endeavouring to deal with water which collected on their land, partly in consequence of the plaintiffs' drains, and partly from

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natural rain fall. The water was a common enemy from which both parties tried to protect themselves.

The defendants are a Railway Corporation formed under an Act, Cap. 36 of 50 Vict. Provincial, and by section 25, the Dominion Consolidated Railway Act, 1879, and Amending Acts were to apply. This section was repealed by Cap. 36 of 1889, Sec. 5, and in lieu thereof certain sections of the Dominion Railway Act only were to apply. These sections refer to fences, cattle guards and gates only. By section 7 of the Amending Act the Vancouver Land Clauses Consolidation Act is incorporated. This last Act makes the Lands Clauses Consolidation Act (Imperial) 1845, part of the statute as far as applicable, and excepting certain clauses. Section 8 of the defendants' Act makes the Vancouver Island Railway Clauses Consolidation Act, 1862, which is the Imperial Act of 1845, also applicable, except certain specified sections. By section 6 of that Act compensation is to be made to the owners and other persons interested, for lands taken or injuriously affected by the construction of the railway, such compensation to be ascertained in the manner provided by the Land Clauses Consolidation Act, and all the provisions of the said Act shall be applicable to the determining the amount of any such compensation, and to enforcing payment thereof. The mode of assessing compensation in that Act is arbitration. Then comes section 16 in the Railway Clauses Act, which, after giving powers to railways to make on their lands any acqueducts, ways, drains, etc., they may think proper, authorizes them to make drains or conduits through or under any lands adjoining the railway for the purpose of conveying the water from or to the railway, provided that in doing the works they shall do as little damage as may be, and shall make full satisfaction in manner therein provided."

The Company in 1890, bought its right of way through lands of the plaintiffs from one Elisha Pickard, the then

owner of the property, who conveyed the right of way to the Company by a deed of conveyance, the material part of which was as follows: "And it is hereby agreed and declared that the said sum of $193.75 is to be taken not only as the purchase money for the estate and interest of the vendor in the said land and premises, but also in full compensation for all damage by severance and injury to the adjoining lands (if any) of the vendor, and also for all loss, annoyance or inconvenience of whatever kind."

At the trial the jury returned a general verdict in favour of the plaintiffs for $1,549.00, and judgment was thereupon entered for plaintiffs for that amount and costs.

The defendant appealed to the Full Court on the grounds amongst others (1) that the learned Judge erred in refusing to direct the jury that there was no duty cast upon the defendant to receive water from the plaintiffs' land or to put a flood gate or to repair the same or to keep it free from obstruction, and that the plaintiffs in discharging water into defendants' ditch and enlarging such discharges from time to time was a wrong doer and could not recover; (2) that the learned Judge erred in directing the jury that there was a duty on the defendants to put in a proper flood gate or to keep the flood gate or the ditch free from obstructions; (3) that the whole cause of action was concluded by the deed from Pickard to the defendant and therefore the plaintiffs cannot recover; and (4) that in the absence of an averment and proof of negligence no compensation could be recovered by the plaintiffs except in the way set out in the Railway Clauses Act, 1845 (Imperial), and the Land Clauses Act, 1845, (Imperial).

Statement.

The appeal came on for argument at Victoria on 10th January, 1899, before WALKEM, DRAKE and MARTIN, JJ.

Wilson, Q.C., and *Reid* for appellant: There is no obligation on the Company, either by statute or common law to keep the ditch open. See *Partridge* v. *Great Western*

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Railway Company (1858), 8 U.C.C.P. 97; *L'Esperance* v. *Great Western Railway Company* (1856), 14 U.C.Q.B. 173; *Wallace* v. *Grand Trunk Railway of Canada* (1858), 16 U.C.Q.B. 551; *Knapp* v. *Great Western Railway Company* (1856), 6 U.C.C.P. 187. Irrespectfully of the question whether the flood gates are good or bad the plaintiffs have no right to put water in defendants' ditch. See *Wheeldon* v. *Burrows* (1878), 12 Ch. D. 31. The question of contributory negligence is ignored by the jury and specific findings as to the cause of the trouble should have been given. As to the desirability of specific findings see judgment of Patterson, J., in *Canada Central Railway Company* v. *McLaren* (1883), 8 A.R. at p. 596.

By the common law there is no servitude of lower in favour of higher grounds in respect to mere surface water or such as falls or accumulates by rain or melting snow; and a land owner is not entitled to damages against a railroad company whose embankments collect and set back such waters upon his lands. See *Walker* v. *New Mexico and S.P.R. Company* (1897), 17 S.C. Rep. 421; *East Jersey Water Co.* v. *Bigelow, et al* (1897), 38 Atlantic Rep. at p. 633; *Yazoo & M.V.R. Co.* v. *Davis et al* (1896), 19 Southern Rep. 487; *Croft* v. *The London and North-Western Railway Company* (1863), 32 L.J., Q.B. 113.

