# 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 362 INCLUSIVE BY

**GORDON HUNTER, K.C., - EDITOR.**
**PETER SECORD LAMPMAN, BARRISTER-AT-LAW, REPORTER.**

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VOLUME VIII.

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VICTORIA, B. C.
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# JUDGES

OF THE

# SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

## AND IN ADMIRALTY

During the period of this Volume.

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### 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.

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### LOCAL JUDGES IN ADMIRALTY.

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

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### COUNTY COURT JUDGES.

| | |
|---|---|
| HIS HON. ELI HARRISON, | Nanaimo |
| HIS HON. WILLIAM NORMAN BOLE, | Westminster |
| THE HON. CLEMENT FRANCIS CORNWALL, | Cariboo |
| HIS HON. WILLIAM WARD SPINKS, | Yale |
| HIS HON. JOHN ANDREW FORIN, | Kootenay |
| HIS HON. ALEXANDER HENDERSON, | Vancouver |
| HIS HON. ANDREW LEAMY, | Kootenay and Yale |

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### ATTORNEY-GENERAL.

THE HON. DAVID MacEWEN EBERTS, K.C.

## MEMORANDA.

On the 16th of January, 1902, the Honourable Angus John McColl, Chief Justice of the Supreme Court of British Columbia and Local Judge in Admiralty of the Exchequer Court in and for the District of British Columbia, died at the City of Victoria.

On the 4th of March, 1902, Gordon Hunter, one of His Majesty's Counsel learned in the law, was appointed Chief Justice in the room and stead of the Honourable Angus John McColl, deceased.

On the 4th of March, 1902, the Honourable Archer Martin, was appointed Local Judge in Admiralty in the room and stead of the Honourable Angus John McColl, deceased.

On the 6th of June, 1901, Alexander Henderson, one of His Majesty's Counsel learned in the law, was appointed Judge of the County Court of Vancouver.

On the 13th of June, 1901, Andrew Leamy, Barrister-at-Law, was appointed Judge of the County Court of Kootenay, and on 31st October, 1901, a Judge of the County Court of Yale.

# TABLE OF CASES REPORTED

## IN THIS VOLUME.

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# REPORTS OF CASES

DECIDED IN THE

# SUPREME AND COUNTY COURTS

OF

## BRITISH COLUMBIA,

TOGETHER WITH SOME

# CASES IN ADMIRALTY.

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## IN THE COUNTY COURT OF VICTORIA.

MARTIN, J. (In Chambers.)

1901.

April 17.

## CHARLES T. DAILY CO. v. B. C. MARKET CO.

DAILY CO. v. B. C. MARKET CO.

*Practice—Interrogatories—Order for ex parte—County Court Order XIII., r. 6.*

An order for leave to deliver interrogatories under Order XIII., r. 6, may be made *ex parte*.

SUMMONS by defendant Company to set aside an *ex parte* order giving the plaintiff Company leave to deliver interrogatories to be answered by the defendant's manager. Statement.

*Lindley Crease*, for the summons.
*Moresby, contra.*

17th April, 1901.

MARTIN, J.: It is contended that an order for leave to deliver interrogatories under Order XIII., r. 6, should not be granted *ex parte*, on the grounds that the procedure is governed by sections 124 and 125 of the County Courts Act, and that it is not Judgment.

MARTIN, J. (In Chambers.)
1901.
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the practice that applications should be granted without giving the other side an opportunity to be heard. But, in my opinion, the provisions of the statute and of the rule do not clash, and the Registrar informs me that the invariable practice has been to make such orders *ex parte*. The matter, however, has been settled by the recent decision of Mr. Justice DRAKE in the case of *Tiarks* v. *Pettingell*, wherein it was held that a similar order was properly made *ex parte*, and I am bound to follow that ruling. I might add that the form of order, No. 198, does not contemplate notice to the other side, and the somewhat peculiar provisions of the rule are couched in imperative language.

Judgment.

*Summons dismissed.*

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FULL COURT At Vancouver.
1901.
March 8.
B. C. L. & I. AGENCY v. CUM YOW

## B. C. LAND AND INVESTMENT AGENCY, LIMITED v. CUM YOW *ET AL.*

*Practice—Writ of summons—Special indorsement—Claim for principal and interest under mortgage—Order III., r. 6 and Order XIV., r. 1.*

**An indorsement of a claim for principal and interest under a covenant in a mortgage, in order to be a good special indorsement within the meaning of Order III., r. 6, and Order XIV., r. 1. must allege that the moneys are *due* under the covenant.**

ACTION to recover principal and interest under a mortgage. The writ of summons issued 10th August, 1900. was indorsed as follows:

"STATEMENT OF CLAIM.

Statement.

"The plaintiff's claim is under covenants, contained in a deed dated the 1st day of February, 1897, against the defendant, Won Alexander Cum Yow, for $407.15, principal and interest, and against the defendants, John Carty and W. H. Keary, for $82.15 interest, the said Won Alexander Cum Yow having made default

in payment of such interest and notice in writing of such default having been duly given to the said John Carty and W. H. Keary.

"PARTICULARS.

"1897.

| | | |
|---|---|---|
| Feb. 1. | Principal | $325.00 |
| 1900. | | |
| Aug. 10. | Interest at ten per cent. from 1st February, 1898 | 82.15 |
| | The plaintiff claims | $407.15" |

The plaintiff took out a summons for judgment under Order XIV., and 14th September, 1900, IRVING J., made an order allowing it to sign final judgment for the amount indorsed on the writ and costs.

The defendants appealed on the ground amongst others that the writ was not specially indorsed under Order III., r. 6.

The appeal came on for argument at Vancouver on 22nd November, 1900, before the Full Court consisting of MCCOLL, C.J., DRAKE and MARTIN, JJ.

Argument.

*A. D. Taylor*, for appellants: The defendants are entitled to know what the covenants are: see *Manchester Advance and Discount Bank, Limited* v. *Walton* (1892), 62 L.J., Q.B. 158 and *Walker* v. *Hicks* (1877), 3 Q.B.D. 8. There is nothing to shew on the indorsement that Cum Yow is a mortgagor; see *Munro* v. *Pike* (1893), 15 P.R. 164; Holmsted & Langton, 2nd Ed., 752. The word *due* is omitted: see Form No. 8 at p. xxix., of the Appendix to the Rules. He also cited *The Gold Ores Reduction Company, Limited* v. *Parr* (1892), 2 Q.B. 14.

*Wilson, Q.C.*, for respondent. referred to *Powell* v. *Peck et al* (1888), 15 A.R. 138 and *Grant* v. *The People's Loan and Deposit Company* (1890), 17 A.R. 85; 18 S.C.R. 262.

*Cur. adv. vult.*

On 8th March, 1901, the judgment of the Court allowing the appeal was delivered by

Judgment.

MARTIN, J.: Objection is taken to the indorsement on the ground, first, that it substantially departs from the form given

FULL COURT
At Vancouver.

1901.

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B. C. L. & I. AGENCY v. CUM YOW

in Appendix C. Sec. IV., No. 8, in that there is no allegation that the principal and interest are "due" under the covenant in the deed; and further, by way of accentuating the omission, that while there is an allegation of default as regards interest, there is none as regards principal.

I have been unable to find a case in point, though in all similar cases which I have referred to, wherein the indorsement has been considered on other grounds, the allegation is made that the amount sued for was "due" under the covenant. In the preceding form, No. 7, in the case of a money bond, the word "due" is also to be found.

Judgment.

Unless the amount claimed is due under the covenant the plaintiff has no cause for action, and in my opinion it is not advisable that such a substantial departure from the form should be sanctioned, however regrettable the effect of the over-sight may be. The appeal should be allowed with costs.

*Appeal allowed with costs.*

## ROSS v. HENDERSON.

McColl, C.J.

1901.

Feb. 12.

Ross v. Henderson

*Landlord and tenant—Lease—Privileges not specified therein conceded—Injunction.*

**Before the construction of a building by the defendant, the plaintiff agreed to rent a shop in the proposed building. The lease, in the short form, made in pursuance of the Leaseholds Act, described the premises by metes and bounds without specifying any privileges. Plaintiff, after entering demanded use of water closet and a place for storing coal and defendant conceded the right.**

***Held,* that the plaintiff was entitled to an injunction restraining defendant from interfering with his right of access to the closet and his right to store coal in rear of the premises.**

Statement.

THIS is an action for an injunction restraining the defendant from interfering with the plaintiff's right of access to a water closet in the rear of a store occupied by plaintiff and also from interfering with plaintiff's right to store his coal in rear of said premises. The action was tried at New Westminster, before McColl, C.J., on 11th February, 1901.

Argument.

*Henderson, K.C.*, for plaintiff, contended that the plaintiff was entitled to everything that was obviously necessary for the enjoyment of the premises demised. The lease was in the short form made in pursuance of the Leaseholds Act and the rights contended for were implied by a reference to the long form. He cited *Ewart et al* v. *Cochrane et al* (1861), 4 Macq. H.L. 117; *Hinchliffe* v. *The Earl of Kinnoul* (1838), 5 Bing. N.C. 1 and *Watts* v. *Kelson* (1870), L.R. 6 Chy. App. 166.

*Dockrill*, for the defendant: The premises were described by metes and bounds in the lease and hence the plaintiff must be confined strictly to the terms of the lease. It was open to the plaintiff to have asked that the privileges contended for be set out in the lease, but he neglected to do so. He cited *Maitland* v. *Mackinnon* (1862), 32 L.J., Ex. 49; *Wood* v. *Ledbitter* (1845), 14 L.J., Ex. 161 and Clarke's Landlord and Tenant, p. 96.

12th February, 1901.

McColl, C.J.

1901.

Feb. 12.

Ross v. Henderson

McCOLL, C.J.: The plaintiff is tenant under the defendant of a shop, being a room in a building situate on Columbia street in New Westminster, and the question in dispute is as to the plaintiff's right to use a certain water closet and to be afforded space on the defendant's premises apart from the shop for storing fuel. The ground floor as planned (and constructed) consisted of two rooms fronting on that street and one room behind them extending the whole width of the building. A door was to be made between the westerly front room and another door from this back room at its easterly side, giving access to and from the premises in the rear of the building. A water closet was to be built on these premises at the westerly side. The agreement between the parties was made before the construction of the building was begun and nothing was settled between them then except that a lease was to be made of a shop for a certain term at a fixed rent. The plaintiff went into possession on October 2nd, and the building was not completed until a month later. He never saw the plans.

I find upon the evidence that the plaintiff after entering into possession demanded as of right what he now claims, and that the defendant conceded the demand as a right and did not merely give a license.

The plaintiff did not succeed at once in getting the water connected with the closet, which was not done until March, after which it was used by him without question. But he was permitted at once to use for storing the fuel a part of the back room, which was partitioned off from its westerly side as a storeroom, and afterwards a platform outside the building and under a stairway.

Judgment.

Because of the partition not contemplated by the plan a door was made from this storeroom giving to the plaintiff access to the water closet without passing through the other back room.

By the enjoyment as of right of both the things now claimed, any uncertainty which before then may have existed was removed.

The defendant relied upon the case of *Maitland* v. *Mackinnon* (1862), 32 L.J., Ex. 49, which with the other cases cited are to be found in Clarke pp. 96 to 99; but all that was decided

there is that a stable held under a separate title from that to a house and in fact not belonging to it, but to an adjacent house, did not pass by general words relating to things described as belonging to the house. In view of the absence of any public accommodation in the way of a water closet, I am of the opinion, that having regard to the obvious necessity of such a convenience and to the arrangement of the doors, the right to the use of the closet was granted by the lease read in long form; but I rest my judgment on the ground first mentioned which is applicable to both the things claimed. It is not altogether immaterial that the Clapps and the tenants of the defendant of another room in the building used the closet, they having a lease in the same form as the plaintiff.

I think the present difficulty is attributable to the circumstance that the parties are now competitors in trade.

*Judgment for plaintiff with costs.*

McColl, C.J.
1901.
Feb. 12.
Ross v. Henderson
Judgment.

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## GRANT v. DUPONT.

Irving, J.
1901.
Jan. 11.
Grant v. Dupont

*Architect—Whether liable for loss caused by mistakes in estimates.*

In making his estimates of the cost of a building an architect is only required to use a reasonable degree of care and skill and if he does this he is not liable for any loss caused by error in the estimates.

ACTION tried at Vancouver on 15th and 16th June, 1900, before Irving, J. The motion for judgment was argued in December, 1900.

*Bowser* and *Godfrey*, for plaintiff.
*Wilson, Q.C.*, and *J. H. Senkler*, for defendant.

11th January, 1901.

Irving, J. This is the case of an architect suing for the balance of his fee and of the defendant counterclaiming for damages. It arises out of the rebuilding of a brick block in New Westminster, destroyed by the fire in September, 1898.

dgment.

IRVING, J.

1901.

Jan. 11.

GRANT v. DUPONT

The terms of employment are not in dispute.

The amount agreed upon was $500.00, of this $200.00 was paid on 25th February, 1899.

The defence is that the plaintiff was negligent and that the $200.00 paid represents the full value of his services.

The negligence charged consisted in representing that the new building could be completed by 1st of January, 1899, at a cost of $13,000.00, where, as a matter of fact, it was not completed till June, and at a cost of $20,665.00.

In addition to the above, the defendant charges that there were blunders made in the course of construction, *viz.*: (1.) Improper drainage connection; (2.) Omission to put in anchors in a party wall; (3.) Traps in sidewalk were not in accordance with by-law; (4.) Negligent supervision of workmanship resulting in leaky premises; (5.) Rear wall not in accordance with by-law; (6.) Curbing on sidewalk not in accordance with by-law; and he counterclaims in respect of these, and also for loss of certain rents which he would have obtained if building had been completed on 1st of January, and fixes his damages at $10,000.00.

The writ was issued on the 2nd of March, 1900; trial, in June, 1900; motion for judgment in December, 1900. The witnesses were testifying to facts which occurred between August, 1898, and August, 1899. I venture to think that in these circumstances the correspondence is of the utmost importance, I, therefore, make a note of it in chronological order:—

Judgment.

18th September, 1898—Mr. Grant writes with reference to the alteration in the standing brick work.

19th September, 1898—Stewart's bill for taking down walls.

21st September, 1898—Mr. Grant reports the fall of the old brick wall on Sunday night, and that he now estimates the cost of the proposed erection at $13,000.00 by day labour; with additional story, $2,750.00 additional.

23rd September, 1898—Major Dupont answers "I shall not be able to determine the question of rebuilding . . . for a fortnight, *i. e.*, 7th October. Meantime I would like to have all the old bricks possible cleaned and piled."

28th December, 1898—Suggesting alterations in size of windows.

6th January, 1899—Mr. Grant reports that nothing is being done on account of cold spell. Brick work delayed in consequence.

10th February, 1899—Major Dupont writes as to lining stores. "I am very desirous of keeping down expenses and unless there are tenants in sight for the Front Street stores time is not so much an object in respect of them as *economy*." Inquiry as to extra cost.

24th March, 1899—Major Dupont informs Mr. Grant that Mr. Roy has agreed to take the five rooms on Columbia Street and that he will sub-divide rooms as required and put in vault and w. c. accommodation; all to be ready within seven weeks, *i. e.*, about the 10th of April. "Please hurry completion of upper floor and vault."

4th May, 1899—Major Dupont says:—

"Dear Mr. Grant.

"I wish you to-day to purchase the vault doors in Vancouver. I did not know until to-day that you were waiting on me *re* the P. O. doors here, but I think it is my fault. I understood from you that you could get doors in Vancouver that would do for $85.00. I am getting anxious to have the building finished as it is a direct loss of rental. Is not the completion of upper floor dragging and cannot you hurry it? Tenants are complaining. Please push matters to completion. Mechanics will make as long a job as possible when working by the day.

"Sincerely yours,

"C. T. Dupont."

Judgment.

I stop here to point out that this correspondence plainly shews that down to May, 1899, the delay was not regarded as the fault of Mr. Grant; that alterations and additions to the origin plan were being made and the total cost of necessity would in- creased; that the determination to build was not reached til after the 7th of October, and that on the 23rd of September, Ma r Dupont was undecided as to whether he would rebuild by contr or by day labour, but in the meantime the bricks were to cleaned and piled. Mr. Grant's estimate was based on the co- dition of the building and the rate of wages on the 21st of September.

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The building was to all intents and purposes completed on the 24th of June, 1899. Some of the tenants, however, were able to take possession in April, others in May; the remainder in June.

The case can conveniently be divided into two heads, (1.) Negligence in making estimate (*a*) as to cost and (*b*) as to time; and (2.) Negligence in carrying out the work.

As to the first point, I think it was necessary for the plaintiff to bring to bear a reasonable degree of care and skill; such a degree of skill as may be expected from an average person in the profession. If this degree of care and skill is taken, a professional man is not liable even if he is unsuccessful. The point to be determined is not whether the plaintiff arrived at a correct conclusion, but whether he did or did not exercise a reasonable and proper care, skill and judgment (*Chapman* v. *Walton* (1833), 10 Bing. 57.) That is a question of fact upon which the evidence of other architects would be of the greatest assistance to me; but no evidence of that kind has been submitted.

The defendant really rests his case upon the decision in *Moneypenny* v. *Hartland* (1824), 1 C. & P. 352, and the discrepancy between the amount estimated in September, *viz.*, $13,000.00, and the total amount he has been called upon to pay, *viz.*, $20,665.00, and the difference in time for completion mentioned in September and the date of actual completion.

Judgment.

Now, as to the cost. I find that the $20,665.00 includes a number of items which were not in contemplation of the parties in September, *viz.*, clearing out the debris after the fire, subdivision of the interior of the upper flat and building a vault, the lowering of shop windows in front, cementing front wall, altering rear wall in consequence of the passage of a by-law passed in December, extra lining of stores, an extra stairway, and some items which should not be included in the estimate, *e. g.*, architect's fee.

If we take all these into consideration and remember that the estimate was based upon what could only be a rough guess as to the amount of old brick that would be fit for use, and that there was an advance in the price of labour and material after the estimate was made, and finding all these facts how can it be said,

in the absence of evidence from skilled men, that this discrepancy proves negligence as to cost?

Then as to time. The estimate was based upon the idea that the construction would begin in September. It was delayed by the defendant till the end of October, with the result that in January all brick work was stopped. Everybody knows that if a building is roofed in before the frost comes, cold makes but little difference; but with brick work not completed, it is quite another story.

In stating the above facts, I have mentioned the conclusion upon two or three issues in respect of which much contradictory evidence was given. In doing so I have been guided wherever it was possible to obtain any assistance from the correspondence by the correspondence rather than by the verbal testimony; where no such assistance could be obtained, then by the verbal evidence. To the evidence given by the expert called by the defendant, I attach little or no importance.

I find as facts that the sub-division of the upper story was not included in the original $13,000.00; nor was the vault nor clearing away the rubbish after the fire; that there was an increase in the rate of wages for bricklayers and an increase in the cost of material after the estimate had been made; and these advances were not made manifest, so far as labour and material used in brick buildings, until the building of brick buildings began, which is not shewn to have been before the 23rd of September. I find that Grant is not guilty of negligence in preparing his estimate and that he was not negligent or incompetent in supervising the construction.

Judgment.

With reference now to the second branch of the case. As to the defect in sewerage system—Major Dupont knows nothing. Mr. Major knows that something was wrong, but that does not seem to me to be enough. Something was wrong and it had to be put right. If plaintiff is to be held responsible for this, he may with just as much reason be held responsible for the damage done by the fire to the building.

As to the party wall. It seems that there was or had been in existence before the fire a party wall of three storys on Columbia and four storys on Front Street, in respect of which wall Major

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Dupont was to receive $1,000.00. After the present two story wall was built, the person making or about to make use of the wall, to whom Major Dupont's agent applied for a new agreement, refused to pay more than $250.00, alleging that it was not a three story wall and that it had no anchors. Mr. Grant, I think, ought to have made some further enquiries about this agreement. In this respect, I think there may have been some negligence in view of Major Dupont telling him that anchors would be required; but, although I have read the evidence with care, it is not clear to me whether the $1,000.00 agreement was at an end or not; and I do not think that the hearsay statement that Mr. Owens, in the course of bargaining, said that the wall was useless without anchors, is evidence that it was in fact useless. Then again if there was negligence, how are the damages to be assessed? The fact, however, remains that Major Dupont wanted a building with anchors, whether in consequence of an existing agreement, or with a view to making a new agreement, and he did not get it. I think he is entitled to damages which I fix at $25.00.