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The covenant in the deed from Pickard exempting the Company from making compensation precludes the plaintiffs from recovering.

Davis, Q.C., and *Corbould, Q.C.*, for respondents: The defendant Company in putting in the flood gate was acting as a land owner and not as a railroad company. The action is one of trespass and not of negligence. See *Lawrence* v. *Great Northern Railway Company* (1851), 20 L.J., Q.B. 293.

The jury should not be examined as to their findings. So long as the jury were properly instructed and proper directions were given, specific questions need not be put. There can be no question of the plaintiffs' wrong doing. See

Whalley v. *The Lancashire and Yorkshire Railway Company* (1884), 13 Q.B.D. at p. 137, where the Company was held liable for cutting holes in the embankment even although done to protect itself.

Wilson, Q.C., in reply: It was a trespass on the part of the plaintiffs to run water into defendant's land and there is no presumption of leave and license in favour of a trespasser. See *Wallis* v. *Harrison* (1838), 4 M. & W. 538; *Davis* v. *Garrett* (1830), 6 Bing. 724.

[MARTIN, J., referred to *Langstaff* v. *McRae, et al* (1892), 22 Ont. 78.]

20th January, 1899.

DRAKE, J., (after stating the facts): I must confess that this state of facts points to negligence as the actual basis of the action. If the defendants had constructed a ditch on the plaintiffs' land with leave, or under the powers vested in them under section 16 of the Railway Clauses Act, 1845, then their might be a duty cast upon them to keep the ditch in order, and to prevent flooding as far as the capacity of the ditch went . . . . . There is a difference in the language used in the 6th and 16th sections. By the 6th section the Company are to make compensation to all parties interested in any lands taken or used for the purposes of the railway. By the 16th section they are to make full compensation by reason of the exercise of the powers contained in the Act, but by *Ricket* v. *Metropolitan Railway Company* (1867), L.R. 2 H.L. 175, it was held that only actionable damage was contemplated limited to parties expressly interested in the land.

Judgment of DRAKE, J.

The defendants' contention is that the plaintiffs cannot succeed in this action, first, because there was no duty cast upon the Railway Company to provide against flood waters; second, that the remedy if the plaintiffs were entitled to any, is by arbitration under the Land Clauses Act; third,

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that compensation having been awarded to the plaintiffs' predecessors in title, it is awarded once for all; fourth that if the defendants are liable, the damages are excessive on the first point. The Railway Company under section 16 has power to make aqueducts, conduits, drains, etc., on their own, or on adjoining lands, doing as little damage as can be. But here the Company have not touched adjoining lands, which they have power to do making compensation; they have made a ditch on their own land for their own purposes, and in my opinion, as section 68 does not apply, they fall within the rule of law that a person is justified in protecting his property from damage, even if in so doing he injures his neighbour's. *Nield* v. *London and North Western Railway Company* (1874), 44 L.J., Ex. 15. If the defendants had made no ditch at all, the plaintiffs would have had their land overflowed from the ordinary rain fall, and much more so from an extraordinary rain fall, but the plaintiffs could not in such a case complain. If the defendants, after having made a ditch, filled it up and damage ensued, no right of action would thereby accrue to the plaintiffs. The defendants in no sense brought the water, or caused it to come to the place where the damage happened, it came by natural causes, and by the configuration of the country, and the plaintiffs cannot complain, although what the defendants did in constructing a flood gate for their own protection somewhat augmented the plaintiffs' damage.

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The second point is that the remedy, if any, is by arbitration. The authorities clearly establish this distinction that where the damage arises from works authorized by statute, the authority is a bar to the action, and damage by reason of the work being negligently done as to which the remedy by action remains. *Brine* v. *Great Western Railway Company* (1862), 31 L.J., Q.B. 101. And it is laid down in *Ricket* v. *Metropolitan Railway Company*, *supra*, and *Beckett* v. *Midland Railway Company* (1867), L.R. 3 C.P. 82, that

the action taken away by the statute is the right of action respecting some injury to the land, and not an injury of a personal nature. Here the injury complained of is injury to land. The Legislature has excluded section 68 from the statute which relates to works done for the accomodation of land owners under which the plaintiffs might have been able to establish a claim, but then the matter would have to be settled by two justices, and not by action. If the defendants are responsible at all, the remedy is by arbitration.

On the third point, the award of compensation for taking the land does not in any way preclude the owners of land from recovering damage arising from an insufficient performance of a statutory duty. *Lawrence* v. *Great Northern Railway Company* (1851), 16 A. & E. (N.S.) 643. The principle to be deduced from the authorities is this, that where an undertaking is authorized by an Act of the Legislature, the Company are not answerable for damages for constructing authorized works, and to do so would have the effect of repealing an Act of Parliament.

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For these reasons I think the plaintiffs have no case, and the appeal should be allowed, and the action dismissed with costs.

WALKEM, J.: I concur.

MARTIN, J.: I concur in the view that the appeal should be allowed. At first I was of the opinion that this Court could not satisfactorily deal with the matter, because specific questions were not submitted to the jury, as was done in the similar case of *Langstaff* v. *McRae, et al* (1892), 22 Ont. 78 (though this of course is not absolutely necessary), nor did it appear that the attention of the jury had been sufficiently directed to certain matters, but after further consideration I have arrived at the conclusion that the plaintiffs have no cause of action. The plaintiffs' case was stoutly maintained at the bar as one of trespass, but if it could have been sup-

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ported at all it must have been, in my opinion, on the ground of negligence.

It is admitted that under the defendant Company's peculiar charter—peculiar in that it enjoys all the benefits of section 16 of the Imperial Railway Clauses Consolidation Act, 1845, without being subject to the obligations of section 68—the construction of the railway embankment and ditch was authorized by the Legislature. It is also admitted that the plaintiffs could not complain of any flooding of their lands caused by the construction of the embankment, which cut off the former natural drainage towards the sea (p. 50 Q. 404), and some artificial drainage.

The plaintiffs drain their land into the defendant's ditch, which empties in the Nicomekl River at tidewater. But it is contended that because the defendant obstructed its own ditch on its own land, and thereby locked up the water on the plaintiff's land, and prevented it from running off freely through the defendant's ditch, therefore the defendant is liable to the plaintiff for damages from the flooding of the land.

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The plaintiff says that the water on his lands in the wet (flooded) season, which he complains of, was "water from the sky and high land" (88) and from the ditch (90), and also that he has "no complaint of the river water of any kind at all."

The question is, is there any duty or obligation cast upon the defendant to see that the plaintiff has such an outlet through its ditch for the water which so collects on his lands that no damage will result from his inability to drain it off by means of such ditch.

That is the bald question as I understand it, though it may be expressed in other ways which tend to confuse the real issue.

The obstructions complained of are a flood gate erected at the mouth of the ditch where it discharges into the Nicomekl (which flood gate is alleged to be insufficint in capa-

city and faulty in construction), and the accumulation of stumps, logs and driftwood, which dammed up the water in the ditch back of the flood gate (pp. 50-1).

Starting with the assumption that the defendant could lawfully construct the embankment cutting off the plaintiff's drains, without being liable to make compensation, and later construct the ditch for the protection of its railway line, it would follow, it seems to me, that the defendant could discharge all the water so collected on its own lands by its ditch into the river in the manner it thought best adapted for the purpose : and if it could discharge it all it could restrict the discharge to part : and if it could discharge part only it could fill up the entire ditch if it saw fit, and discharge none at all. Now if it filled up the whole ditch that would be a complete obstruction, nevertheless it would not be liable. And if it were to wholly fill up a large or small section of the ditch at any point in its course, it would still not be liable ; and if it were to partially fill up a large or a small section at any point it would not be liable ; and it is immaterial what form the obstruction takes ; a large mass of brush wood, or a small mass of brushwood ; a large mass of stones and sods, or a small mass of stones and sods ; a large and adequate flood gate, or a small or inadequate flood gate—the principle is the same.

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It may be here remarked that the defendant had a force of seven or eight men working for a month or over to keep the ditch clear of obstructions (50-1), though according to the view I take, it was under no obligation to do so.

Counsel for the plaintiff relied particularly on the case of *Whalley* v. *Lancashire and Yorkshire Railway Co.* (1884), 13 Q.B.D. 133, and I have consequently examined it with attention, but to my mind (even were the present defendant's charter not unusual in character), it can readily be distinguished from the case before us.

It will first be noted that counsel for the plaintiff admitted (p. 134) that the penning back and accumulation of the

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water behind the embankment was a lawful accumulation of the water, "but that it would give no right to the defendant to cut the trenches and to pass the water from where it was comparatively safe to the plaintiff on to his land to the injury of his crops." And the Master of the Rolls states (p. 135): "Now the jury found from the way in which the defendant 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." Lord Justice Lindley puts the matter plainer still (p. 141): "We must look at the broad question, which is, whether a land owner on whose land there is a sudden accumulation of water brought there without any fault of, or act of his, is at liberty actively to let it off on to the land of his neighbour, without making that neighbour any compensation for damages, etc."