As to the leaks. There seem to have been two; one an accident, which was remedied; the other through the back wall. Mr. Grant had recommended before the rain came, that this should be coated with cement, as the bricks were porous. This precaution, however, was not taken. I do not think he can, after having made this recommendation, be held negligent.

Judgment.

As to the traps. In March, 1899, the city passed a by-law directing traps to be placed farther out, that is to say, on the edge of the sidewalk. Long before this by-law was passed, the architect had completed the brick work and apertures necessary for the use of the traps. In fact all the work connected with the traps, except the doors themselves, which were then being put in, had been done and finished before this by-law was passed. Mr. Major and Mr. Grant saw the Council and endeavoured to obtain from that body a recognition of the sidewalk then being restored as an old sidewalk, but they were unable to do so. Here the plaintiff was in an awkward position, not by any fault of his. Of course, had he moved these traps out to the edge of the sidewalk, as required by the new by-law, he would have to excavate under

the sidewalk and alter the sidewalk itself, thereby incurring fresh expense. That expense he was trying to save, and he failed, and I do not see that he is blameable in this respect. The poor man is in this dilemma—If he is careful and saving, as he attempted to be in this matter, he is charged with negligence; when he does the work as the changing circumstances require him to do it, the total sum is increased and he is charged with making an under estimate.

As to the rear wall. Here again a change in the by-law created a difficulty. The original idea was a slate roof, on a very steep pitch I take it, something like a mansard roof. The studding had been erected, but the slate not fastened to it when the by-law was passed requiring brick. This brick was put in and the terms of the by-law satisfied. This is one of the extras not contemplated in the original estimate, and it is through these bricks that the rain drives and thereby causes the leakiness already dealt with.

There remains only one curb. Before the fire there was a sidewalk. It had been built ten years ago. In consequence (I suppose) of falling walls, etc., the inner part of this sidewalk had to be rebuilt, but the outer part was uninjured, that is to say, it was uninjured by the fire, but the outer edge of it had been chipped a good deal by waggons backing against it. The plaintiff cut off this outer edge about five inches and put a wooden buffer in place of the part cut off. The Chairman of the Board of Works examined it and accepted it; but later, Major Dupont was compelled by the city to cut off still more. But the statement that the Council compelled Major Dupont to cut off a portion is not evidence that the architect built it contrary to the by-law. See *McAllum* v. *Reid*, L.R. 3 Adm. 57, n.; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623; *Quintal* v. *Chalmers*, (1898), 12 Man. 231.

Judgment.

During the argument on the motion for judgment, I expressed my opinion as to Mr. Grant not explaining more fully to Major Dupont the amount likely to be reached. He must have known in January, for Mr. Major knew it in the spring, that the work upon which his estimate had been given was going to cost more than he anticipated, and that the other work, not included in the

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estimate would swell the gross total to an amount much larger than that which Major Dupont expected to pay. I do not think he treated Major Dupont quite fairly in this respect, but of itself it does not constitute negligence.

In a measure, he brought this suit upon himself, but not altogether, for when an angry man and a timid man meet, the timid man is never very clear in his explanations, especially is this so when they are not agreed as to what the estimate was intended to include. Now, on the 24th of June, Major Dupont was an angry man.

Judgment.

Plaintiff will recover his $300.00 with costs, and the defendant on his counterclaim $25.00 without costs; section 95 Supreme Court Act.

In the case of *Cull* v. *Wakefield* (1841), 6 U.C.Q.B., O.S., 178 are to be found some interesting remarks on actions of this character.

*Judgment accordingly.*

## VICTORIA v. BOWES.

MARTIN, J.

1901.

Jan. 17.

VICTORIA v. BOWES

*Practice—Dismissal of summons under Order XIV.—Costs—Whether payable forthwith.*

On a summons for judgment under Order XIV., if the case is not within the order, or there are circumstances which render it improper to grant the application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be dismissed with costs in any event, but not payable forthwith.

When leave to defend is given, costs, as a general rule, will be in the cause.

It is only in exceptional circumstances that costs will be ordered to be paid forthwith.

In Chamber applications generally, costs are made payable by the unsuccessful party in any event, but not forthwith.

SUMMONS for judgment under Order XIV.

*Bradburn*, for plaintiff.

*Alexis Martin*, for defendant.

17th January, 1901.

MARTIN, J.: To this summons under Order XIV., objection was first taken that the writ was not specially indorsed, whereupon the plaintiff's solicitor abandoned the motion and the application was dismissed, the question of costs being reserved.

It was argued for the defendant that since the writ was not specially indorsed the case was not within the Order, and therefore the costs should be paid forthwith. The plaintiff's solicitor contends that this is not the practice, and that the costs should only be made payable "in any event." Judgment.

The well-settled general rule of practice of this Court in Chambers is that where a party makes an unsuccessful application the costs are made payable to the other side in any event. Similarly, if an application becomes necessary because of the opposite party doing something which he ought not to do, or neglecting to do something which he ought to do in the ordinary course of procedure (*e. g.*, comply with a request for security, or further

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and better particulars), the costs would not be merely costs in the cause, but costs payable by the party offending or defaulting in any event. It is only in exceptional circumstances that costs will be ordered to be paid forthwith.

In this particular application if our rules were the same as those in England the defendant's contention would be given effect to, because rule 9 (*b*) of Order XIV., would apply, but there being no corresponding rule in force here, our own practice must be followed.

In the similar case of *Rattenbury* v. *Lawrence* (April 24th, 1900), this question was raised, and after consultation with my brother DRAKE (the only other Judge in town at the time) it was decided that where the case was not within the Order, or there were circumstances which rendered it improper to grant the application, or where the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons should be dismissed with costs in any event: but in general where leave to defend is given, costs should be in the cause. Of course the foregoing does not exclude a possible case where a Judge might, in dismissing a summons, think it necessary, in order to mark his disapproval of a certain line of action, or for other reasons, direct that costs should be paid forthwith.

Judgment.

The costs herein should be to the defendant in any event.

## *IN RE* WATER CLAUSES CONSOLIDATION ACT.

MARTIN, J.

1901.

Jan. 19.

IN RE WATER CLAUSES CONSOLIDATION ACT

*Practice—Water record—Appeal—Right of parties affected to intervene.*

Anyone affected by a decision appealed from under section 36 of the Water Clauses Consolidation Act, may be let in on the hearing of the appeal even though the month for giving notice of appeal has expired.

Such person may make his application on the hearing of appellant's motion for directions.

MOTION for directions as to hearing of petition, under section 36 of the Water Clauses Consolidation Act, to set aside a water record granted by the Gold Commissioner at Nelson to the B. C. Southern Railway Company. The record was subject to the rights of the City of Rossland, the holder of a prior record.

Statement.

*Galt*, for the Centre Star and War Eagle Mining Companies, for the motion.

*Daly, Q. C.*, for the Le Roi, a mining Company, not served with the petition, but affected by the decision appealed from, asked for leave to appear and be heard on the appeal under subsection (*f.*) of section 36 when

*MacNeill, Q. C.*, for the B. C. Southern objected that the application was premature and if made at all should be made on the hearing of the appeal.

The objection was overruled.

Argument.

*Daly* then read material shewing Le Roi Company was affected.

*MacNeill:* The month allowed for appeal has expired and anyone not having given a notice of appeal within the month should not now be let in. As no excuse is given for not having appealed the Court should follow the practice in adding parties under Order XVI., r. 11. If the causes of action are distinct, or if inconvenience or difficulty will result, or if a plaintiff is barred by a statute, parties will not be joined. See Annual Practice 143 and *The Germanic* (1896), P. 84.

*Barnard*, for the City of Rossland.

MARTIN, J.

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IN RE WATER CLAUSES CONSOLIDATION ACT

*Per curiam:* Let the appeal be heard at Rossland on 18th February—on oral evidence. The Le Roi Company is entitled to be heard on the appeal as the limitation of one month does not extend to it.

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DRAKE, J.

1901.

Feb. 22.

CUNLIFFE *v.* CUNLIFFE

## CUNLIFFE v. CUNLIFFE.

*Divorce—Evidence of witness at former trial—How it may be used.*

In divorce proceedings the evidence of a witness who cannot be found, given at a former trial proving misconduct, may be read over to the petitioner at the trial and verified by her as a correct note of the evidence as given by the witness and used as proof of misconduct.

PETITION for divorce heard at Nanaimo before DRAKE, J., on 19th February, 1901.

*J. H. Simpson*, for petitioner.

No one *contra*.

**22nd February, 1901.**

DRAKE, J.: This action was tried without a jury. The respondent asks for a dissolution of the marriage on the ground of the desertion by her husband for two years, and his misconduct. The parties were married at Nanaimo in 1890, and lived at Nanaimo, and in Alaska. While at Dyea, in Alaska, the respondent turned the petitioner out of her house, and from there she made her way to Nanaimo, which she reached on the 15th of June, 1898. Since that time although she has seen her husband several times, he has never contributed to her support, or exchanged words with her.

Judgment.

Prior to this action having been brought, the petitioner brought a similar action for the same object, but failed, as a desertion for two years was not proved, but misconduct was proved, and in that action the petitioner was held entitled to a judicial separation. See *Lapington* v. *Lapington* (1888),

14 P.D. 21. On the trial of the present action the respondent did not appear, and the petitioner was unable to obtain the evidence of misconduct which was proved in the first action, owing to the fact that the witness had left the country, and her whereabouts was not known. The petitioner served on the respondent a copy of the evidence she proposed to adduce, and applied to be allowed to prove the respondent's misconduct by the Judge's notes taken at the former trial. This I refused, but the notes were read over to the petitioner, and she swore that she was in Court and heard the witness Julia Le Mont give the evidence set out in the notes, and they were a correct note of her evidence as she heard it. On these facts I think the evidence of misconduct is sufficiently proved, and the petitioner is entitled to a decree *nisi*, and custody of the children.

Judgment.

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## FORREST v. FORREST AND MORTON.



*Divorce—Disregard by husband of marital duty—Wife's misconduct caused by—Not entitled to divorce.*

Where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation.

PETITION for divorce heard before DRAKE, J., at Nanaimo, on 19th February, 1901.

*J. H. Simpson*, for petitioner.

No one *contra*.

22nd February, 1901.

DRAKE, J.: The petitioner seeks for a divorce from his wife on the ground of misconduct with the co-respondent.

The parties were married in August, 1895, at Nanaimo, and lived together until 1898. The respondent had contracted habits of intemperance which led to quarrels, and in the result the petiti-

Judgment.

DRAKE, J.

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FORREST v. FORREST

oner insisted on a separation. Accordingly the respondent left the house without money and without any provision for her support. As the petitioner says he left her to take her chance. The petitioner was in a position to support his wife, but he never contributed towards her maintenance, and now complains that she has dishonoured him and desires to have the marriage tie dissolved. There is no doubt that the respondent is leading an immoral life, but in my opinion the cause of her fall was the petitioner's disregard of his marital duty. A wife is entitled to her husband's protection, and if that is withdrawn, and a wife is thrown on to the streets without money or friends, she either becomes an object of charity, or, for the sake of the necessities of life, becomes what this woman has become. Her intemperance might not unreasonably have induced a separation, but the husband in such a case should have made a provision for his wife. Not having done so, I think he is guilty of such wilful neglect as has conduced to the adultery complained of under section 16 of Cap. 62, R.S.B.C. 1897: see *Baylis* v. *Baylis* (1867), 36 L.J., P. & M. 89.

Judgment.

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## *RE* SING KEE.

MARTIN, J.

1901.

Feb. 22.

RE SING KEE

*Criminal law—Certiorari—Selling liquor to Indians—View by Magistrate alone—Whether warranted or not—Sections 108 of the Indian Act and 889 of the Criminal Code.*

On the trial for selling an intoxicant to an Indian, the Magistrate, after hearing the evidence, but before giving his decision, went alone and took a view of the place of sale.

*Held*, (1.) quashing the conviction, that this proceeding was unwarranted. (2.) that sections 108 of the Indian Act and 889 of the Criminal Code do not prevent proceedings by *certiorari* where the ground of complaint is that something was done contrary to the fundamental principles of criminal procedure.

THIS was a summons to make absolute a rule *nisi* for *certiorari*, heard before MARTIN, J., at New Westminster on 22nd February, 1901.

On 14th November, 1900, the applicant, Sing Kee, was tried before G. E. Corbould, Police Magistrate for the City of New Westminster, on a charge of selling an intoxicant to an Indian. At the conclusion of the evidence the Magistrate reserved his decision until the 20th of November, and immediately afterwards informed the applicant that there was a second charge against him for selling intoxicants to an Indian on a subsequent date, the hearing of which was adjourned till the 20th of November.

On the 19th of November, the Magistrate in passing the premises of the applicant took occasion to go in and view the place where the liquor was alleged to have been sold. On the 20th of November he heard the evidence in the second case and at its conclusion sentenced the applicant on both charges, and in the course of his remarks stated that he had seen the premises during adjournment, and he fined the applicant $75.00 for the first offence and $100.00 for the second, and in default imprisonment for six months.

Statement.

On 11th December, *Howay*, for Sing Kee, applied for and obtained an order *nisi* on the ground *inter alia* that the Magistrate had no power to view the place where the offence was alleged to have been committed, and in so doing, acted without authority, and that the conviction was therefore bad.

On the return *Howay*, in support of the rule, contended that all the evidence in the first case having been heard, and counsel closing the case, and it being taken into consideration by the Magistrate, he had no jurisdiction to take this view which was really the taking of further evidence behind the back of the prisoner and his counsel. A view is only substitution of evidence by the eye, for evidence by the ear; *Regina* v. *Petrie* (1890), 20 Ont. 317.

Argument.

MARTIN, J., called on

*Dockrill*, in support of the conviction, who distinguished *Regina* v. *Petrie* on the ground that in this case the defendant was present at the view along with the Magistrate and he read the latter's affidavit to that effect. He further relied upon section 889, of the Criminal Code and contended that up to the time

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of the adjournment there was ample evidence to sustain a conviction; that the Court might disregard under this section "the view" taken by the Magistrate and that therefore the Magistrate having jurisdiction up to the time of the adjournment no *certiorari* would lie, citing on this point *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417 and section 108 of the Indian Act, R.S.C., Cap. 43.

Upon the question of the amendment of the conviction under section 889 of the Code he referred to *The Queen* v. *Murdock* (1900), 4 C.C.C. 82; 27 A.R. 443. The right of *certiorari* is taken away by the Indian Act and the time for appeal extended. The Magistrate had jurisdiction to begin the inquiry and no fraud is alleged, so that the only remedy here is by appeal: see *Regina* v. *Cunerty* (1894), 26 Ont. 53; *Regina* v. *Coulson* (1893), 24 Ont. 249 and *Regina* v. *Coulson* (1896), 27 Ont. 60.

*Howay*, in reply: The Canada Temperance Act, Cap. 106, Sec. 19, also took away the writ of *certiorari* in practically the same words as the Indian Act, yet it was held the writ lay in *Regina* v. *Eli* (1886), 10 Ont. 727 and *Regina* v. *Wallace* (1883), 4 Ont. 140. So also the writ of *certiorari* was taken away in the Ontario Public Health Act, but nevertheless *certiorari* lies for want of jurisdiction: see *Re Holland* (1875), 37 U.C.Q.B. 214. In *Ex parte Hill* (1891), 31 N.B. 84 *certiorari* was held to lie even though taken away by section 108 of the Indian Act. These cases shew that where a Magistrate has been guilty of a clear dereliction of duty or improper conduct or has acted contrary to natural justice the writ will lie though taken away by statute. As to section 889 he contended it did not apply to the irregular action of the Magistrate, but to the irregularity of the conviction, and here the conviction is perfectly regular.

Argument.

At the conclusion of the argument judgment was given as follows by

MARTIN, J.: Even though section 108 purports to take away the right to *certiorari* I think the cases shew that it nevertheless lies where there has been improper conduct of the Magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. I hold that what is complained of

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MARTIN, J.
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RE SING KEE

here is not within the scope of section 889 of the Criminal Code —it is really an inherent defect in the course of legal procedure, something not warranted by law—which voids the conviction even though the course taken by the Magistrate was with the best intention: *Regina* v. *Petrie* (1890), 20 Ont. 317.

The conviction will be quashed, but without costs.

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## BULLOCK v. COLLINS.

DRAKE, J.
1900.
Dec. 3.
FULL COURT At Victoria.
1901.
Jan. 17.
BULLOCK v. COLLINS

*Judgment debtor—Examination of—Incurring debt by fraud—Practice—R.S. B.C. 1897, Cap. 10, Secs. 15, 16 and 19.*

Defendant received from plaintiff several sums of money, part of which were to be invested and part expended on plaintiff's farm. Defendant placed these moneys to his wife's credit, made no investment, kept no accounts and could not account at all for a large portion, although he said it had been expended on the farm. Before the plaintiff got judgment and while the action was pending defendant allowed his wife and sister-in-law to get judgments against him.

*Held*, by the Full Court, reversing DRAKE, J., that the defendant had not incurred the debt by fraud or false pretenses within the meaning of section 15 of the Arrest and Imprisonment for Debt Act.

An appeal lies direct from an order committing a debtor to gaol and no preliminary motion to the Judge for discharge is necessary.

APPEAL from an order of DRAKE, J., made 3rd December, 1900, committing the defendant to gaol for nine months.

On 1st November, 1900, the plaintiff took out a summons (entitled in the action only) for the examination of the defendant as a judgment debtor. This summons coming on for hearing on 3rd November, an order (entitled in the action only) was made for such examination, and in pursuance thereof on 12th November, the defendant was examined orally before DRAKE, J., who refused to allow him to be represented by counsel on such examination. Immediately upon the close of such examination and without any further notice the plaintiff's counsel made an application to have the defendant committed to gaol, and the learned

Statement.

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Judge after hearing the application, without hearing the defendant or his counsel, adjourned the same for judgment and on 3rd December, gave judgment and ordered the defendant committed to gaol for nine months, entitling the order in the cause and in the matter of the Arrest and Imprisonment for Debt Act. The remaining facts appear in the judgment and the headnote.

The following is the judgment as delivered by

**3rd December, 1900.**

DRAKE, J.: The plaintiff is a judgment creditor of the defendant, and has been examined as a judgment debtor under the Arrest and Imprisonment for Debt Act, Cap. 10 of the Revised Statutes of British Columbia, Sec. 19.

The judgment debtor by that Act can be examined as to what property he had when the debt was incurred, and as to the disposal he may have made of any property since contracting the debt; and under section 15, if it shall appear to the Judge that the debtor incurred the debt by fraud or false pretenses the Judge shall have power to commit the debtor to gaol.

The evidence as disclosed by the debtor shews that he was acting as a confidential agent of the plaintiff, who entrusted him with some $6,000.00 of which sum $2,000.00 was to be invested by the defendant at interest, the remainder was to be expended in improvements on the plaintiff's farm. The defendant spent the whole sum, partly on account of the farm, but he never invested any portion of the money on security, and has wholly failed to account for a considerable portion of the $6,000.00. He kept no accounts and no vouchers are produced. The plaintiff thereupon brought an action against the defendant, and recovered judgment for $4,329.23 and costs. When this action was commenced the defendant was owner of a farm on Salt Spring Island of one hundred acres or thereabouts, and a second piece of ground on the mountain. While the action was pending, and before judgment, the defendant allowed two judgments to go by default against him in respect of certain moneys alleged to be due to his wife and his sister-in-law, and these judgments were registered before the plaintiff's judgment was recovered. Part of the moneys alleged to be advanced by Miss Pedder, his sister-in-law, were alleged to be a loan as far back as 1889, and other

Judgment.

moneys were alleged to be spent in purchasing the farm and building house and barn thereon.

It is not possible on this application, without having the other parties before me, to come to any conclusion as to the *bona fides* of these judgment creditors, and it is not necessary for the purpose of this application. The main fact is that the defendant admits that he was entrusted with the plaintiff's money for a particular purpose, and that he did not so apply it; and he also admits that he kept no accounts and has misappropriated a considerable sum. This in my opinion is incurring a debt by fraud, and I therefore order that the defendant John Topham Collins be imprisoned for nine months, unless the judgment of the plaintiff, Henry Wright Bullock, be sooner satisfied.

The defendant appealed to the Full Court on the grounds (1.) that the defendant was denied the right of being represented by counsel on the examination and on the application to commit, and had no opportunity of calling evidence in his own behalf; (2.) that the finding of the learned Judge, that the judgment debt was incurred by fraud was wrong, and was against the weight of evidence before him and (3.) that section 19 of the Arrest and Imprisonment for Debt Act is *ultra vires* of the Provincial Legislature.

The appeal came on for argument at Victoria on 17th January, 1901, before WALKEM, IRVING and MARTIN, JJ.

*A. E. McPhillips, Q.C.*, for respondent, took the preliminary objection that under R.S.B.C. 1897, Cap. 10, Sec. 16, the appellant should have moved for his discharge before DRAKE, J., and in case of refusal he could have then appealed.

The objection was overruled.

Argument.

*Gregory*, for appellant, in opening asked, if it should become necessary to argue the question of *ultra vires*, that a day be fixed for argument on that point, as the Attorney-General for the Province desired to be heard. The order for examination was made under rule 486, but the order for arrest was made under section 19 of the Act. It must be shewn that all the proceedings were under the Act otherwise there was no juris-

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diction for this order. The rules do not give such large powers of committal for fraud as the statute does.

In either case the defendant had a right to be represented by counsel both on the examination and on the application to commit.

The acts complained of as fraudulent took place prior to the coming into force of the Act, and as the Act is not retrospective the defendant is not amenable to its provisions. He cited *Re Lucas Tanner & Co.* (1900), 36 C.L.J. 384 and 32 Ont. 1—see also 37 C.L.J. p. 21. There is no evidence of misappropriation. As to the right to be heard by counsel he cited Cordery on Solicitors, p. 53; *Collier* v. *Hicks* (1831), 2 B. & A. 663 at p. 673; *Ex parte Prance* (1869), 5 Chy. App. 16, and *Graham* v. *Devlin* (1889), 13 P.R. 245.

He was stopped and the Court called on

Argument.

*A. E. McPhillips, Q.C.*, and *Barnard*, for respondent: When the defendant failed to invest the $2,000.00 as directed he incurred a debt by fraud—the misappropriation incurs the debt. This is a process of execution and not criminal, the test being can he go free if he pay the debt. See *Re Lucas Tanner & Co.* (1900), 36 C.L.J. 384 and 32 Ont. 1; *Henderson* v. *Dickson* (1860), 19 U.C.Q.B. 592; *Jones* v. *Macdonald* (1893), 15 P.R. 345; *Ex parte Dakins* (1855), 24 L.J., C.P. 131; American and English Encyclopædia of Law, vol. 14. p. 193; *Humphrey* v. *Oliver* (1859), 28 L.J., Ch. 406; *Jones* v. *Macdonald* (1891), 14 P.R. 109; *Miller* v. *Macdonald* (1892), 14 P.R. 499.

*Gregory* was not heard in reply.

Judgment.

*Per curiam:* The appeal is allowed. Although the evidence shews that the defendant acted with great carelessness, inasmuch as he kept no proper accounts of the moneys received from the plaintiff, or alleged to have been expended on his behalf, yet no instance of fraud was proved.

*Appeal allowed.*

## JORDAN v. McMILLAN: CANADIAN PACIFIC RAILWAY COMPANY, GARNISHEE.

FULL COURT At Victoria.

1901.

Jan. 21.

JORDAN v. McMILLAN

*Practice—Canadian Pacific Railway Company—Service on—Whether by-law requiring service of papers to be at one place in British Columbia valid—County Court Order VIII., r. 18.*

In an action against the Canadian Pacific Railway Company, service of process against the Company must be effected at the Company's office in Vancouver appointed pursuant to 44 Vict., Cap. 1, Sec. 9. So *held* by the Full Court, following a former unreported decision in *Hansen* v. *Canadian Pacific Railway Company*, refusing to hear subsequent decisions of the Privy Council, which counsel alleged in effect overruled such decision.

APPEAL from an order of FORIN, Co. J., dated 6th September, 1900, setting aside the service of a garnishee summons. The plaintiffs on 16th August, 1900, issued out of the Nelson Registry a summons in the County Court of Kootenay against the defendant for the sum of $103.89, and on 18th August issued a garnishee summons against the Company and which was served at the Company's office in Nelson.

On 12th February, 1894, the Company passed and duly filed a by-law (No. 70) providing that, on and after 1st May, 1895, the head office of the Company in Vancouver be the place where service of process might be made upon the Company in respect to any cause of action arising within British Columbia. Before that the office of Messrs. Drake, Jackson & Helmcken, in Victoria, was the place for service (by-law, No. 51.)

Statement.

Order VIII., r. 18 of the County Court Rules provides that "Service of the summons may be effected on a railway company or other corporation by delivering the summons to a secretary, station master, or clerk of the defendant, at any station or office of the defendant within the district of the Court in which the summons is to be served."

On the application of the Company, FORIN, Co. J., made the order setting aside the service of the garnishee summons and reserving leave to appeal.

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The plaintiffs appealed to the Full Court on the grounds *inter alia*, that the statutes of Canada authorizing the garnishees to appoint and fix a place where service of process may be made upon them in respect to any cause of action arising within the said Province is *ultra vires* of the Dominion Parliament, as being an attempt to regulate procedure in civil causes or matters arising within British Columbia, and that the said by-law is null and void and *ultra vires* of the Company as being an interference with and an attempt to control without any statutory or other authority the proceedings of the Courts within British Columbia.

The appeal came on for hearing at Vancouver on 22nd November, 1900, before MCCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.

*Wilson, Q.C.*, for appellants.

*Davis, Q.C.*, for the Company, raised the objection that the garnishee summons was served on a clerk in the Company's office at Nelson instead of at the head office in Vancouver as required by by-law No. 70. The same point was settled in our favour by the Full Court on March 13th, 1891, in *Hansen* v. *Canadian Pacific Railway Company* (not reported.)

The case was ordered to stand over and the Registrar was directed to get Mr. Justice MCCREIGHT'S book to get particulars of decision in *Hansen* v. *Canadian Pacific Railway Company*.

Argument. Subsequently the case was ordered to be put on the next Victoria appeal list.

The appeal was called at Victoria on the 21st January, 1901, before MCCOLL, C.J, DRAKE, IRVING and MARTIN, JJ.

*Duff, Q.C.*, for appellants, admitted that the same point was decided against him by the Full Court in *Hansen* v. *Canadian Pacific Railway Company*, yet subsequent decisions in the Privy Council have shewn the Court was in error, and counsel was proceeding to cite such decisions when he was stopped by

MCCOLL, C.J., who said that the only point having been

Judgment. decided by a majority of this Court, we are bound by its decision. It would not be so if some enactment had not been

brought to the attention of the Court, and there may be other cases, but as this Court is constituted it would introduce the wildest uncertainty in the administration of justice if we were to hold that a former decision is not binding merely because due consideration may not have been given to a question of this kind.

*Appeal dismissed.*

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NOTE.—HANSEN v. CANADIAN PACIFIC RAILWAY COMPANY.

On appeal to the Supreme Court from the County Court of Kootenay.

Case on appeal as settled by WALKEM, J., acting as Co. J.

(*Memo.* To save the expense of settling a case according to the requirements of Order XXVIII., r. 5, County Court Rules, the solicitors in this action (and in sixteen others of the same nature) consented to my settling the case and depositing it with the Registrar at Victoria, in the event of their failure to agree upon a case. They have failed to agree, as appears by the respective statements of case handed to me.)

I gave judgment for the plaintiff for a certain sum which in itself is not in dispute. The same is to be said of the sixteen other cases. The respective judgments will therefore stand as has been agreed if my decision upon the legal points raised at the trial in this action is upheld on appeal.

The facts proved at the trial were as follows: In 1888 and 1889, Jeffrey Brothers contracted with the defendant Company to supply it with ties for its railway track in the neighbourhood of Donald.

The plaintiff, Hansen, as well as sixteen other men (also plaintiffs in as many cases against the same Company), was a sub-contractor under Jeffrey Brothers. Jeffrey Brothers left the Province in 1889 without paying the plaintiff (and the others) what was due under the sub-contract.

Plaintiff then brought the present action under The Protection of Workmen's Wages Act, 1888. This Act is now incorporated

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in the Mechanics' Lien Act, Cap. 74, Consol. Acts, 1888, as sections 25, 26 and 27, under the heading Woodmen's Wages.

The objection to the action *in limine* was:

No. 1. That the service of the plaint (and the other plaints) at the Company's station, say, at Donald, was invalid, it being contended that the service should have been made at the office of Messrs. Drake, Jackson & Helmcken (in Victoria), the Company's solicitors, duly appointed by by-law (which was put in and approved), conformably to section 9 of Schedule A. Cap. 1, 44 Vict., which was relied upon in support of this contention. (See p. 17, Dominion Statutes, 1881).

I decided that the service at the station was good under Order VIII., r. 18, of our County Court Rules, and that as civil procedure was, by section 92, B.N.A. Act, placed under the legislative control of the Province, the provisions in that respect of section 9 of the Dominion Act must give way. I referred at the time to the judgment of the Privy Council in *The Queen's Insurance Company* v. *Parsons* (1881), 1 Cartwright's cases on B.N.A. Act, 265, and especially to the observations of the Court on p. 279 that the Ontario Act then in question was *intra vires*, as it did not interfere with the status and constitution of the Company, and to the further observations on p. 283 as to Mortmain laws. I had not the case before me at the time, nor was this or any other authority then cited on the point.

Since my decision I have been able to look further into the matter, and am free to admit that *Valin* v. *Langlois* (1879), 1 Cartw. 158, see especially judgment of Ritchie, C. J., 167 and *Cushing* v. *Dupuy* (1880), same volume, p. 252, are apparently against me. But behind this there is the question whether the Dominion Legislature can effectively enact such a section as section 9 for the benefit, not of all railway corporations incorporated by the Dominion, but of a single or individual corporation such as the Canadian Pacific Railway Company.

Objection No. 2 was that the County Court had no jurisdiction in the case, as section 26, Cap. 74, Consol. Acts, 1888, indicated the tribunal to which the woodmen should apply for redress. I overruled the objection on the ground that the amount involved in the action was within the limit of jurisdiction assigned to the

County Court. But see Maxwell on Statutes, 1st Ed., p. 109, and the case there cited of *Hertford Union* v. *Klimpton* (1855), 25 L.J., M.C. 41, recently brought to my notice by the learned Chief Justice. (Query, Is not a new cause of action given to the woodmen by section 26?)

Objection No. 3 that "logs" or "timber" mentioned in section 25, Cap. 74, Consol. Acts, 1888, did not include railway ties, as the latter were manufactured articles. I overruled this. (See "Timber," Webster's Unabridged.)

Objection No. 4, that proof of payment is a condition precedent under section 26 (Workmen's Act) to plaintiff's right to recover. I overruled this. The Act is very badly drawn, but the intention of the Legislature was clearly to secure payment to the woodmen, whether his employer, or the contractor, had been paid or not.

The question for the opinion of the Court is, whether my decisions at the trial were right. I may add that no authorities for any of the objections were cited, though they were all taken advisedly, for they were submitted before any evidence was given.

The case came on for argument at Victoria on 13th March, 1891, before the Full Court consisting of CREASE, McCREIGHT and DRAKE, JJ.

*Pooley, Q.C.*, for appellant Company.
*Sprugge*, for plaintiffs.

The Court unanimously allowed the appeal and the following memorandum of the decision appears in the Registrar's book:

"Service of the plaint in these actions is bad. Appeal allowed with costs of the appeal. Direction to Registrar to repay all moneys paid into Court in these actions to be returned."

FULL COURT
At Victoria.

1901.

March 23.

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## BRYCE v. JENKINS: *EX PARTE* LEVY.

*Practice—Adding parties—Contract for sale of land to different purchasers —Order XVI., r. 11.*

**Where the owner of property authorized two agents to make a sale for him and each of the agents entered into a contract for sale—**

*Held* **(reversing DRAKE, J., IRVING, J., dissenting), that in a suit by one purchaser for specific performance, the other purchaser had a right on his own application to be added as a party defendant.**

APPEAL from an order of DRAKE, J., dated 2nd March, 1901, dismissing an application of H. E. Levy to be added as a defendant.

Statement.

Jenkins owned the equity of redemption in certain premises in Victoria and instructed two different real estate brokers to effect a sale for him. One of them made a sale to the plaintiff and the other on the same day made a sale to Levy. Each purchaser contended that the sale to him was the earlier.

Plaintiff commenced an action for specific performance and obtained an *interim* injunction restraining defendant from conveying the property to anyone else. Levy applied to be added as a co-defendant and his application was refused, the order refusing being the order appealed from.

The appeal was argued at Victoria on 21st March, 1901, before the Full Court consisting of MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ.

Argument.

*Higgins*, for the appeal: *Cave* v. *Mackenzie* (1877), 37 L.T. N.S. 218 shews that the equity belonged to Levy as soon as the contract was entered into. The appellant is interested and desires to be added as a party in order to protect his property. He referred to Order XVI., r. 11; *Cox* v. *Barker* (1876), 3 Ch. D. 368; *Byrne* v. *Brown* (1889), 22 Q.B.D. 657 at p. 666; *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165; *Moser* v. *Marsden* (1892), 1 Ch. 487; *Apollinaris Company* v. *Wilson* (1886), 31 Ch. D. 632; *Ferris et ux* v. *Ferris* (1883), 9 P.R. 443; *Long* v. *Crossley* (1879), 13 Ch. D. 388.

*Bradburn*, for respondent: The applicant should commence an action and then the two actions should be consolidated. We have no claim against him and don't want him as a party—his presence in the case would embarrass us. He cited *Norris* v. *Beazley* (1877), 2 C.P.D. 80; *Samuel* v. *Samuel* (1879), 12 Ch. D. 152; *Sadler* v. *The Great Western Railway Company* (1896), A.C. at p. 456; *Pilley* v. *Robinson* (1887), 20 Q.B.D. 155; *Barton* v. *London and North Western Railway Company* (1888), 38 Ch. D. 144; *Bennetts & Co.* v. *McIlwraith & Co.* (1896), 2 Q.B. 464 and *Moser* v. *Marsden, supra.*

23rd March, 1901.

McColl, C.J.: The defendant, by different agents, sold the same land to the plaintiff and to one Levy, who now seeks to be added as a defendant in the action, which is for specific performance. The only question is which of the two purchasers is first in time and therefore entitled to the conveyance of the legal estate. In the absence of Levy the action cannot determine this as regards himself, and therefore might really determine nothing. In my opinion the principle laid down in *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. 321, applies, and the appeal ought to be allowed.

Judgment of McColl, C.J.

Walkem, J.: As I understand the facts of this case, the defendant, Jenkins, placed the land in question in the hands of two brokers for sale. The plaintiff alleges that he bought the land from one of these brokers, and a person named Levy lays claim to the land on the ground that he bought it from the other broker. The terms of the bargain in either case are not material; but it seems to me that the question as to who was the first purchaser in point of time—the plaintiff or Levy—is most material to the decision of even the present action; and if Levy is added as a party, as I think he ought to be under the circumstances, that question can be most conveniently, and, in my opinion, most effectively dealt with in the interest, too, of all three parties, and multiplicity of actions be thus avoided. It cannot be said that Levy is not interested in the result of the present action.

Judgment of Walkem, J.

I think the appeal should be allowed with costs.

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Judgment of IRVING, J.

IRVING, J.: I am of opinion that the learned Judge appealed from was right, and that we should be governed by the case of *Moser* v. *Marsden* (1892), 1 Ch. 487.

I think the fact that an injunction has been granted—improperly—should not cause us to put a construction on the rules different to that which we would put on them if the plaintiff had contented himself with filing a *lis pendens*.

The usual practice in an action for specific performance is to make the parties to the contract only, parties to the action. The reason of this rule is explained in *Tasker* v. *Small* (1837), 3 Myl. & Cr. at pp. 69 and 70.

MARTIN, J.: This case comes before us in a peculiar way. The plaintiff sues the defendant for specific performance of an agreement for sale of certain property, and has obtained an *interim* injunction restraining the defendant from conveying the property to anyone other than the plaintiff. The applicant claims to be the prior purchaser from the defendant of the same land under an agreement for sale on which a deposit was paid; the conveyance to the applicant though drawn up, was not executed owing to the sudden illness of the defendant. Because of the injunction the applicant cannot now receive a conveyance from the defendant, so applies to be added as a co-defendant under Order XVI., r. 11. The defendant consents to this being done, but the plaintiff opposes it.

Judgment of MARTIN, J.

It is urged for the applicant that he is substantially interested in the action because if the plaintiff succeeds in getting a decree for specific performance the applicant will lose his property, so that it would be an injustice to allow the matter to be litigated "over his head" as it were; and, further, that his presence is "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

The case of *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, bears a certain resemblance to this. Plaintiff obtained an injunction restraining certain persons in England from selling or delivering shells to the Government of Japan, or otherwise parting with or disposing of the same. The Mikado of Japan applied to be and

was made a defendant to the suit, and moved for leave to take the shells despite the injunction, on the ground that they were his property, and leave was granted. This decision was approved in *Moser* v. *Marsden* (1892), 1 Ch. 487, Lord Justice Lindley saying, at p. 490, "I can understand the application of the rule where the property of a third party is affected. He may well say, 'I am not to be deprived of my property in my absence.'" The application in *Moser* v. *Marsden* was refused because, as the same learned Judge says, the third party's interest was not directly or legally affected, but only indirectly and commercially. I regard this case as being in principle in favour of the appellant.

Then there is *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q. B. 321, which practically overrules *Norris* v. *Beazley* (1877), 2 C.P.D. 80, and though, because of the widely different circumstances it is not of much assistance in determining the present question, yet it is valuable on the general question of shewing the great advance that has been made since *Norris* v. *Beazley* was decided.

There is a case in Ontario, *Kitching* v. *Hicks et al* (1883), 9 P.R. 518, which supports, to some extent at least, the appellant's contention. There it was held, under a similar rule that where a plaintiff claimed a lien, under an agreement in the nature of a chattel mortgage, on certain goods as against the defendant Clarkson as assignee for the benefit of creditors of the defendant Hicks, yet nevertheless, Huston, Foster & Co., creditors of the said Hicks, were added as defendants on the ground that they had a substantial interest in the subject matter of the action. And it is to be noted that this decision was given after a consideration of *Norris* v. *Beazley*, and before that case was overruled: the case of *Wilson* v. *Church* (1878), 9 Ch. D. 552, at pp. 558-9, was relied upon as an authority wherein a dissenting bond holder was added as a defendant, despite the opposition of the plaintiffs who claimed to represent them all, on the ground, as Jessel, M.R., puts it, that "He has an interest even as an individual. He says, in effect, 'my rights will be affected,' and they certainly will, if judgment is given in favour of the plaintiffs, 'and I insist that I should be here to dispute the contention of the plaintiffs.'

Judgment of MARTIN, J.

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I think that is too plain for argument. He not only has an interest but a substantial interest."

Applying the above authorities, so far as possible, to the present case, I have, with some hesitation, come to the conclusion that the application should have been allowed. It is, in my opinion, no sufficient answer to say, that if the plaintiff should succeed and obtain the land, still the applicant would have his action of damages against the defendant: if the applicant be in truth the prior purchaser, he should be placed in a position to resist the claim of the plaintiff, who is, in effect, seeking indirectly by attacking the defendant to deprive the applicant of the results of his purchase—the injunction the plaintiff has obtained means nothing else: if the plaintiff sought only damages, the applicant would not be concerned.

Judgment of MARTIN, J.

Perhaps I should add that third party procedure is not applicable to this case because the defendant does not "claim to be entitled to contribution or indemnity over against" the applicant. The appeal should be allowed with costs.

*Appeal allowed.*

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March 6.

MACKENZIE v. CUNNINGHAM

## MACKENZIE v. CUNNINGHAM *ET AL.*

*Libel—Publication—New trial.*

Defendant took a copy of an alleged libellous resolution to the editor of a newspaper who dictated it to his stenographer and handed defendant's copy back to her. Before the stenographer extended his notes another copy of the resolution was found in the office and from it the printer set up the type.

*Held* (reversing IRVING, J., who dismissed the action on the ground that it was not shewn that defendant was the cause of publication), that there should be a new trial.

Statement.