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To bring the present case within these expressions it would be necessary to shew that the defendant "actively let off" the water in the ditch on to the plaintiff's lands, whereas what it did more resembles the circumstances set out in *Nield* v. *The London and North-Western Railway Company* (1874), L.R. 10 Ex. 4, where the defendants were held justified in raising the sides of their canal to guard against a flood from a neighbouring river, even though the result was to damage the plaintiff's lands by the overflow of the pent up water in the canal.

Appeal allowed with costs.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

CANADIAN PACIFIC RAILWAY COMPANY v. MCBRYAN (p. 136).—Reversed by Supreme Court of Canada. See (1899), 29 S.C.R. 359.

CANADIAN PACIFIC RAILWAY COMPANY v. PARKE (p. 6.)—Appealed to the Judicial Committee of the Privy Council and judgment delivered 17th June, 1899, reversing judgment appealed from. See (1899), A.C. 535.

CONNELL v. MADDEN (pp. 76 and 531).—Affirmed by Supreme Court of Canada, 24th October, 1899.

HOBBS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY (p. 228).—Reversed by Supreme Court of Canada. See (1899), 29 S.C.R. 450. This case has been appealed to the Judicial Committee of the Privy Council and is standing for argument.

MCNERHANIE v. ARCHIBALD (p. 260).—Affirmed by Supreme Court of Canada. See (1899), 29 S.C.R. 564.

POPE v. COLE (p. 205).—Affirmed by Supreme Court of Canada. See (1899), 29 S.C.R. 2981.

QUAI SHING, AN INFANT, *In re* (p. 86).—Affirmed by Supreme Court of Canada.

WOOD v. CANADIAN PACIFIC RAILWAY COMPANY (p. 561).—Affirmed by Supreme Court of Canada, 24th October, 1899.

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7. ——*Mineral Act, 1896, Secs. 28, 34 and 50—Statute of Frauds—Verbal agreement—Whether enforceable.*] The interest of a free miner in his mineral claim is an interest in land and an agreement not in writing respecting it cannot be enforced. Where one person on behalf of another locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal. FERO v. HALL. - - - - - - 421

8. ——*Mineral Acts—Adverse claim—Affirmative evidence—Of what—B. C. Stat. 1898, Cap. 33, Sec. 11—Practice.*] Section 11 of the Mineral Act Amendment Act, 1898, applies to all adverse proceedings, including those commenced before the Act. By proving (1) his free miner's certificate; (2) prior location and due record; and (3) the overlapping of the claims in dispute, a prior locator who is plaintiff in adverse proceedings makes out a *prima facie* case. SCHOMBERG v. HOLDEN. - - - - - - 419

9. ——*Mineral Acts—Adverse proceedings—No satisfactory affirmative evidence—B.C. Stat. 1898, Cap. 33, Sec. 11—Practice.*] Where both parties in adverse proceedings failed to establish title to the property in dispute the Judge so found, and judgment was entered accordingly, without costs to either party. RYAN v. MCQUILLAN. - - - - - 431

10. ——*Defects in location of—No. 2 post—Mistake in giving approximate compass bearing of—Whether cured by subsequent certificate of work.*] The defendant's mineral claim, Cube Lode, was located in May, 1892, and duly recorded

and certificates of work were issued in respect of it regularly since. The plaintiff in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. *Held*, that the irregularity in locating was cured by the defendant's recording his last certificate of work. CALLAHAN v. COPLEN. 523

11. ——*Occupation of—Defects in location of—Right of second person to relocate.*] The defendant's mineral claim, Grand Prize, was recorded in June, 1894, and certificates of work were issued in respect of it in June, 1895, and in June, 1896. The plaintiff in July, 1896, located the Buffalo Bill claim on the same ground, and attacked defendant's location on the ground that his posts were situate outside the limits of his claim. *Held*, that defendant's ground, being actually occupied and actively worked, was not open to location. WATERHOUSE v. LIFTCHILD. 424

12. ——*Right of partner who has allowed his license to expire to share in proceeds of sale of—Mineral Act of 1896, Secs. 9, 34, 50, 80-92.*] If a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale merely because his free miner's certificate was allowed to lapse after the making of the agreement. MCNERHANIE v. ARCHIBALD. - 260

13. ——*Mining location—Mineral Act, 1896, Secs. 16, 19 and 27—Priorities between locators.*] Per Bole, Co. J.: (1) An error in the statement on the initial post of the approximate compass bearing of No. 2 post of N.E. and S.W. instead of N.W. and S.E. is fatal to the validity of the location of the mine. (2) That, as a fact, such a mode of location was calculated to mislead other persons desirous of locating claims in the vicinity; and therefore could not be treated as a *bona fide* attempt to comply with the provisions of the Mineral Act, 1896. (3) That the plaintiff's prior location not having been recorded within the prescribed time