ACTION for damages for libel tried at Vancouver on 18th December, 1900, before IRVING, J. The plaintiff, Martha G. Mackenzie, was a member of the Vancouver Branch of the Women's

Christian Temperance Union. In the Vancouver World of 30th December, 1899, the following article entitled "W. C. T. U." appeared: "At a meeting of the Women's Christian Temperance Union, held, etc., etc., the following resolution was adopted:

"Whereas it has been proved by witnesses present that Mrs. M. G. Mackenzie has been circulating false reports and defaming the character of members of this Union: Be it therefore resolved, that she is unworthy to be a member of the Women's Christian Temperance Union, and is hereby deposed from all offices and positions to which she has been elected, or appointed, and is hereby expelled from membership in the Women's Christian Temperance Union, in the City of Vancouver."

Statement.

Publication was denied in the pleadings.

The defendant, Mrs. Cunningham, took this resolution to J. C. MacLagan, the editor of the World, for publication as a matter of news and he dictated its contents to his stenographer and handed her copy back to her. Before the stenographer extended his notes another copy of the resolution was found in the office and from it the article was set up. The evidence did not shew from whom this copy was received.

IRVING, J., dismissed the action on the ground that it was not shewn that Mrs. Cunningham was the cause of the publication.

The plaintiff appealed and the appeal was argued at Vancouver on 6th March, 1901, before MCCOLL, C.J., DRAKE and MARTIN, JJ.

*Davis, K.C.*, and *A. D. Taylor*, for appellant: We proved a *prima facie* case. Whether the publication took place because of a joint request or not, there was enough to make defendant liable. He cited *Bond* v. *Douglas* (1836), 7 C. & P. 626; *Regina* v. *Lovett* (1839), 9 C. & P. 462: Newell on Libel 240-1. Here we have the MS. brought by the defendant and the request—it doesn't make any difference from what copy the printer set up the type; see *The Queen* v. *Cooper* (1846), 15 L.J., Q.B. 206; *Parkes* v. *Prescott* (1869), L.R. 4 Ex. 69. MacLagan did not publish another resolution, but another copy.

Argument.

*Wilson, K.C.*, and *Reid*, for respondents. The statement of claim alleges a conspiracy in addition to libel. There is no evidence to shew that the publication in the World was the result

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of Mrs. Cunningham's interview with MacLagan—the plaintiff should have shewn that the publication would not have resulted if the request by her had not been made; see *Foster* v. *Pointer* (1841), 9 C. & P. 718.

The judgment of the Court was delivered by

6th March, 1901.

McCOLL, C.J.: One of the defendants took the resolution complained of to the editor of the World newspaper for publication in it as matter of news. He accepted it for such purpose and in accordance with his usual practice dictated it to his stenographer giving back to the defendant the copy brought to him. Before the shorthand copy was extended for the printer's use a longhand copy was found in the office—by whom brought there or for what purpose the evidence does not disclose—and presumably for convenience was used in the printing.

Judgment.

The defendants urged that this circumstance prevented the plaintiff recovering against them as shewing a different publication from that intended by the defendant. I am unable to follow this reasoning.

The appellants are entitled to a new trial with the costs of the appeal. The other costs will abide the event.

*New trial granted.*

## COOK *ET AL* v. DENHOLM *ET AL.*

WALKEM, J.

1901.

March 13.

*Mining law—Transfer to joint tenants—Whether repudiation by one affects title of other.*

Cook v. Denholm

If one of two joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other.

ADVERSE claim tried at Nelson on 28th October, 1897, before WALKEM, J. Written arguments were put in in December, 1899. Statement.

*Daly, Q.C.*, for plaintiffs.
*Bodwell* and *Galt*, for defendants.

13th March, 1901.

WALKEM, J.: These are adverse proceedings brought for the purpose of preventing the defendants from getting a certificate of improvements preparatory to their application for a Crown grant. The facts connected with the case are as follows:—A miner named Harrington located and recorded a mineral claim in Kootenay, in July, 1894, under the name of the Mariposa. When running his centre line he came upon another fresh line which, after a search, he found had one stake on it and was being run by a miner named Mahoney for location purposes. He, however, went on and completed his own location, first telling Mahoney that he would let him have a third interest in it. About the same time, he also promised, as he states in his evidence, to give a third interest to a friend named Stillman, as a "kind of a donation." Now, there is no evidence whatever to support the statement in the plaintiffs' pleadings that the location was made jointly by the three men in Harrington's name upon the understanding that he should hold it in trust for all three in equal shares. The objection is taken in the statement of defence that this alleged understanding was not reduced to writing; but I doubt if I can give effect to it as the pleading omits to mention the statute intended to be invoked. Probably reference was intended to be made to the 7th section of the Statute of Frauds, which is directly applicable. However, as I have said, there was Judgment.

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no such understanding on the part of any of the three men; and, judging from what subsequently took place, all that Harrington was expected to do was to fulfil his promises to the other two men by transferring a third to each in writing, as no transfer of a mineral claim, or of any interest in it, is valid except made in writing and signed by the transferrer (section 50, Act of 1896.) As evidence of this expectation, Harrington handed the following bill of sale to Stillman:

"Trail, B. C., Oct. 5, 1894.

"On the date above mentioned I the undersigned for and in consideration of the sum of Five Dollars of which this shall be the receipt thereof I hereby deed and quit claim unto William Stillman and James Mahoney an undivided two-thirds interest in and to the Mariposa mineral claim situate in Trail Creek Division of West Kootenay District, B. C.

"Charles Harrington."

"E. S. Topping."

"Recorded at Rossland, B. C., Oct. 15, 1897."

This document speaks for itself, and as Mahoney refused to accept it, or have anything to do with it, it was not recorded at the time, as required by the Act, nor for three years afterwards—a circumstance that would make it inoperative as against the present defendants and their predecessors in title, even if it ever was valid as between the parties to it (Act of 1891, Sec. 50.) But it never was a valid transfer; for Mahoney rejected it because, as he told both Stillman and Harrington, he wanted his third interest transferred to himself alone by a separate bill of sale; and this latter, he subsequently got from Harrington on his assuring him that the former, or, rejected, bill of sale, had been destroyed. The separate bill of sale is as follows:

Judgment.

"Mariposa.

"For and in consideration of the sum of Five Dollars of which this shall be a receipt thereof I hereby deed and quit claim unto James Mahoney an undivided one-third interest in and to the Mariposa mineral claim, situate in the Trail Creek Division of West Kootenay.

"Dated at Trail, February 14, 1895.

"Witness, E. S. Topping. Charles Harrington."

Furthermore, Harrington states that he never gave Stillman a separate bill of sale for any interest in the claim, and as Stillman does not appear to have asked for one, Harrington no doubt thought that he did not want one, and, consequently considered that he was at liberty to personally deal with the interest that he had promised Stillman, as the promise was a gratuitous one. Now, as Stillman acquired no title from Harrington, or from any one else, his bill of sale of the 30th of October, 1895, purporting to transfer a third interest in the claim to one Jerry amounts to nothing. Harrington sold his remaining two-thirds interest in the claim as follows:—One-third to G. Washolm on October 11th, 1894; and one-third to G. Jackson on May 3rd, 1896; and the defendant Denholm acquired the whole claim by bills of sale from these men and Mahoney of their respective thirds. Hawley bought an interest from Denholm, and has therefore been made a defendant.

The plaintiffs claim title through Stillman, who, as I have shewn, had nothing to convey. This fact is apparent on the face of the Mining Recorder's books.

Judgment.

All the transfers made by Harrington, except the rejected, or discarded one, as well as those made by the transferees Washolm, Mahoney and Jackson to Denholm, were recorded within the proper time, and are otherwise in order.

The action must be dismissed with costs. As it was commenced before section 11 of the Mineral Act of 1898, came into force, I am not called upon to report specially on the defendants' title to the claim; but I have no hesitation in stating for the information of the proper officer that it seems to me to be unimpeachable. I might also observe that they may be said to have given "affirmative evidence" of their title because they put in the necessary records, and bills of sale, upon which it depends.

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## GELINAS *ET AL* v. CLARK.

*Mineral claim—Location before former location abandoned—Whether validated by certificates of work.*

**The Trilby mineral claim lapsed by abandonment in July, 1896. Before lapse the same ground was located as the Old Jim by the defendant's predecessor in title, and certificates of work were recorded in respect of it in 1897, 1898 and 1899. In February, 1899, the plaintiffs located the same ground as the Herald Fraction claim.**

*Held*, affirming SPINKS, Co. J. (MARTIN, J., dissenting), **that the defects in defendant's title were cured by the recording of the certificate of work.**

**Unless objection is taken to the jurisdiction of the Court below at the trial, it will not be considered in appeal.**

**Remarks by MARTIN, J., as to admissibility of evidence of abandonment when same not pleaded.**

ACTION in the County Court of Yale (mining jurisdiction) for recovery of possession of the ground in dispute, a declaration that the Old Jim mineral claim in so far as it encroached upon ground common to the Trilby and Herald Fraction claims was an invalid location, a declaration that the Old Jim was an illegal location and that the Herald Fraction was valid, and for $50.00 expended in support of the action. On July 1st, 1895, one Stephens located a mineral claim and duly recorded it on 10th July, under the name Trilby. The claim lapsed on July 10th, 1896, for want of a certificate of work. Meanwhile, on April 1st, 1896, one Robert Clark, the husband of the defendant, located upon the lands covered by the Trilby, a mineral claim and recorded it under the name Old Jim.

Statement.

On 13th April, 1897, Clark recorded a certificate of work in respect of the Old Jim claim and other certificates of work were recorded in respect of it on April 12th, 1898, and April 15th, 1899.

On 17th May, 1898, Robert Clark by bill of sale recorded 24th March, 1899, transferred the Old Jim claim to the defendant Ella Clark.

On 2nd February, 1899, the plaintiffs located the Herald Fraction claim covering most of the ground originally covered by the Trilby. The defendant in her dispute note set up that the Old Jim was located on unoccupied and vacant waste lands of the Crown, that at the time of the location of the Herald Fraction the ground covered thereby was not open to location, and that certificates of work had been issued and duly recorded in respect of the Old Jim, and she claimed the benefit of section 28 of the Mineral Act.

The action was tried before SPINKS, Co. J., who held that the County Court had jurisdiction and that section 28 cured all defects in the defendant's title.

**Statement.**

At the trial Robert Clark was a witness for the defendant and testified that one Lancaster (alleged by defendant to have located the Trilby) told him before the Trilby lapsed that he (Lancaster) did not want the claim and that he (Clark) might have it. This evidence was ruled out.

The plaintiffs appealed to the Full Court and the appeal was argued at Vancouver before MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ., on 4th June, 1900. Defendant had given notice that the objections would be taken on the appeal that the Court below had no jurisdiction and that Clark's evidence as to what Lancaster told him should have been received.

*Davis, Q.C.*, for appellants: The denial in paragraph 1 of the dispute note is not sufficient—it must be specific. Abandonment must be pleaded. He cited *Aldous* v. *Hall Mines* (1897), 6 B.C. 394 and *The Nelson & Fort Sheppard Railway Company* v. *Jerry et al* (1897), 5 B.C. 396. This is not an adverse proceeding—it is an action of ejectment or trespass. He referred to section 117 of the Mineral Act; *Connell* v. *Madden* (1899), 6 B.C. 531; *Belk* v. *Meagher* (1881), 104 U.S. 279; *Del Monte Mining and Milling Company* v. *Last Chance Mining and Milling Company* (1898), 171 U.S. 55.

**Argument.**

*L. G. McPhillips, Q.C.*, for respondent: The plaintiffs have not proved a case of ejectment as on their own evidence they are in possession, and if there has been a trespass there is nothing to connect the respondent with it. Unless the plaintiffs take the position that this is an adverse action they are out of Court on

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the evidence. If it is an adverse action there is no jurisdiction. He cited sections 37 and 117 of the Mineral Act: Robertson's Local and County Courts Acts, 31; *Aldous* v. *Hall Mines* (1897), 6 B.C. 394; *Rogers* v. *Reed* (1900), 7 B.C. 142: *Hand* v. *Warren* (1899), 7 B.C. 44. The only remedy the plaintiffs have is by an action in the Supreme Court as provided for by section 37. The plaintiffs must wait till defendant applies for a certificate of improvements—unless the defendant herself applies. As to section 28 see *Peters* v. *Sampson* (1898), 6 B.C. 405 at pp. 415 and 417. As to rules of construction see *Newton* v. *Cowie* (1827), 4 Bing. 234; Beal's Cardinal Rules, "Precedent," article on in the Encyclopædia of the Laws of England; *Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395; *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247 at p. 253; *Callahan* v. *Coplen* (since reported 7 B.C. 422), simply wipes out the section and leaves nothing for it to operate on—it is inconsistent with *Peters* v. *Sampson* and the Court may disregard it.

As to ruling out evidence of Clark as to abandonment of the Trilby. If A. locate a claim and tell B. he has abandoned it, there is no reason why B. should not locate on the faith of what A. said: see *Granger* v. *Fotheringham* (1894), 3 B.C. 595 and *Black* v. *Elkhorn Mining Company* (1896), 163 U.S. 450.

*Davis*, in reply: The answer to abandonment is that it is a material fact and was not pleaded.

Argument.

[*McPhillips:* There are no pleadings in the County Court and it need not be raised. MCCOLL, C.J.: This is in the nature of a special defence and should be pleaded under the County Courts Act. See also the Rules promulgated by the County Court Judges dated 6th August, 1892.] Lancaster was not the locator—according to paragraph one (admitted in dispute note) Stephens was the locator. As to trial by consent in writing see *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244 and *In re Jones* v. *James* (1850), 19 L.J., Q.B. 257. Here by coming in, pleading and going to trial defendant has waived the right to object—if the objection to jurisdiction is not taken in the dispute note it is waived. I agree that this is not an adverse action under section 37, but nevertheless we can get relief by a declaration. As to ejectment while in possession see Roscoe's *Nisi Prius* Evidence 991-2;

Williams and Yates on Ejectment 128-9. If we are not entitled to a declaration of title we are entitled to an order that defendant be put off and for nominal damages.

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*Cur. adv. vult.*

5th March, 1901.

McCOLL, C.J.: On July 1st, 1895, one Stephens located a mineral claim and duly recorded it under the name Trilby. The claim lapsed on July 10th, 1896, for want of a certificate of work. Meanwhile, on April 1st, 1896, one Clark assumed to locate upon the lands covered by the Trilby a mineral claim and to record it under the name Old Jim. After the lands in question had become waste lands of the Crown, Clark, on April 13th, 1897, recorded a certificate of work in respect of the Old Jim claim and other certificates of work were recorded in respect of it on April 12th, 1898, and April 15th, 1899, respectively. On February 2nd, 1899, the plaintiffs assumed to locate the Herald Fraction claim upon the lands covered by the Old Jim claim, relying upon the circumstance that it was located before the lapse of the Trilby claim.

By section 34 of the Mineral Act the interest of a claimant in his claim is declared to be a chattel interest equivalent to a lease for one year and thence from year to year; and by section 24 the claimant is entitled upon recording a certificate of work yearly to hold his claim without re-recording it. It was not contended that the location or record of the Old Jim claim was defective; but merely, that as the lands covered by it were not, by reason of the existence of the Trilby claim, open to location till after the Old Jim was in fact staked upon the ground, the lands remained open to location by the plaintiffs on February 2nd, 1899, notwithstanding the recording of the certificates of work in the two preceding years.

Judgment of McCOLL, C.J.

I cannot accede to this. It was open to Clark after the lapse of the Trilby claim to adopt the staking of the Old Jim previously made by him and to change the dates upon the posts and record the claim, and the certificates of work having been recorded after the lapse of the Trilby claim the effect of section 28 is, I think, to prevent the Crown disputing the validity of the yearly

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leases in effect granted of the Old Jim claim; there being no uncertainty in the location or record. If that be so, it follows that the lands being so held as against the Crown were not during the existence of any such yearly lease waste lands of the Crown, and therefore could not have been open to location by the plaintiffs. There is no suggestion that the plaintiffs were misled as in the case of *Callahan* v. *Coplen* (1899), 7 B.C. 422; (1900), 30 S.C.R. 555.

As the question of the jurisdiction of the County Court was not raised in the Court below until after all the evidence had been put in, I do not think the appellants can ask us to consider it now. The appeal should be dismissed with costs.

IRVING, J.: I concur.

MARTIN, J.: Assuming that the respondent is now entitled, for the first time, to raise the question of jurisdiction, the contention is that this is merely an action of trespass or ejectment under the mining jurisdiction of the County Court, and so the plaintiff can get no relief because the evidence shews that he is in possession himself, and that, if there has been a trespass there is no evidence to connect the defendant with it. So far as trespass is concerned, the first answer to this contention is that it is, in effect, admitted on the pleadings, and therefore the plaintiff could not have been expected to give any evidence on that point. But the case on the pleadings is more than bare trespass, and a declaration of title is also asked for, probably in view of the operation of section 11 of the Mineral Act Amendment Act, 1898, the effect of which section was considered by me in *Schomberg* v. *Holden et al* (1899), 6 B.C. 419 and *Dunlop* v. *Haney et al* (1899), 7 B.C. 2 and 4. I may here remark that though my said judgment in *Dunlop* v. *Haney* was varied by the Full Court (p. 305 of same volume) yet the conclusions I arrived at on the case as then presented to me are in no way affected by the action of the said Court, as it simply made a certain order by consent of the parties and omitted the declaration as to establishment of title required by said section 11; there is no report of the case, but simply a note of an order made, as I understand, at the request of the parties to meet a certain state of affairs

Judgment of MARTIN, J.

which they had overlooked when the matter was before me.

The mining jurisdiction of the County Court is contained in section 117 of the Mineral Act, and in connection therewith section 25 of the County Courts Act must be considered. It is as follows:

"Every County Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall to every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the Supreme Court of British Columbia."

It has already been twice decided, in *Schomberg* v. *Holden* and *Dunlop* v. *Haney*, that the words "adverse proceedings" in section 11 (first enacted in 1898), apply not merely to actions which were and are, in default of a better term, loosely styled "adverse actions" under the old section 37, and amendments, but also "to all cases which come before the Court for trial." *i.e.*, mining cases wherein there are mineral claims in conflict.

And I am further of opinion that the combined operation of said sections 25, 117 and 11 is to give the same effect to section 11 in the County Court as in the Supreme Court. To hold otherwise would largely defeat the objects of the section which were considered in *Dunlop* v. *Haney* at p. 4. I see nothing in the judgment of Mr. Justice MCCREIGHT in *Aldous* v. *Hall Mines* (1897), 6 B.C. 399, 401, which conflicts with the above view, because the learned Judge expressly says that he had not "any intention of giving a decided opinion upon" the present point among others; and it should further be borne in mind that his judgment was pronounced before section 11 was enacted. It follows from the view I have taken that the trial Judge in either Court must "find" whether or not an affirmative title to each claim has been established, so far as the ground in controversy is concerned. This is merely another way of saying that the Court shall make a declaration as to title, (in regard to which see Odgers on Pleading, 4th Ed., 24, 204-5, 263) and in my opinion the Court below had jurisdiction.

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Then as to the rejection by the learned trial Judge of the evidence relating to the alleged abandonment of the Trilby claim in favour of the defendant. The objection is taken that this material question of abandonment is not raised on the pleadings. Though it is true that under section 29 of the County Courts Act causes are in general to be disposed of without formal pleadings, yet this is subject to the course of procedure provided by Rule of Court (section 205) and, apart from the requirements of section 91, the County Court Rule of August 6th, 1892, requires the defendant to give notice in writing "stating shortly and distinctly the grounds of defence on which he intends to rely." Effect to this useful rule was recently given by this Court in the case of *Anderson* v. *Godsal* (1900), and it carries out the spirit of the decisions in *Aldous* v. *Hall Mines* (1897), 6 B.C. 394; *Schomberg* v. *Holden*, *supra* and *Dunlop* v. *Haney*, *supra*, that litigants in mining cases particularly should know beforehand exactly what case they have to meet, and that anything in the nature of a surprise should be discountenanced. No application for leave to raise such a ground of defence was made at the trial.

I am therefore of the opinion that the point was not open to the defendant, and the evidence was properly excluded.

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Coming then to the chief point of the case, it appears that during the time the Trilby mineral claim was an admittedly good location the defendant located the Old Jim claim covering a large part of the Trilby ground. After the Trilby location lapsed, the plaintiff located the Herald Fraction claim, which also covers most of the old Trilby ground.

It has been held repeatedly in this Court that if a claim is located over an existing valid location, and such valid location subsequently lapses, the junior location acquires no title to any part of the senior location. The learned County Court Judge held that though the plaintiff had established a *prima facie* case to the Herald Fraction, yet all defects in the defendant's title were cured under section 28 by her having recorded certificates of work for the Old Jim claim. The plaintiff has not recorded any such certificate.

In support of his contention that the Old Jim was an utterly void location the appellants' counsel relies on the well-known

case of *Belk* v. *Meagher* (1881), 104 U.S. 279, where the subject is considered by the Chief Justice of the United States under mining laws very similar in this respect to our own. At p. 284 it is stated:

"A location can only be made where the law allows it to be done. Any attempt to go beyond this will be of no avail. Hence, a re-location on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And as the learned Chief Justice points out (p. 285) there is a further ground of public policy in support of this view:

"To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a re-location will be to encourage unseemly contests about the possession of the public mineral-bearing lands which would almost necessarily be followed by breaches of the peace."

In 1884 *Belk* v. *Meagher* was approved by *Gwillim* v. *Donnellan* 115 U.S. 45, 49, and again in 1898 by *Del Monte Mining and Milling Company* v. *Last Chance Mining and Milling Company*, 171 U.S. 55, Mr. Justice Brewer stating "Of the correctness of these decisions there can be no doubt." In my opinion the spirit of these decisions is applicable to the present case, and it has to a certain extent, at least, been recognized in *Connell* v. *Madden* (1899), 6 B.C. 531, affirmed on appeal (1899), 30 S.C.R. 109.

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What then is the effect of section 28? This question has been discussed in *Peters* v. *Sampson* (1898), 6 B.C. 405; and in *Callahan* v. *Coplen* (1899), 6 B.C. 523, reversed by the Full Court November 30th, 1899 (7 B.C. 422), and the reversal affirmed, though on somewhat different grounds, by the Supreme Court of Canada (1900), 30 S.C.R. 555.

It was argued at the bar that *Callahan* v. *Coplen* is inconsistent with *Peters* v. *Sampson*, and consequently not a binding decision on us, it being pointed out that in *Peters* v. *Sampson* the Court (composed of WALKEM, IRVING and MARTIN, JJ.), was unanimous, while in *Callahan* v. *Coplen*, the Court (WALKEM, DRAKE and IRVING, JJ.), was divided, Mr. Justice IRVING dissenting. And a peculiar circumstance in that case should be noted, which is that

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the judgment of the Full Court (delivered by Mr. Justice DRAKE) contains no reference whatever to *Peters* v. *Sampson*, though my brother WALKEM wrote a judgment in that case with which I concurred, wherein the effect of section 28 was considered at length. I agree with counsel that *Callahan* v. *Coplen* and *Peters* v. *Sampson* are inconsistent and conflicting, and, in view of what I have pointed out, were it not for the judgment of the Supreme Court of Canada above mentioned, I am of the opinion that the latter is the decision which should be followed, as I endeavoured to follow it when giving the original judgment in *Callahan* v. *Coplen*; but in view of the said judgment of the Supreme Court effect must now be given to the judgment of this Court in *Callahan* v. *Coplen*, so far as may be done without going beyond what flows from the judgment of the Supreme Court. In strictness, perhaps, the judgment of the Court does not go further than to decide that where a location as originally made is calculated to mislead, its owners cannot invoke section 28 to establish their title to part of another opposing location which is not embraced within any part of their location as described in the record thereof, and that in such case the section could only be invoked in an action wherein the Crown was a party. But the broad result of the judgment undoubtedly is that section 28 must not be given that very wide operation which, from a first consideration thereof, one would gather that the Legislature intended to give it, and the words "it shall be assumed that up to that date the title to such claim was perfect" must be largely restricted in their operation.

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Assuming for the moment that the defendant herein is entitled to invoke section 28 despite the fact that the Crown is not a party to the action, I shall consider what is the effect of the judgments in *Callahan* v. *Coplen* on the question now before us. Mr. Justice DRAKE in that case states, "In my opinion it (section 28) only purports to cure little irregularities which may arise in various ways after location and record, and which do not go to the root of title;" and again: "The statute intends that a claim which has been properly taken up and properly recorded shall be assumed to be perfect except for fraud. If a claim is not properly taken up and recorded it never becomes a mineral

claim." It is true that the learned Judge further states, "The section may be a valuable protection against a claimant who has not obtained any certificate of work," but it is not pointed out how far this protection extends, and it must, even then, be subject to the language already quoted, and his further statement, "There is no title that can be rendered perfect by a certificate of work. On the other hand, if a mineral claim has been properly and legally located and recorded, and subsequently some neglect has occurred or slip happened which does not affect the original title, then the fact that a certificate of work has been given will validate such neglect or slip."

In the absence of any consideration by Mr. Justice Gwynne, who wrote the judgment of the Supreme Court in *Callahan* v. *Coplen*, of the general effect of section 28 (and I may be permitted to say that such consideration by so learned a Judge would have been of great assistance to this Court in determining the difficult question arising from it) it is impossible for us to say how far the Supreme Court gave effect to the expressions of this Court above quoted, but from the fact that the judgment is affirmed they must be considered as being more or less ratified, even though, in the beginning of his judgment, Mr. Justice Gwynne stated that the only question to be decided was as to whether the location did mislead other locators; but nevertheless in the latter part of his judgment he did consider briefly the application and effect of that section.

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The authorities being in such an unsettled state it is difficult to apply them satisfactorily to the present case. But it seems to me that if due effect is to be given to *Callahan* v. *Coplen* the narrow result must inevitably be, to cite the judgment of the Court, that unless a claim "is properly taken up and recorded it never becomes a mineral claim." This result is, perhaps, somewhat startling to one who is familiar with the course of mining litigation in this Province, but I cannot see how it is to be avoided if precedents are to be followed.

Applying then that conclusion and also the decisions of the Supreme Court of the United States and this Court already noticed to the present case it must be held that the Old Jim claim was not "properly taken up and recorded" in so far as it over-

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laps the Trilby ground. In my opinion that part of the location must be deemed to be absolutely void, because to that extent the Old Jim claim simply never had any existence, and to that same extent there is nothing for section 28 to operate on. Whatever may be said of that section I think it must be admitted that the most it can do is to cure defects in the title of a claim, it cannot create one either wholly or in part.

I have had the benefit of perusing the judgment of the learned Chief Justice upon the combined operation of sections 24 and 34 of the Mineral Act, and appreciating as I do very highly the value of my learned brother's opinion on this important point, his views have received commensurate consideration.

After some hesitation I have come to the conclusion that, viewed in the light of the decisions above quoted, these two sections do not establish the defendant's claim, because in addition to the effect of what I have already stated, the opening words of section 24 impose the limitation that the claim must first have been "duly located and recorded," yet this is exactly what has not been done here, if the cases cited are authoritative, as I think they are. Though I am unable, in trying to give a consistent and logical effect to *Callahan* v. *Coplen*, to come to any other conclusion than this, at the same time I think it much to be regretted that the exact interpretation of section 28 is in doubt, and the sooner that said section is either fully interpreted by the Supreme Court of Canada, or explained by the Legislature, the better it will be for owners of mining property in this Province.

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It flows from the foregoing that the title to the Herald Fraction claim is, in my opinion, established, and since it embraces that part of the ground in controversy which was included in the original Trilby location, the Old Jim claim in so far as it encroaches upon that ground is declared to be an invalid location.

The appeal should be allowed with costs.

*Appeal dismissed, Martin, J., dissenting.*

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON.

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*Contract—Scow taken in tow by steamer contrary to orders of owners of steamer—Liability of owners—New trial.*

Defendants' steamer which previously had been employed carrying freight and passengers between White Horse and Dawson, had gone out of commission on 23rd September, 1898, and on that day, and while on her way down Lake Lebarge to winter quarters, she took in tow the plaintiffs' scow loaded with goods. After proceeding some way the weather became bad and in endeavouring to get into shelter the scow foundered and the whole cargo was lost.

In an action for damages against the owners of the steamer, evidence was tendered by the owners that those in charge of the steamer had been particularly warned not to do any towing, but this evidence (being objected to by plaintiffs) was ruled out.

At the trial DUGAS, J., held that the defendants were common carriers and therefore liable.

*Held*, by the Full Court on appeal (reversing DUGAS, J.), that the appeal should be allowed with costs, and that the plaintiffs could have a new trial upon payment of the costs of the first trial.

APPEAL to the Full Court from the judgment of DUGAS, J., in the Territorial Court of the Yukon. On 23rd September, 1898, the defendants' stern-wheel steamer Canadian, which during the summer had been employed carrying freight and passengers from White Horse to Dawson, had gone out of commission. Her master, engineer and purser left her at White Horse and she was ordered to go to Hootalinqua, down Lake Lebarge, and tie up for the winter, and those on board her on the way down were the mate, the pilot, the engineer and about a dozen hands who were not under pay. On the way down the Canadian with the engineer in charge was hailed by the plaintiffs who were on their scow tied to the shore, and an agreement was made to tow the scow down the Lake for $20.00. Those in charge of the

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steamer had been particularly warned not to do any towing, but notwithstanding the contract was made and the scow taken in tow. After proceeding some way the weather became bad and in endeavouring to get into shelter the scow filled with water and turned upside down, the whole cargo being lost. The plaintiffs sued for damages, alleging negligence.

*Lisle*, for plaintiffs.

*Clark*, for defendants.

The following is the judgment of

17th April, 1900.

DUGAS, J.: The statement of claim declares that on the 23rd day of September, 1898, the plaintiffs were owners of a scow loaded with hogs and goods, and that the defendants, through their servants and agents, verbally agreed to tow the same across Lake Lebarge from its head to its foot with their steamer Canadian at a fixed price, $20.00, and that the defendants took possession of the said scow, and that the same was lost with all its load through the negligence of their servants. The claim is for $13,604.00. The defendants state that they are unaware of the facts alleged and deny the authority of the persons in charge of the said boat to make such a contract, repudiating all negligence, at all events, on their part, and averring plaintiffs' negligence.

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The proof establishes that on the afternoon of the 23rd of September, 1898, the defendants with their boat and the plaintiffs with their scow, were near the shore of an island at the head of Lake Lebarge, and that on the plaintiffs' demand to the persons in charge of the boat they undertook to tow the scow to the foot of Lake Lebarge, for the agreed price of $20.00, that the scow being brought near the boat it was made fast to the left side thereof by the persons in charge of the same. They started about half-past four o'clock in the afternoon and on their way the defendants agreed to tow another scow, which they met, for the same price, and this one was made fast to the other side of the boat. At about nine o'clock they were but a few miles from the foot of Lake Lebarge, or at the head of the Thirty-Mile River, when the weather became windy and rainy, it then being

dark. The wind and rain continued increasing until they were within about a mile of the head of the river, when the weather became threatening. The plaintiffs were told to get out of the scow as much as they could, and it appears that they put on the steamer a few bags of corn, no further insistence being made by the plaintiffs' agent that more should be done, although the defendants were asked to have a lookout put on the scow. At this last point the defendants' servants and agents thought that the weather was too rough to continue their course in the river, and in order to get shelter in a place called False Bay, they turned to the left, where it appears there is a narrow channel permitting of such entry. The plaintiffs were struck by the idea that the boat was running too fast in making that turn, and they went to the acting captain and the engineer to warn them. This they seem to have done as hastily as possible, but too late to prevent an accident, for in the meantime the scow had filled with water and turned upside down, the whole cargo being lost. It is contended on the part of the defendants that the engine was stopped and that, at all events, they could not, at that time, on account of the place where the boat was situated, go at a slower rate of speed. Plaintiffs say that having addressed themselves to one of the officers they were told to go to another one for orders, while the acting captain and engineer pretend that they stopped as soon as the danger was noticed. Only one man, it seems (the plaintiff Gainsford), could give an account of how the boat was upset, which would appear to be that by the action of the wind the boat listed, and the water being waving, brought the outside of the scow under the water, thereby filling it and causing the accident, the posts to which the ropes were attached breaking.



The question, therefore, is whether this is a negligence for which, under the circumstances, a common carrier can be held responsible, and, if there was negligence, whether it was contributory negligence on the part of the defendants, so as to relieve the plaintiffs from responsibility. The contract here falls under the principles governing common carriers who, at common law stand in the situation of an insurer of the property entrusted to them, and are answerable for every loss or damage happening to it while in their custody, no matter by what cause occasioned, unless

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it were by the act of God, such as a tempest, or of nature, or a defect in the thing carried, or that of the King's enemies. The carrier will not be liable for deterioration by evaporation or leakage, or the inherent vice of the article. In other cases even his entire faultlessness does not excuse him. Thus he is liable for damage done by accidental fire, or by a robbery. His liability continues up to the time of the goods being delivered. In several cases, as in *Phillips* v. *Clark* (1857), 2 C.B.N.S. 156 and *Grill* v. *The General Iron Screw Collier Company, Limited* (1866), L.R. 1 C.P. 600, cited in foot note at page 304 of Smith's Mercantile Law, it has been decided that even when the accident happens through the act of God, such as tempests, etc., he will be liable even then if he be guilty of negligence, and in all cases he must use ordinary care, skill and foresight. In the ordinary towage there are principles of law which impose upon both parties certain responsibility. Here, although the term "towage" is used in order to qualify the proceeding by which the cargo of the plaintiffs was being carried, yet, I do not believe that it was, under the circumstances, such a tow as would bring the facts of the case thereunder. I take it that the defendants, by their servants, having themselves fastened the scow to the boat, they undertook the same responsibility as if the cargo had been laid into the boat itself; they took the supervision of the scow, and it was for them to judge whether there was or was not any danger in proceeding in that way; it was for them to decide whether the scow was too heavily loaded, and, when they accepted to bring it in that way to the foot of Lake Lebarge they should have foreseen all danger and accident which any change of weather, for the worse, might expose the scow to in this case, and when their witnesses try to place the negligence upon the plaintiffs (who are not and never pretended to be sailors) who had entirely confided their property to their skill, care and prudence, it is simply trying to put the responsibility of the accident upon unskilled persons who had the right to expect from them that protection, skill and prudence, care and knowledge, in the manipulating of their scow, which is ordinarily expected from sailors in charge of a boat of that description, and that, therefore, they would see for themselves as to whether there was any danger in

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towing the boat loaded as it was, with all the incidents and accidents of navigation on a lake of that description.

But, we may go further and ask whether, under the circumstances, there was by the crew on board, that care, skill and knowledge displayed to avoid the consequences of what had been termed "a tempest on the lake." A "tempest" is put among the acts of God. This idea will readily be accepted when it is such that the consequences thereof cannot be avoided, and it becomes next to impossible for human beings to avert them, for there is a degree in this, as in other things. Was the tempest in question one of this character?

In reading over the evidence of the witnesses brought by the plaintiffs, it seems that the accident could have been easily avoided, either by going straight into Thirty-Mile River and anchoring there, or that, in view of the threatening attitude of the weather, the old channel might have been followed at the head of the bar which existed in the neighbourhood; or that, by a better regulation of their speed, the listing might have been avoided or diminished and the scow saved; or that, seeing the danger, the scow might have been loosened from the boat, which would have permitted it to float by itself.

On the other side, the witnesses for the defence pretend that all due skill and diligence was exercised by the crew; that it would not have been safe to try to go into the Thirty-Mile River, and the listing could not be avoided, nor the accident prevented.

I must say that, taking the evidence of the witnesses for the defence as given, and considering (as I have the right to) what was the state of the elements at that time, and all the facts and circumstances, I have no hesitation to believe that if the accident did happen it was because there was not on board sufficient skill, prudence and care, which could have otherwise prevented it.

The plaintiffs, in the examination of the witnesses of the defendants, attempted to draw from them an assertion that if the scow had been loosened from the steamer, the accident would have been prevented, but this without avail. Yet, I find that the engineer, Henry Chapman, in his examination-in-chief, when trying to find fault in the fact that some of the plaintiffs were

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around the pilot-house instead of having an eye on the scow, avers "that if they had been on the lookout they could have certainly cut the scow adrift from the ship and done the same as other scows on the lake that night," which means that there was some means of saving the same, but I say it was for the defendants' crew to see that it was done, and give orders accordingly. But the defendants tried to avoid the responsibility of the doings of their servants by saying that this contract was entered into, not only against what was the ordinary duty of their servants in the circumstances, but against the express orders of their manager, Mr. H. Maitland Kersey, who swears to that effect. On that date the boat was not in commission being on its way from White Horse to Hootalinqua to go into winter quarters. The crew, composed of regular sailors, numbering twenty-five or twenty-six, had all been discharged, with the exception of the engineer, the mate and four or five other men, and the boat left in charge of these under officials who took upon themselves the charge of towing the two scows in question at a fixed price, apparently for the benefit of the Company.

This brings the case under the difficult branch of the law, fixing the responsibility of masters by the acts of their servants. The general principle is "that the master is answerable for such wrong of the servant or agent as is committed in course of the service and for the master's benefit, though no express command or privity of the master be proved." (See *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259 at p. 265.)

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The rule *qui facit per alium facit per se* is stated to be a dogmatic statement, which in its terms would seem to be applicable only to authorized acts, not to acts that, although done by the agent or servant (in the course of service) are specially unauthorized or even forbidden and therefore, not sufficiently defining the responsibility of the master. The wider application of the principle seems to have been better determined by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at p. 283, when he says that "the master is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business," which brings the question to the very

difficult point as to what acts are admitted to be "in the course of service" or employment, and we see:

"(*a.*) That it may be the natural consequence of something being done by the servant, with ordinary care, in the execution of the master's specific orders; (*b.*) The servant's want of care in carrying on the work or business in which he is employed; (*c.*) The servant's wrong in excess or mistaken execution of a lawful authority; (*d.*) A wilful wrong, such as assault, provided the act is done on the master's behalf, and with the intention of serving his purpose." (Smith on Negligence, p. 55.)

The difficulty in this case arises from the fact that the ship was not at its ordinary duties, which consisted in freighting and carrying passengers; it was on its way—the season being over—to its winter quarters, with special instructions, and as Smith, page 57, again says, "whether the servant is really bent on his master's affairs or not is a question of fact, but the question may be troublesome." Several cases are reported suggesting very fine distinctions, but I believe that the principle which seems to be most acceptable is the one laid down as applying especially to this case—"that not every deviation in the servant from strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but when there is not merely a deviation but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own' the master is not answerable for the servant's conduct," and the responsibility of the master under similar circumstances appears to be still better defined by what is said again at page 59 of Smith on Negligence that "to establish a right of action against the master, when the servant acts in his excessive or erroneous execution of a lawful authority, it must be shewn that the servant intended to do, on behalf of the master, something of a kind which he was in fact authorized to do, and the act, if done in a proper manner, under the circumstances, erroneously supposed by the servant to exist would have been lawful, the master is chargeable only for the acts of an authorized class which in particular instances are wrongful by reason of excess or mistake on the servant's part. For acts which he

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has neither authorized in kind nor sanctioned in particular he is not chargeable."

And further, a person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, whether the act of that class is to be done, and trusts him for the manner in which it is done.

The principle (sustained by the English and American authorities alike) strikes me as being sound as making the master responsible for the action of his servant, whom he chooses himself. When the act is within the scope of that kind of business to which their services are attached, and actually for their masters, notwithstanding the private or secret instructions which they may have received, and of which the public could not have any knowledge. In this case the plaintiffs, no more than anybody else, could know, or even imagine, more particularly at the time the contract was entered into and the voyage was begun, that the reduced crew, being then under special duty, were not authorized to tow their scow, and, if they did learn of it afterwards (as it is hinted), I do not see that it would make any difference then.

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The crew were under the defendants' orders, acting for them or for their benefit. There is nothing in the record to shew that they were on a "frolic of their own," acting for themselves or for their own benefit, but entirely for that of the Company, and, however hard it may appear for the defendants to be held responsible for such an excessive or erroneous execution of their lawful authority, yet, I believe that the injustice would be against the plaintiffs, who acted all through in good faith and without the knowledge of such an unauthorized act on the part of the crew, if the defendants were not held liable for the damages incurred and which have generally to be supported by common carriers, more particularly, when negligence can be attributed to them.

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

As to the amount of damages, I do not feel disposed to make the calculation thereof with the proof in the record, and I will,

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therefore direct that the amount be ascertained by William Snell, with instructions to determine the same, taking as a basis the prices prevailing at the time and place where the accident happened. It is understood that the attendance of defendants at the above reference will not be taken as a waiver of their right to appeal.

The defendant Company appealed on the grounds that the learned Judge erred in finding (1.) that the accident was due to defendants' negligence; (2.) that the contract was the contract of a common carrier with a consignor whereas the contract, if any, was a contract of towage, and that he should have found that the seamen on board the steamer were only employed for the purpose of taking the said boat into winter quarters, and the said boat was, at the time the said alleged contract for towage was made, out of commission, and the seamen employed thereon had no authority to make the contract alleged by the plaintiffs herein.

The appeal was argued at Vancouver on 22nd and 23rd November, 1900, before McColl, C.J., Drake, Irving and Martin, JJ.

*Duff*, for the appellant: The engineer in charge had no authority to employ the steamer in towing scows as it never had towed scows, and the evidence shews that such steamers do not tow scows. As to duty of master and usual employment see Abbot on Shipping, 13th Ed., 123-4 and Lord Tenterdern's remarks in *Boucher* v. *Lawson* (1734), Ca. temp. Hardw. 85. The master would have power to engage in salvage as salving is an obligation due to society: *The Thetis* (1869), L.R. 2 Adm. & Ecc. 365.

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If it should be thought there was authority there should be a new trial as the Judge applied a wholly wrong principle of law to the case in holding that defendant Company was an insurer as a common carrier.

As to the rights and duties of the tow and the tug he cited *Sewell* v. *The British Columbia Towing and Transportation Company et al* (1884), 9 S.C.R. 527 and *Smith* v. *The St. Lawrence Tow-Boat Company* (1873), L.R. 5 P.C. 308.

*Peters, Q.C.*, for respondents: We do not contend that the

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doctrine of common carriers applies, but the judgment can be supported on the ground that the defendant Company did not use reasonable care and diligence. The instructions not to tow were never communicated to the plaintiffs and the instructions were not given to the person in charge of the steamer—the plaintiffs were not informed that the steamer was out of commission.

*Sir C. H. Tupper, Q.C.*, on the same side: By law no steamer should be under charge of an uncertificated master as this was, and that in itself affords some evidence of negligence. The fact that the tow, a business transaction, was entered in the log with full particulars negatives the view that the men were trying to make money for themselves and is evidence of course of business.

As to a master's general agency he cited Kent's commentaries 12th Ed., 161; Leake on Contracts, 3rd Ed., 447; MacLachlan on Shipping 136-9; *Limpus* v. *London General Omnibus Company* (1862), 1 Hurl. & C. 526 and *Poulton* v. *The London and South Western Railway Company* (1867), L.R. 2 Q.B. 534. If the Court should be of opinion that the evidence is not sufficient to sustain the judgment below we ask for a new trial.

*Duff*, in reply: If the plaintiffs fail on the question of agency they should not have a new trial as they objected to our giving evidence on the point.

*Cur. adv. vult.*

5th March, 1901.

Judgment of DRAKE, J.

DRAKE, J.: The defendants were the owners of the stern-wheel steamer Canadian, a boat which had been employed in carrying freight and passengers from White Horse to Dawson. On 23rd September, 1898, she had finished her season's work and gone out of commission. Her master, engineer and purser left her at White Horse and she was ordered to go to Hootalinqua down Lake Lebarge, and tie up for the winter. The officers on board were Martin, the mate, Murray, the pilot, and Chapman, the engineer, and some ten or twelve hands who were not under pay. The directions they received from Mr. Kersey at White Horse were to go into winter quarters and tie up, and particularly warned not to do any towing. The boat accordingly left White Horse and proceeded on her voyage, and a few miles down

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she was hailed by the plaintiffs and asked if she would tow them to Dawson. The plaintiffs were informed she was out of commission, and going into winter quarters, but an agreement was made to tow down Lake Lebarge for $20.00.

According to the evidence, the engineer was in charge of the boat, and according to the mate, he it was fixed the price to be paid for the towage. The plaintiffs objected to any evidence being given with regard to the authority to tow, and the result is that there is no evidence to shew that the boat did do towing work as part of its ordinary work We are asked to assume that she was in fact engaged in towing as part of her ordinary employment. There is no evidence in support of such an assumption, but what evidence there is as to the ship's duties is to the contrary. The vessel was engaged during the season in carrying freight and passengers, and there is uncontradicted evidence that she was instructed not to tow.

The fact that she only had a sufficient number of officers and men on board to take her into winter quarters, and no master, all points in favour of the contention of the defendants that the boat was not to engage in any work, but merely to go into winter quarters. If the master had been on board and had taken this tow, the question would be as to whether or not such towing was within the scope of his authority; but the master was not on board, and how a mate or engineer who was employed in a special service can claim the master's authority to act as agent of the owners, and enter into contracts binding on them, has not been made clear. The defendants apparently knew the provisions of the Shipping Act that every vessel carrying freight and passengers must have a certificated master, and this is applicable to a boat engaged in towing in Canadian waters; and I think this fact is some evidence in support of the defendants' contention that the people on board had no inherent authority to engage in towing. If, therefore, the vessel was not engaged in ordinary employment, she must be held to be doing something for which those on board had no authority to engage in. We further find from the evidence that the ordinary cost of towing a barge the distance which the plaintiffs say they were going was $75.00. It is therefore in the highest degree improbable

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that the owners of the vessel would allow the risk to be run for the sum of $20.00, for towage involves a certain amount of risk, especially with regard to a stern-wheel boat such as this was. There is no analogy between this case and the assistance which one vessel ought to give to another in the case of salvage services. In such a case the salvors have a duty cast upon them by the universal maritime law to render all possible assistance to a vessel in distress. On a review of the whole of the evidence it nowhere appears that the persons in charge of the Canadian were acting within the scope of their authority, or within the ordinary employment of the vessel.

"Where an agent," says Lord Blackburn, "is clothed with ostensible authority no private instructions prevent his acts within the scope of that authority from binding his principal." *The National Bolivian Navigation Company* v. *Wilson* (1880), 5 App. Cas. 176.

In *Beard* v. *London General Omnibus Company* (1900), 2 Q.B. 530, it was held that the burden of shewing that the injury was due to negligence of a servant of the defendant acting within the scope of his employment was cast on the plaintiff; and the case of *Boucher* v. *Lawson* (1734), Ca. temp. Hardw. 85, it was held that as it did not appear the contract which gave rise to the action was made in the course of the usual employment of the ship the owner was not bound, he not having sanctioned the employment or been privy thereto.

Judgment of DRAKE, J.

Under these circumstances what evidence there is, is opposed to the contention that the mate, or engineer, of the Canadian or either of them were acting within the scope of their authority, and however negligent they were in the task they undertook, this will not shift the burden on to the defendants' shoulders. All the authorities shew that the owners of a vessel may be held responsible for damages suffered through the negligence of their servant the master, even although they were ignorant of the employment he had undertaken, if the work done was within the usual employment of the vessel. It is not necessary to allude to the judgment of the learned trial Judge, because however much he misdirected himself on the question of her duties and responsibilities as a carrier, his main ground for arriving at the

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conclusion he did was negligence. If the defendants are liable at all there is ample evidence of the neglect of proper precautions, and the amount of damage is not in issue before us. Under the circumstances the appeal should be allowed with costs, and the plaintiffs can have a new trial upon payment of the costs of the first trial as it was owing to their action that evidence was excluded which might have seriously affected the result.

MARTIN, J.: Though I do not wholly adopt the judgment of my brother DRAKE, yet I agree that there should be a new trial on the ground, broadly, that the question of agency was not sufficiently dealt with, the consequence being that we are unable to come to a satisfactory conclusion in regard to the crucial point of the alleged contract for towing, and the customary employment of the Canadian in particular.

Judgment of MARTIN, J.

*Appeal allowed and new trial granted.*

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## DUVAL v. MAXWELL: BURRARD ELECTION CASE.

MARTIN, J.

1901.

Feb. 23.

DUVAL v. MAXWELL

*Election petition—Preliminary objection—English rules—Copy of petition—When to be filed—R.S.C. 1886, Cap. 9, Sec. 9.*

**In order to have due presentation of an election petition under the Dominion Controverted Elections Act a petitioner must at the same time he files his petition, leave with the Clerk of the Court a copy of the petition to be sent to the Returning Officer.**

THIS was a petition against the return of George R. Maxwell as a member of the House of Commons for the Electoral District of Burrard. The respondent under section 12 presented a number of preliminary objections, but only one was considered. It was that the leaving of a copy of the petition with the Clerk of the Court two days after the petition was presented, was not a sufficient compliance with Rule 1 (English Parliamentary Election Petition Rules, Michaelmas Term, 1868), which requires such copy to be left with the petitioner at the time of its presentation.

Statement.

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The objections were argued at Vancouver before MARTIN, J., on 22nd February, 1901.

*Macdonell*, for respondent, referred to R.S.C. 1886, Cap. 9, Secs. 9, 12, 62 and 63; 54 & 55 Vict., Cap. 20, Sec. 7; *Collins* v. *Ross* (1891), 7 Man. 581; 20 S.C.R. 1 and *Ex parte Lamb* (1881), 19 Ch. D. 169.

Argument.

*Wilson, K.C.*, for petitioner: The English rules were extinguished 26th May, 1874. The statute does not require the Clerk of the Court to send forthwith to the Returning Officer a copy of the petition—it only requires the Returning Officer to publish it forthwith.

**23rd February, 1901.**

MARTIN, J.: Assuming, as contended by counsel for the petitioner, that the copy of the petition was left with the Clerk of the Court two days after the petition was presented, the question arises is this a sufficient compliance with the rule which requires such copy to be left with the petition at the time of its presentation?

It is submitted on behalf of the respondent that the rule must be construed literally and reliance is placed on *Collins* v. *Ross* (1891), 7 Man. 581; 20 S.C.R. 1.

Judgment.

Counsel for the petitioner seeks to distinguish that case from the present, on the ground that in it no copy was left at any time; and further, points to certain remarks of the learned Judges in *Collins* v. *Ross* in support of the contention that if such a case as this now under consideration had originally come before the Supreme Court the objection herein taken by the respondent would have been overruled. While recognizing that there is much to be said in favour of this view, and also that there is no good reason why the practice of Courts in election matters should be stricter than in other proceedings, nevertheless, I find myself unable to distinguish this case from the principle underlying *Collins* v. *Ross*, namely, that the effect of the statute and rule is to require the copy to be left when the petition is presented. Mr. Justice Patterson puts the matter thus: "The second requirement of the rule may seem less fundamental than the first, but it is something prescribed to be done by the petitioner at the

institution of the proceedings, and it is not easy to find safe ground for holding one requirement to be less imperative than the other." Similar expressions are used by Sir William Ritchie, C.J., and by the Judges of the Court appealed from.

It follows, therefore, that, if I am right in the view I have taken as to the effect of the judgments of said Courts, I have no other course open to me than to sustain the objection, and dismiss the petition with costs.

*Petition dismissed.*

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## CHONG MAN CHOCK v. KAI FUNG.



*Practice—Appearance after judgment—Leave to enter.*

After judgment in default of appearance an appearance cannot be entered without leave.

SUMMONS for a stay of proceedings. Plaintiff obtained judgment against defendant on 5th January, 1901, for $190.35 in default of appearance and issued execution against defendant's goods on 8th January, and the writ was returned *nulla bona*. On 21st February, an order was made for the examination of the defendant, as a judgment debtor, and in pursuance thereof an examination took place on 18th March. Subsequently plaintiff applied for an order for a further examination, but before the return of the summons an appearance was entered for defendant and on the same day he obtained a summons returnable by special leave that afternoon applying for a stay of proceedings on the ground that the parties had made a settlement of the action after the first examination.

Statement.

The summons came on for argument before WALKEM, J., on 4th April, 1901, when

*Moresby*, for plaintiff, took the preliminary objection, that an appearance having been entered without leave of the Court the

Argument.

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solicitor had no status and the application was not of such a nature as could be made without an appearance having been properly entered. He cited Daniell's Chy. Prac. 6th Ed., 351; Seton on Decrees, 24 and Order XII., r. 12.

*Alexis Martin*, for defendant, referred to the practice of a defendant moving to set aside judgment without entering appearance and contended that an appearance having once been entered even though irregularly, the proper course was to move to set it aside: *Gordon* v. *Roadley* (1898), 6 B.C. 305.

Judgment.

WALKEM, J.: The summons applied for must be dismissed with costs on the ground that leave to enter an appearance ought to have been obtained in accordance with the rule stated in Daniell's Chancery Practice, 6th Ed., 351.

*Summons dismissed.*

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## DAVIES *ET AL* v. DUNN *ET AL.*

IRVING, J.
1901.
April 16.

*Practice—Ex juris writ—Action to rescind purchase of shares in mining company—Order XI.*

DAVIES v. DUNN

**An action to rescind purchase from defendant of shares in an incorporated company on the ground of misrepresentation, is not an action within Order XI., so as to enable the plaintiff to obtain an *ex juris* writ against the defendant.**

Statement.

THIS was an application on behalf of the defendant Dunn to set aside an order of FORIN, Lo. J., for service *ex juris* and notice in lieu of writ, and the service thereof on the said defendant.

The action was brought by Benjamin S. Davies for himself and on behalf of all other shareholders of the Sunset Gold and Silver Mining Company (Foreign), against James M. Dunn and the said Sunset Company.

The defendant Company is incorporated under the laws of the State of Minnesota, and is registered in the Province of British

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Columbia. The plaintiff, Davies, is one of the shareholders of the said Company and holds 11,000 fully paid up and non-assessable shares in the capital stock of the Company. The defendant Dunn is the registered owner in his own name of an undivided one-half interest in the Sunset mineral claim, in the Province of British Columbia, and which undivided one-half interest is alleged to be the property of the defendant Company.

The statement of claim alleges that the plaintiff was induced by the defendant Dunn to buy from the defendant Dunn said 11,000 shares by falsely and fraudulently representing to the plaintiff that the defendant Company (of which the defendant Dunn was the Secretary), were the owners in their name of the said undivided one-half interest in the said Sunset mineral claim, whereas the said interest was in the name of the defendant Dunn to his knowledge.

The plaintiff claimed *inter alia* (1.) A declaration that the half-share held by Dunn was the property of the Company; (2.) An order compelling Dunn to convey to the Company; (3.) Judgment against Dunn for the amount of the purchase money paid by the plaintiff for shares and (4.) An injunction restraining Dunn from conveying or dealing with the said half-share.

Statement.

It was contended on behalf of the defendant Dunn that there was no cause of action against him under any of the branches of Order XI., r. 1.

*Marshall*, for the application.
*Wilson, K.C., contra.*

16th April, 1901.

IRVING, J.: At the close of the argument I was inclined to take the view that the order could be sustained under sub-section (*g*) of Order XI., r. 1, on the ground that the defendant Dunn was a necessary or proper party to the action brought by the plaintiff against the Company, which had already been served within the jurisdiction. On examination of the affidavits, however, it is not at all clear that the action had been "properly" brought against the defendant Company. It is the duty of the applicant for an order under this sub-rule to shew that the action is properly brought. No relief is asked against the Company.

Judgment.

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That, however, is immaterial if the case falls within that class of cases in which it has been laid down that the plaintiff as a shareholder suing for himself as well as the other shareholders, may sue for the Company's benefit making the Company a defendant in addition to the other defendant or defendants against whom relief is sought. It is suggested in argument that the case is within that class; I think that is not enough. Having regard to what is said in *Comber* v. *Leyland* (1898), A.C. 524, it is my duty to see that the affidavits disclose the facts necessary to bring the case within the cases mentioned by Chitty, L.J., at p. 128, in *Spokes* v. *The Grosvenor Hotel Co.* (1897), 2 Q.B. 128.

The order was sustainable, so it was said in argument on other grounds, *viz.*, under sub-section (*a*) Land situate within the jurisdiction; (*b*) Breach of contract relating to land; (*f*) An injunction.

Unless the plaintiff has shewn that he has a *locus standi* to represent the Company within the class of cases already referred to, I do not see how he can bring this action within any of these sub-sections. His personal action, that is to say, the action which he attempts to bring in his own personal right, as distinguished from his position of the representative of the Company, is not within the provisions of Order XI.

Judgment.

Order, writ and service will be set aside with costs.

## B. C. MILLS LUMBER AND TRADING CO. v. MITCHELL: WALKER, GARNISHEE, AND CHAMPION AND WHITE, CLAIMANTS.

FULL COURT At Vancouver.

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*Money order—Indorsement of—Parol assignment—Interpleader.*

Defendant, under contract to build for one Walker, purchased the materials from plaintiffs who subsequently got judgment against him, and who garnished the moneys due from Walker to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect, Grant.

Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker, to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270.00 and charge the same to my account for plastering Place Block, Hastings Street, W., in full to-date;" which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my account on contract for Robert Walker Block on Hastings Street, City."

*Held*, in interpleader, by the Full Court, affirming McCOLL, C.J., that apart from the order there was a parol assignment specifically appropriating to the assignees the sum in question, of the moneys to arise out of the contract.

APPEAL from the judgment of McCOLL, C.J., delivered 9th April, 1900, in which he decided against the plaintiffs (judgment creditors) upon the garnishee issued and gave judgment in favour of the claimants. The facts appear fully in the judgments on appeal.

Statement.

The Chief Justice found upon the evidence that apart from the order there was a parol assignment specifically appropriating to the assignees the sum in question, of the moneys to arise out of the contract and that as the moneys in Court did so arise was not disputed the assignees were entitled as against the garnishors.

The plaintiffs appealed on the grounds amongst others, that the order set out in the evidence herein is only a money order and not an equitable assignment; that the facts disclosed by the evidence do not constitute a verbal equitable assignment; and that according to the evidence there was at the time of the

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service of the garnishee summons a large amount of money due from the said garnishee to the judgment debtor.

The appeal was argued at Vancouver on 18th September, 1900, before WALKEM, DRAKE and IRVING, JJ.

*Davis, Q.C.*, for appellants.
*Martin, Q.C., contra.*

Argument.

(The following authorities were cited on the argument: *Johnson* v. *Braden* (1887), 1 B.C. (Pt. 2), 265; *Hall* v. *Prittie* (1890), 17 A.R. 306; *Gurnell* v. *Gardner* (1863), 9 Jur. N.S. 1,220; *Heath* v. *Hall* (1812), 4 Taunt. 326; *Tibbits* v. *George* (1836), 5 A. & E. 107; *Heyd* v. *Millar et al* (1898), 29 Ont. 735; *In re Irving* (1877), 7 Ch. D. 419; *Lane* v. *The Dungannon Agricultural Driving Park Association* (1892), 22 Ont. 264; *The Trusts Corporation of Ontario* v. *Rider* (1896), 27 Ont. 593 and *In re Richardson* (1885), 30 Ch. D. 396, Kay, J., at p. 397.)

**27th March, 1901.**

Judgment of WALKEM, J.

WALKEM, J.: This is an appeal from a judgment given by the learned Chief Justice in an interpleader issue between Champion & White as claimants, and Mr. Walker, as garnishee, in an action of the B. C. Mills Company against Mitchell.

The facts, as proved at the trial, are that Mr. Walker being the owner of some lots in Vancouver, contracted with Mitchell who is a builder, to erect buildings on them. The B. C. Mills Company recovered a judgment against Mitchell for materials supplied, and obtained a garnishee order against Mr. Walker attaching any moneys due, or becoming due, by him to Mitchell under the contract. Previously to this, Mitchell had accepted the following order drawn upon him by Nicholas & Barker, to whom he was indebted on a sub-contract:

"Vancouver, July 27, 1899.

"Mr. J. W. Mitchell.

"Please pay to Champion & White the sum of $270.00, and charge the same to my account for plastering Place Block Hastings St. W., in full to date.

"Nicholas & Barker."

"Accepted.

"J. W. Mitchell."

On this document there is the following indorsement:

"Mr. G. W. Grant,

"Please pay that order and charge to my account on contract for Robert Walker Block on Hastings Street, City.

"J. W. Mitchell."

The amount in question was paid into Court by Mr. Walker, to abide the result of the interpleader. In my opinion the document is a money order, or bill of exchange, as it is unconditional in its terms, and as the money is not payable out of any particular fund, as would have been the case had it been an equitable assignment. *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. (C.A.), 848, is a case in point.

The indorsement is palpably not a money order, nor is it an equitable assignment.

In *Johnson* v. *Braden* (1887), 1 B.C. (Pt. 2), 265, the same question arose in reference to written orders very similar to the present one; and I held, reluctantly, but in view of two Ontario decisions, that they were equitable assignments. All this appears in the report of the case. Moreover, *Brown, Shipley & Co.* v. *Kough*, was not cited at the time. There is, however, ample evidence of a parol equitable assignment having been made of a sufficient sum, out of what was coming to Mitchell, to meet the draft. Mitchell, for instance, went with Champion & White to the architect, Mr. Grant, and told him, in their presence, that he had agreed that the amount of the draft was to be paid out of any moneys that might be due to him under his contract, and Mr. Grant says that, although he refused to accept the draft, he agreed to this. It also appears that Mr. Grant had authority to make payments under the contract without referring to Mr. Walker or his agents. Mr. Walker also agreed that the amount should be paid out of any money due to Mitchell; but whether he agreed to it or not is immaterial, as he had notice of the assignment.



There is nothing at all inconsistent, or uncommon, in the co-existence of a draft and of an equitable assignment of money to meet it; see *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128. The appeal must be dismissed with costs.

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DRAKE, J.: An issue was directed between the claimants and the judgment creditors as to a sum of $270.00, portion of a fund paid into Court by the garnishees. On the trial of the issue the learned Chief Justice found that there had been a parol assignment of the fund in question to the claimants. The facts as far as necessary appear as follows: Mitchell was contractor for erection of a building in Vancouver, and Grant was the architect, on whose certificate all moneys due to the contractor were to be paid. Walker was the owner of the building, Nicholas & Barker were sub-contractors for plastering. On 27th July, Nicholas & Barker drew an order on Mitchell to pay the claimants $270.00, and charge the same to account for plastering Place Block, Hastings Street, W., in full to date. This Mitchell accepted. On the back of the order the following indorsement appears:

"Mr. G. W. Grant.

"Please pay that order and charge to my account on contract for Robert Walker Block on Hastings Street, City.

"J. W. Mitchell."

The Bills of Exchange Act by Sec. 2, defines a bill as an unconditional order in writing to pay on demand, or at some fixed time a sum certain to a specified person, or bearer, and the Code further says that an order to pay out of a particular fund is not unconditional; but an unqualified order to pay coupled with an indication of a particular fund, out of which the drawer is to re-imburse himself, or a particular account to be debited, is unconditional. This document is an absolute order to pay, and the fund is indicated out of which the drawer is to re-imburse himself; but it is not an assignment of any portion of the fund due to the drawers, and as such cannot be treated as an equitable assignment. See *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848.

Judgment of DRAKE, J.

Then it was contended that the indorsement on this order was at all events a good assignment. That indorsement is merely a direction to Mr. Grant to pay, and charge to Mitchell's account on contract for Robert Walker Block, and signed by the acceptor of Nicholas & Barker's bill. The documents do not agree. The first is an order on Champion & White against the account for plastering Place Block, Hastings Street, W., the other is on

account of Robert Walker Block, Hastings Street, but I consider both documents in fact referred to the same contract.

If then the documents do not in fact make a valid assignment, was there evidence of a parol assignment? A verbal notice to the debtor is sufficient to make an assignment good in equity. *Ex parte Agra Bank* (1868), 3 Chy. App. 555. Any words are sufficient which clearly indicate an intention to appropriate a specific portion of a specified fund to the assignee. *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128.

The evidence here shews that Mr. Walker had notice of the debt, and agreed as soon as matters were settled up to pay the amount, and Grant also promised to pay the order out of the funds due on the Walker contract. Here we have a parol agreement both by Mr. Grant and Mr. Walker to pay the amount of the order, and the order was put in to shew the amount due. Under the circumstances I think the appeal should be dismissed with costs.

IRVING, J.: The B. C. Mills Company having recovered judgment against Mitchell garnished certain money in the hands of Walker. Walker paid the money into Court, and an interpleader issue was ordered to be tried between Champion & White (who claimed the money under an assignment from Mitchell), and the B. C. Mills Company—as to whether the claimants were entitled to $270.00 in priority to the garnishors.

Judgment of IRVING, J.

In support of their claim, plaintiffs relied on the assignment in writing and incidentally put forward evidence that Mitchell has made an assignment by parol of this money to them. The inference I think to be drawn from the evidence is that Mitchell and Champion & White did what they intended to do when they went to see Grant, that is, they made the fund which Grant was administering a security for the payment of the order held by Champion & White, and later on Walker acquiesced in this.

The learned Chief Justice came to the conclusion that there was a parol assignment, and my brothers WALKEM and DRAKE agree. The evidence was not directed to this point with any precision, but I think the inference may fairly be drawn that a

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parol assignment was made. As to the time when this assignment was made there is no evidence at all. Everybody seems to accept the theory that if made, the assignment was prior to garnishee proceedings.

*Appeal dismissed with costs.*

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RE PROVINCIAL ELECTIONS ACT AND RE HOMMA

## *IN RE* THE PROVINCIAL ELECTIONS ACT AND *IN RE* TOMEY HOMMA, A JAPANESE.

*Provincial Elections Act, R.S.B.C. 1897, Cap. 67, Sec. 8—Validity of—Right of naturalized Japanese to be registered as voters.*

*Appeal to Privy Council—Leave.*

Section 8 of the Provincial Elections Act which purports to prohibit the registration of Japanese as Provincial voters is *ultra vires*.

*Union Colliery Company of British Colombia, Limited* v. *Bryden* (1899), A. C. 580, considered and followed.

Judgment of McCOLL, C.J., reported in 7 B.C. 368, affirmed.

Leave to appeal to the Judicial Committee of the Privy Council granted.

APPEAL to the Full Court from the judgment of McCOLL, C.J., reported in 7 B.C. 368.

The appeal was argued in Vancouver on 8th March, 1901, before WALKEM, DRAKE and MARTIN, JJ.

*Wilson, K.C.*, for appellant.
*Harris*, for respondent.

On 9th March the Court gave judgment dismissing the appeal with costs and subsequently written judgments were delivered as follows by

Judgment of WALKEM, J.

WALKEM, J.: The facts which have given rise to this appeal are that Tomey Homma, a naturalized Japanese, applied to the Collector of Voters for the Electoral District of Vancouver City, to have his name entered on the Register of Voters. The Collector refused to make the entry, as he considered that he was prohibited from doing so by section 8 of the Provincial Elections Act (hereafter referred to as the Franchise Act), which is as follows:

"No Chinaman, Japanese, or Indian shall have his name placed on the Register of Voters for any Electoral District, or be entitled to vote at any election. Any Collector of Voters who shall insert the name of any Chinaman, Japanese, or Indian on any such Register shall, upon summary conviction thereof before any Justice of the Peace, be liable to a penalty not exceeding fifty dollars."

According to section 3, R.S.B.C. 1897, Cap. 67—

"The expression 'Japanese' is to 'mean any native of the Japanese Empire or its dependencies not born of British parents, and . . . include any person of the Japanese race, naturalized or not.'"

Tomey Homma appealed to the County Court, with the result that the learned Chief Justice ordered his name to be placed on the Register on the ground that the above enactment, in so far as it purports to affect naturalized Japanese, was *ultra vires* of the Provincial Legislature. From this order the Collector now appeals.

The question thus raised, is undoubtedly one of great constitutional importance; and whether the Legislature had the power to pass the enactment or not depends upon the meaning of sections 91 and 92 of the B. N. A. Act, as they are the respective sources of the separate legislative powers possessed by the Dominion and the Provinces. In apportioning those powers, section 91 has given the Dominion Parliament exclusive control of the several subjects enumerated in it, as well as of all others that are not specifically assigned to the Provincial Legislatures by section 92, and concludes with the following paragraph:

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"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

This paragraph, when read in conjunction with the first part of section 91, is referred to in the judgment of Sir Montague Smith in the case of the *Citizens and Queen Insurance Cos.* v. *Parsons* (1881), 7 App. Cas. at p. 108, as an "endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers; but, as he has further observed, the Imperial "Legisla-

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ture could not have intended that the powers assigned to the Provincial Legislatures should be absorbed in those given to the Dominion Parliament;" and hence, it is for the Courts to decide as best they can—not upon any general principle, but on the facts of each case in which a conflict occurs—where the dividing line as to jurisdiction should be drawn. Again, it must be borne in mind that the above paragraph has been held to apply to all the subjects enumerated in section 92, and not merely, as has been contended by counsel for the appellant, to the local matters mentioned in clause 16 of that section. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 359, 360.

Following the practice of the Privy Council in cases like the present one, one must ascertain, first, whether the subject-matter of the impeached enactment falls within any of the legislative powers of the Province enumerated in section 92, and, if it does, whether there is anything in section 91 which has the effect of virtually withdrawing it from the purview of section 92, or, in other words, of cutting down the full meaning of that section, and thereby invalidating the enactment.

Judgment of WALKEM, J.

The case on behalf of the appellant is, in effect, that as the enactment relates to the electoral franchise, and, hence, to the Constitution of the Province, it is *intra vires* by virtue of sub-section (1) of section 92, which places "the amendment of the Constitution . . . . . save as to the office of Lieutenant-Governor," under the exclusive control of the local Legislature; and, furthermore, that as the subject of Naturalization and Aliens is a matter that, in this instance, is incidental to the franchise, it has necessarily been dealt with in the enactment, but only in that limited sense. On the other hand, it is said that, as sub-section 25 of section 91 places the subject of Naturalization and Aliens under the exclusive authority of the Parliament of Canada, the enactment is invalid, as it trenches on that authority.

Much may be said in favour of its validity; for instance, that the real or primary object of the Legislature in passing the statute of which it forms part was not to deal with Naturalization and Aliens as a substantive question, but to establish such a system of franchise as would best subserve the interests of the

Province—a matter that is obviously, one of a purely local nature. By section 15 of the Naturalization Act of Canada (R. S., Cap. 113)—

"An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada."

The term "political rights" is a very wide expression, and is defined as "being those rights which belong to a nation, or to a citizen, or to an individual member of a nation, as distinguished from civil rights, namely, local rights of a citizen."—(Ency. Dict.) But whatever the terms may mean, it cannot affect the question before us, for all that the section, in effect, says is that an alien, when naturalized, shall, within the several Provinces of Canada, have all the ordinary and inherent rights and privileges of a Canadian, or of a natural-born British subject. Now, no Canadian or natural-born British subject has an inherent right to the franchise, and, a fortiori, a naturalized alien can have none, for the franchise is not a matter of right, but is a statutory privilege which can only be acquired by such persons, and under such conditions as are mentioned in the Franchise Act. In other words, the power of acquiring the privilege is not extended to all classes of Canadians alike, for, after declaring who shall be entitled to it, the Act proceeds to name a number of classes, including the four following, from whom it shall be withheld, viz.:—the Judges of the Supreme and County Courts, Sheriffs and their deputies, employees of the Provincial Government in receipt of over $300.00 per annum, and officers and men of His Majesty's army and navy on full pay—all, or at least a large majority, of these classes being, it is safe to say, British subjects. No reason is assigned for their disfranchisement, nor is any needed in view of the well-understood constitutional rule that what a Legislature does is presumed to have been done in the best interests of the community it represents. It is manifest that these observations equally apply to the disfranchisement of the naturalized Chinese and Japanese. Moreover, it may be fairly inferred that they are not disfranchised on account of their being naturalized aliens, because, if that were so, it is only reasonable to suppose that the enactment would have

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included all aliens, of whatever nationality, who have been, or may hereafter be, naturalized in this country. As it seems to me, the Legislature was obliged to refer to them in the enactment as "naturalized aliens" for descriptive purposes as, apparently, there was no other means of describing them. Under the circumstances, I think it must be assumed that the Legislature has considered that these two particular classes of Canadians, for such they are when naturalized, ought not, on grounds of public policy, to be entrusted with the franchise.

Another point in favour of the enactment is that its validity is to be presumed until the contrary is clearly shewn. Furthermore, it must be so construed as to bring it within the legislative authority that is questioned—*Macleod* v. *Attorney-General for New South Wales* (1891), A.C. 455.

Judgment of WALKEM, J.

I have thus endeavoured to state the case of the Province as fully as possible, but merely with a view of shewing that none of the points I have mentioned have been overlooked, for the Court is bound to disallow this appeal, as the Judicial Committee has held that "the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities" of aliens resident in Canada, whether naturalized or not—*Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A.C. at p. 587.

There will be no order as to costs.

DRAKE, J.: This is an appeal against the judgment of the Chief Justice allowing the name of Tomey Homma, a naturalized Canadian, to be placed on the list of voters for the Riding of Vancouver City Electoral District.

Judgment of DRAKE, J.

The appellant in this case is the Collector of Voters for the above district. He relies on Cap. 67, R.S.B.C. 1897. Section 7 of that Act says that, "Every male of full age not being disqualified by this Act, or by any other law in force in this Province, being entitled within the Province to the privileges of a natural-born British subject shall be entitled to vote." Section 8 says that, "No Chinaman, Japanese or Indian shall have his name placed on the Register of Voters for any Electoral District, or be entitled to vote at any election."

If these sections stood alone no question could be raised, as all persons entitled to the privileges of a natural-born British subject are entitled to vote; but in clause 3 of the Act the expression "Japanese" shall mean any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person of the Japanese race whether naturalized or not—this, it is contended, excludes British subjects of Japanese origin, as well as all persons naturalized by the Dominion Legislature.

It is the latter part of this section which is objected to, and claimed to be *ultra vires*. Mr. *Wilson*, on the part of the appellant, contends that under section 92 of the B.N.A. Act the Provincial Legislatures have exclusive right to make laws on the various subject-matters in that section contained, especially on the subject of the constitution of the Provinces; but that section is governed by the last few lines of section 91, which says any matter coming within any of the classes of subjects enumerated in section 91 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Provincial Legislature by section 92. The meaning of this is that, where the subjects assigned to the Dominion Parliament in any way overlap or affect the subjects assigned to the Provincial Legislature, the right of the Dominion to legislate shall not be affected, and the Provincial rights shall be subject to such Dominion legislation as far as such legislation extends. Mr. *Wilson* relies on the right of the Provincial Legislature to establish, alter or amend the constitution, sub-section 1 of section 92.



The term "constitution" includes the persons who are entitled to seats in the Legislature; the mode of election; the formation of electoral districts; the right of voting, and the rules and regulations relating to the registration of voters; and all other matters of a similar nature; and the only limitation expressed is that the office of Lieutenant-Governor is excluded from the Provincial control. This exclusion, he contends, emphasises the otherwise absolute powers conferred on the Provincial Legislature. Notwithstanding the generality of the language thus used, if under section 91 there is any matter which the Dominion Parliament has under the powers conferred on them expressly legislated, and

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which thereby affects the Provincial constitution, the constitution must be held subject to such legislation.

We find that sub-section 24 of section 91 gives to the Dominion Government the subjects connected with naturalization and aliens, and they have legislated on this subject; and by section 15, an alien duly naturalized shall be entitled to all political and other rights, powers and privileges, and subject to all obligations to which a natural-born British subject is entitled. In other words, he is a British subject; and being a British subject, the Legislature cannot take away from him the rights which the Naturalization Act has granted him, neither can they draw a distinction between one British subject and another. They can, and they do, say that British subjects holding certain offices shall not be placed on the voting list, but such officials have not had the political rights expressly conferred on them by a paramount authority. In the case of *Union Colliery Company of British Columbia, Limited* v. *Bryden* (1899), A.C. 587, the Privy Council say that the Dominion Legislature, by section 91, sub-section 25, is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the Provinces of Canada, and *a fortiori* Japanese. They were also of opinion that the pith of the Coal Mines Regulation Act consisted in establishing a statutory prohibition which affected aliens or naturalized subjects, and therefore trenched on the exclusive authority of the Parliament of Canada. The subject of naturalization includes the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.

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Every alien when naturalized becomes *ipso facto* a Canadian subject of the King. As regards aliens the Provincial Legislature can refuse them the franchise, as they have no status to claim political privileges; but when naturalized, section 15 gives to aliens naturalized all the political and other rights, powers and privileges, and subject to all the obligations to which a natural-born British subject is entitled or subject within Canada.

"Political rights, powers and privileges" are very general terms, and import the right of exercising the franchise, and of

representing the electors in Parliament—subject, of course, to fulfilling the statutory requirements as to registration, etc. The Dominion having granted political rights to naturalized aliens, the Provincial Legislature should not treat the Dominion Act as nugatory. The question is one of some difficulty. It has been held by the Privy Council that as regards those subject-matters which are under the sole control of the Province, the Province has sovereign rights; but, as I have pointed out, this question of political rights granted to aliens is within the scope of the powers of the Dominion Parliament, and as the Dominion has granted political rights to naturalized aliens, I think it is beyond the powers of the Provincial Legislature to say that these persons shall not exercise those rights.

Judgment of DRAKE, J.

For these reasons I think the appeal should be dismissed.

MARTIN, J., concurred with WALKEM, J.

On 21st March, 1901, *Maclean, D.A.-G.*, applied to the Full Court consisting of MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ., for leave to appeal direct to the Privy Council.

*Harris, contra:* No appeal is provided for by the Provincial Elections Act. Sub-section (*a*) of section 1 of the Privy Council Rules requires that the matter in dispute shall exceed £300. The importance of the case is not a ground for leave to appeal. This is not a "case" or "suit"—no suit was ever commenced and no pleadings ever issued. He cited *Allan* v. *Pratt* (1888), 13 App. Cas. 780; *Canadian Land and Emigration Company* v. *The Municipality of Dysart et al* (1885), 12 A.R. 80 and *Attorney-General of Nova Scotia* v. *Gregory* (1886), 11 App. Cas. 229.

Argument.

*Maclean:* No Act of the Provincial Legislature does contemplate an appeal to the Privy Council as it is a matter of prerogative. By section 2 of the rules there is even an appeal in interlocutory matters. *Madden* v. *Nelson and Fort Sheppard Railway Company* (1897), 5 B.C. 670 is an authority for allowing the appeal. In that case MCCREIGHT, J., held that the expression "civil right" in the rules included a "franchise" and although he there may have had in contemplation another kind of fran-

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chise, still the franchise or right to vote is the highest kind of franchise and may be considered of much greater value than £300. The Court should be guided by the same rules as would be followed by the Lords of the Privy Council if the application came before them.

Judgment.

*Per curiam* (IRVING, J., *dubitante*): The application is allowed. We think that *Bryden* v. *Union Colliery Company of British Columbia, Limited* (1899), A.C. 580, is sufficient authority that if this application was before the Judicial Committee the appeal would be allowed, and therefore we are of opinion that we should grant the leave asked.

Security should be given in the usual sum of £500 as the Crown is not the appellant.

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## ALASKA STEAMSHIP CO. v. MACAULAY.

*Practice—Security for costs—Foreign company carrying on business in British Columbia—R.S.B.C. 1897, Cap. 44, Sec. 144.*

ALASKA STEAMSHIP CO. v. MACAULAY

An American Steamship Company having its head office in Seattle was the lessee of certain premises in Victoria where applications for freight and passage could be made to an agent.

*Held*, by the Full Court (MARTIN, J., dissenting), affirming DRAKE, J., that the Company was a foreign company within the meaning of section 144 of the Companies Act, and was bound to give security for costs.

Statement.

APPEAL to the Full Court from the order of DRAKE, J., reported at 7 B.C. 338, ordering the plaintiff Company to give security for costs. The appeal was argued at Victoria on 14th January, 1901, before WALKEM, IRVING and MARTIN, JJ.

Argument.

*Bodwell, Q.C.*, and *Duff, Q.C.*, for appellant: This Company is resident in British Columbia and so does not become liable for security under the ordinary rule. No distinction can be drawn between the being subject to service of process

and the power to commence an action: See *La Bourgogne* (1899), A.C. 431. Section 144 of the Companies Act does not apply to the plaintiff as it is not a company such as could be registered under the Act. The legislative authority of the Province does not extend to this Company; it is impossible to extend the operation of section 144 to this Company and not to any other company operating a line of steamboats between British Columbia and Japan, even though operating under a Dominion statute. The section only applies to a company such as could be incorporated under the Act. He referred to sections 1, 123, 124, 132, 134, 138, 146 and 147 of the Act; B.N.A. Act, Sec. 91, Sub-Sec. 29 and Sec. 92, Sub-Sec. 10.

*Cassidy, Q.C.*, for respondent: This Company is resident outside the jurisdiction and security should be ordered independently of the statute: See Lindley on Companies, 910; *Adams* v. *The Great Western Railway Company* (1861), 6 H. & N. 404, judgment of Pollock, C.B.; *Shields* v. *The Great Northern Railway Company* (1861), 7 Jur. N.S. 631. The *La Bourgogne* case is as to service of process and different considerations and principles apply. He referred to English Order IX., r. 8 (our marginal rule 41); Clement's Canadian Constitution, 235 and *North-West Timber Co.* v. *McMillan* (1886), 3 Man. 277.

Argument.

*Bodwell*, in reply: A foreigner usually residing abroad but temporarily residing in the jurisdiction cannot be called upon to give security for costs. *Redondo* v. *Chaytor et al* (1879), 4 Q.B. D. 453. The same word "extra-provincial" is used in sections 123 and 124 and when used in section 144 must mean such as section 123 could apply to, otherwise all these companies are liable to penalties. He cited also *Cox* v. *Hakes* (1890), 15 App. Cas. at p. 515.

*Cur. adv. vult.*

19th June, 1901.

WALKEM, J.: The plaintiff Company, being, as the evidence shews, a foreign corporation, with its head office in Seattle, it is an extra-provincial Company according to the definition given of that term by the Companies' Act, and is, therefore, subject to the provisions of section 144 of the Act, which are as follows:

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"In case of any suit or other proceeding being commenced by

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an extra-provincial company against any person or corporation residing or carrying on business in this Province, such extra-provincial Company shall furnish security for costs, if demanded."

This language is clear and unambiguous, and there is nothing in any other part of the Act which would exempt the plaintiff Company from the operation of the section by reason of its having a branch office in this Province, and doing business here.

We have been referred to the case of *La Bourgogne* (1899), A.C. 431, which, as it seems to me, would govern this case were it not for the above section, which is a new provision, and one that is not to be found in any of the Imperial statutes or rules relating to companies. In my opinion, the order of the learned Judge is right, and the appeal must be dismissed with costs.

IRVING, J.: I agree.

MARTIN, J.: It is submitted that the order appealed from may be supported on two grounds: (1.) that the Company is resident out of the jurisdiction, and is therefore subject to the general rule; and (2.) under section 144 of the Companies Act, which provides that "in case of any suit or other proceeding being commenced by any extra-provincial company against any person or corporation residing or carrying on business in this Province, such extra-provincial company shall furnish security for costs, if demanded."

Judgment of MARTIN, J.

The Company answers the first point by filing affidavits shewing that it is "resident" within the meaning of the rule laid down in *La Bourgogne* (1899), A.C. 431, and submits that there cannot be a distinction between the residence of a company for the purposes of service of a writ of summons and residence for the purpose of resisting an application for security for costs. In my opinion this contention is sound—the effect of the decision in that case is nothing else, and I may mention that the material filed shews a stronger case of residence than was in question in *La Bourgogne*. In coming to this conclusion I have not overlooked the case of the *North-West Timber Co.* v. *McMillan* (1886), 3 Man. 277, but we must follow the decision first noticed.

Then as to the second point. The difficulty arises in interpreting the expression "extra-provincial company" in said sec-

tion 144. At first blush the difficulty would apparently be removed by referring to the interpretation section 1, which states that "extra-provincial company" shall mean any "duly incorporated company other than a company incorporated under the laws of the Province of British Columbia." But this definition is subject to the saving expressions at the beginning of section 1, *i.e.*, "In the construction and for the purposes of this Act (if not inconsistent with the context or subject-matter) the following terms shall have the respective meanings, etc., etc . . . ." So the point to be decided is, if we give the said defined meaning to the words "extra-provincial company" in section 144. is that meaning inconsistent with the context of or subject-matter dealt with by the section?

To arrive at a satisfactory conclusion the circumstances must be looked at briefly.

The Company herein has its head office in the City of Seattle, in the United States, and is a foreign corporation, operating a line of steamers between Victoria and Seattle. So far as the evidence before us is concerned it appears that the Company is carrying on business beyond the powers of the Provincial Legislature, and the inference from that evidence is that the Company is duly carrying on its business within the scope of its articles of association.

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It is clear that the Provincial Legislature has no authority to incorporate a company for the purpose of operating a line of steamers between this Province and the United States; in this Dominion a company similar to this can only be incorporated under a Federal statute. Consequently this Company could not be registered or licensed under Part VI., of the Act. Then this Company would, as an "unlicensed and unregistered extra-provincial company" under Part VII., be liable to be served by delivering a copy of the process to the Registrar of this Court, and advertising as provided by sub-sections 146-9 despite the fact that it has already been held to be resident for such purposes of service under the Rules of Court. This of course is an absurd conclusion, and one to be avoided if possible, though the language of a statute is clear and susceptible of only one meaning the Court must follow it literally even if it does lead to absurdities.

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Likewise, if a literal construction be given to the words in question another result would be that such a company as the Canadian Pacific Railway would under sub-sections 123-4 be liable to a penalty though the very Act which imposes the penalty prevents the company from complying with the law. We are asked to hold, since it would be so manifestly improper for the Legislature to put those engaged in commercial enterprises on a large scale in such a position, that it was, consequently, not the intention to give that strict interpretation to section 144 which, if looked at baldly, it would seem to bear.

As a way out of the difficulty it is suggested that the definition of "company" should be read with and into section 144. That definition is:

"Company shall mean any company which has been or is about to be incorporated under this Act, for any purpose or object to which the legislative authority of the Legislature of British Columbia extends, except the construction and working of railways and the business of insurance."

In view of the fact that the general purview of the Act relates to companies incorporated for Provincial purposes, it seems to me that there is good reason for acceding to this suggestion because it harmonizes conflicting expressions and does violence to neither the sense nor spirit of the statute; to give a narrower definition to the words "extra-provincial company" would be to make them both "inconsistent with the context or (and) subject-matter" of the section. Those words should be limited to that class of companies which can take advantage of the provisions of the Act; in my opinion the Legislature did not intend the Act to apply to cases outside this. To hold otherwise would result in this, that a steamship company which was incorporated under a Dominion Act to carry on business between Victoria and Japan, with its head office at Victoria, and all its shareholders in Victoria, would still be considered an extra-provincial company and forced to give security if it brought an action in its own town against a fellow "townsman," if I may use the expression for the purpose of illustration. The appeal should be allowed with costs.

Judgment of MARTIN, J.

*Appeal dismissed.*

## GARRIEPIE v. OLIVER.

IRVING, J.

1901.

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GARRIEPIE v. OLIVER

*Will—Construction of—Rule in Shelley's case—Specific performance.*

By the terms of the whole will it was doubtful whether the testator so used the word "heir" as to make the rule in Shelley's case applicable and thereby confer a fee simple on the devisee.

*Held*, that the devisee could not get specific performance of a contract for the purchase of land, his title to which depended on the will.

ACTION for specific performance tried before IRVING, J., at Vancouver. The facts appear fully in the judgment. Statement.

*J. A. Russell*, for plaintiff.

*Harris*, for defendant.

2nd May, 1901.

IRVING, J.: This is an action by the vendor to compel the defendant to specifically perform a contract for the purchase of certain lands, the title to which was obtained under the will of George Garriepie by virtue of the following devise: "I give and bequeath to my son Francis (the plaintiff) for the term of his natural life and at his decease to his heir, all that, etc. . . . ."

The defence was, that on the proper construction of the will the plaintiff was not entitled to the lands in fee simple, but only for the term of his natural life.

From the opinion given in the House of Lords in *Van Grutten* v. *Foxwell* (1897), A.C. 658, it is plain that the rule in Shelley's case is a rule of law, and not of construction, and where it applies it is inflexible. It can only have application where the following premises exist: (1.) A limitation of a prior estate of freehold to the ancestor; (2.) An ultimate estate in remainder to the heirs, *i.e.*, the whole line of heirs successively and indefinitely; (3.) Both of the estates must arise under the same instrument, and (4.) The estates must be of the same character, that is, either both legal or both equitable. Judgment.

The point to be determined here is as to whether the second requisite is satisfied by the words of the will, and that is a ques-

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tion of construction which must be determined by reading the will without regard to the rule. The question is, has the word "heir" been used in the will as a designation of some particular individual, or does it include the whole line of succession capable of inheriting?

The will is dated 19th July, 1881, and the testator then had a wife, three daughters and two sons; the devise to the other son Gregoire, who was then the father of two children, is as follows: "I give, devise and bequeath to my son Gregoire for the term of his natural life and at his decease to be divided between the children of my said son, share and share alike, but in the event of his leaving no issue the said property shall go to the next heir, etc. . . . . ."

Judgment.

After comparing the language used in these two devises I have arrived at the conclusion that the testator *may* have used the word "heir" in some limited or restricted sense of his own, and if that is so one of the premises for the application of the rule in Shelley's case is wanting. I say the testator may have used "heir" in that sense; I wish to guard myself against saying more than is necessary to bring the case within the doctrine that the Court will not force upon a purchaser a title of this character.

Counsel agreed at the trial that this was not a case in which I should make any order as to costs.

## *IN RE* OLIVER.

MARTIN, J. (In Chambers.)

1901.

May 7.

FULL COURT At Victoria.

June 18.

IN RE OLIVER

*Succession duty—Amount payable by half-sister of testator.*

The words "sister of the deceased" in sub-section 4 of section 2 of the Succession Duty Act Amendment Act, of 1899, include a half-sister.

SUMMONS by Grace M. Parshall to determine the amount of succession duty payable by her. The applicant was a half-sister of W. H. Oliver and a devisee under his will.

*Moresby*, for the summons.

*Maclean, D.A.-G.*, for the Crown.

7th May, 1901.

MARTIN, J.: The short point herein is, do the words "sister of the deceased" in sub-section 4 of section 2 of the Succession Duty Act Amendment Act, 1899, include half-sister? The contention that they should have that meaning is sought to be supported by section 18 of the Inheritance Act, which provides that "Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree . . . . ." Under sub-section 5 of the Succession Duty Act Amendment Act any person who is "in any other degree of collateral consanguinity to the deceased than is above described" (in sub-section 4) must, subject to certain exemptions, pay a duty of ten per cent.

Judgment.

The primary meaning of the word "sister" is exactly given in Bouvier's Law Dictionary, thus:

"A woman who has the same father and mother with another, or has one of them only. In the first case she is called sister, simply; in the second, half-sister."

In view of the fact that it was necessary to insert a provision in the Inheritance Act to permit the half-blood to inherit equally with the whole, that would be an argument against rather than in favour of the present applicant. The half-blood are not mentioned in the Succession Duty Act, and a half-sister cannot be said, in my opinion, to be in the same "degree of col-

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lateral consanguinity" as a sister. Williams on Real Property (1896), 218, says, "By the old law, a relative of the purchaser of the half-blood . . . . . could not possibly be heir: a half-brother, for instance, could never enjoy the right which a cousin of the whole blood, though ever so distant, might claim in his proper turn."

Sub-section 4 is really an exemption from sub-section 5, which imposes the general duty of ten per cent. and, to be operative the exemption must be clear and explicit. I find myself unable to say that it is so in this case.

I may add that I have not overlooked the fact that a different rule is in force in the construction of wills where a colloquial or even domestic use of certain words is given effect to under certain circumstances.

It is determined that the estate is subject to the duty of ten per cent. under sub-section 5.

An appeal from this judgment was argued on 18th June, 1901, before the Full Court consisting of WALKEM, DRAKE and IRVING, JJ.

Argument.

*Hunter, K.C.* (*Moresby*, with him), for the appeal: The question here is whether a sister as set out in the Succession Duty Act Amendment Act, 1899, Sub-Sec. 4 of Sec. 2, includes half-sister or as shewn by next paragraph whether a half-sister is in a different degree of collateral consanguinity than a sister of the whole blood. Through the whole of the law in its various branches, without a single exception, other than the law with regard to real property, the half-blood is put on the same basis as the whole blood and upon the ground, that they are in the eye of the law in the same degree of consanguinity: *e.g.*, under Statute of Distribution, 22 & 23 Car. II., Cap. 10, and 1 Jac. II., Cap. 17; *Smith* v. *Tracy* (1676), 1 Mod. 209; *Watts* v. *Crooke*, Shower, P.C., 139, and the same case is also reported in (1690), 2 Vern. 124; *Shannon* v. *Fortune* (1876), 16 N.B. 263; Kent's Commentaries, Vol. 2, p. 424; *Jessop* v. *Watson* (1833), 1 Myl. & K. 665; *Gardner* v. *Collins et al* (1829), 2 Peters, 58 at pp. 87 and 88; and *Earl of Winchelsea* v. *Norcliffe* (1686), 1 Vern. 437;

which statutes are in *pari materia* with the Succession Duty Act, as they both deal with the duties of Executors.

Again, in construing wills, the Courts let in the half equally with the whole blood unless a contrary intention appears: See *Leake* v. *Robinson* (1817), 2 Mer. 363; *Grieves* v. *Rawley* (1852), 10 Hare 63; *In re Hammersley* (1886), W.N. 64; Theobald on Wills, 281; Jarman on Wills, 1,008; *Brigg* v. *Brigg* (1885), 33 W.R. 454; Hawkins on Wills, 86. The same rule applied as to administration; See Williams on Executors, pp. 359, 1,367 and 1,383; *Brown* v. *Wood* (1871), Aleyn, 36; *Blackborough* v. *Davis*, 1 P. Wms. 53. Same rule as to marriage—the half-blood is within the prohibited degrees equally with the whole; see Browne & Powles on Divorce, 619; *The Queen* v. *The Inhabitants of Brighton* (1861), 1 B. & S. 447; *Oxenham* v. *Gayre*, 5 Bacon's Abr. 294; Crawley's Husband and Wife. 6. Same as to criminal law: see Crankshaw, 104; Bacon's Abr. Vol. 5, p. 294. Same as to right to Crown, titles of honour, etc.: see Stephen's Commentaries, Vol. 1, p. 424 As to succession to real estate the half-blood was postponed to the whole for feudal reasons in England: see Stephen's Commentaries, Vol. 1, p. 424; Robbins & Maw on Devolution of Real Estate, 296. This is the only exception in England and the reason for the existence of the rule about postponement is that the half-blood is in the same degree as the whole, otherwise there would be no reason for the rule.

In 1872, the Legislature wiped out the exception by the Inheritance Act, Cap. 29, Sec. 18, which is the best possible argument that they did not want any exception to the rule and this legislation should be looked at. See *Boston et al* v. *Lelievre* (1870), 39 L.J., P.C. 17. The dictionaries and books of reference all shew that the half-blood is in the same degree as the whole: see American and English Encyclopaedia of Law, Vol. 3, p. 274; Wharton, pp. 149 and 166; Sweet, pp. 188 and 189; Abbott, Vol. 1, p. 266; Bouvier, Vol. 1, p. 39[illegible]; Blackstone's Commentaries, Vol. 2, pp. 202, 203-205; Shelford's Real Property Statutes, 362. Tax Acts are strictly construed: see *Re Templeton* (1898), 6 B.C. 180; *In re J. Thorley* (1891), 2 Ch. 613 at p. 623 and *The Oriental Bank Corporation* v. *Henry B. Wright* (1880), 5 App. Cas. 856.

Argument.

*Maclean, D.A.-G., contra:* Sub-section 5 of section 4, imposes

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a duty of ten per cent. on all successions where the aggregate value of the property of the deceased exceeds $5,000.00, except in the cases mentioned in sub-section 4 of said section. Sub-section 4 provides for an exemption to the extent of five per cent. where the property passes amongst others to a "sister" of the deceased. The intention to exempt must be expressed in clear unambiguous language as taxation is the rule and exemption the exception. *Dame Mary Wylie & Vir* v. *The City of Montreal* (1885), 12 S.C.R. 384 and Cooley on Taxation, 146.

The word "sister" in the statute in question should be given its strict legal and primary meaning which is "a woman who has the same father and mother with another." This is the primary meaning of the word as given by Webster, Worcester and in Bouvier's Law Dictionary, Vol. 2, p. 1,004. In *Bridgman* v. *The London Life Assurance Company* (1879), 44 U.C.Q.B. 536, Burton, J., expressed the opinion that as a matter of legal construction the word "brothers" does not include half-brothers.

The word "sister" in the Statutes of Distribution is held to include "half-sister," but that construction was placed upon the word at a time when statutes were not so strictly construed as at present. The half-blood being entitled to share in the distribution of an intestate's estate, it follows as a matter of course that the half-blood are in the same position as the whole blood with regard to obtaining administration. In construing wills in certain cases Courts hold that the word "sister" includes "half-sister," but the secondary meaning is given to the word in such cases in the exercise of a species of equity. The Court looks beyond the will in order to ascertain and give effect to the testator's intention, but in construing statutes Courts are bound to give the Legislature credit for meaning what it says. The more formal the writing the narrower must be the limits of interpretation—deeds are to be less liberally interpreted than wills, and it is submitted statutes and especially exempting clauses in taxing statutes are to be much less liberally interpreted than deeds. Thayer on Evidence, 602.

Argument.

If the Legislature had intended to exempt the half-blood it is submitted its intention would have been expressed in unambiguous terms; it has made specific provision for the half-blood

sharing inheritances in certain cases with the whole blood. R.S. B.C. 1897, Cap. 97, Sec. 18.

*Per curiam:* The appeal is allowed with costs.

*Appeal allowed.*

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## ALEXANDER v. HEATH *ET AL.*

DRAKE, J.

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*Mining law—Transfer of mineral claim—Writing—Use by miner of another's name in locating—Same vein or lode—Mineral Acts, 1896, Secs. 29 and 34; 1897, Sec. 14.*

A transfer of any interest in a mineral claim is not enforceable unless in writing.

Where one free miner locates and records a mineral claim, if he locates another claim on the same vein in the name of another free miner, he thereby acquires no interest in such last claim by virtue of section 29 of the Mineral Act of 1896.

ACTION tried at Nelson before DRAKE, J., on June 9th, 1899. The facts appear fully in the judgment.

*McAnn, Q.C.*, and *R. M. Macdonald*, for plaintiff.

*Bodwell, Q.C.*, for defendants Heath and Heap.

*W. A. Macdonald, Q.C.*, and *Johnson*, for the defendant Company.

10th June, 1899.

DRAKE, J.: The plaintiff's case is that on the 5th day of June, 1897, he located and recorded the Tecumsie claim on Woodbury Creek. He wished to take up the adjoining claim, and requested the defendant Heap to allow his name to be used as the two claims were on the same lode. This Heap agreed to, and at the same time furnished the plaintiff with some supplies and agreed to pay the record fees; and the plaintiff agreed that a quarter of this claim should belong to Heap for the use of his name and for the other considerations. This claim was named the Pontiac. Heap requested the other defendant, Heath, to go up

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and examine the claim. This he did, and in consequence of his report Heap completed the record. The plaintiff offered his interest in the two claims for sale at $150.00 cash. This Heap refused, but said he would take an option on the claims for twelve months and do the necessary representation work, but would pay no cash. The negotiations as to the price for the option dragged on for several days, the plaintiff wanting a larger sum than Heap was inclined to promise. At last Heap suggested that the plaintiff should go up and see the claims and make up his mind definitely as to the value. The plaintiff accordingly went up and examined the property, but alleges that the defendant did not inform him that there was another lead discovered on the Pontiac by Heath. This discovery of ore was in fact only 300 feet away from the place where the mineral was found by the plaintiff which induced him to stake the claim. The plaintiff apparently contented himself with going to the discovery he had himself made and on to the Tecumsie claim as well, but did not go farther on the Pontiac and his reason was the country was rough and covered with fallen logs. The result, however, of this visit was that terms were arrived at and on the 30th of July, 1897, an option was given by which the plaintiff agreed to convey to Heath and Heap his interest in the said two claims; Heath to pay $1,250.00 for purchase price within a year in case he made up his mind to buy after the examination of the ground.

Judgment.

The plaintiff alleges that before he gave this option he asked Heap if any other discoveries had been made on the claims, and that Heap informed him that there had been none. This allegation is distinctly denied by the defendants, and the plaintiff seeks to support it by the evidence of Daniel McGraw, who states that about the 20th of July, Heap told him he had something of the best in the country but not to tell plaintiff. And next we have Hughes, who says he was told by Heap that the plaintiff did not know of the new lead before he bought the plaintiff out.

With reference to the first of the witnesses, if any such statement as he speaks of was made, it only goes to this that the discovery made by Heath was not disclosed to the plaintiff. It is improbable that if Heap had desired to keep this find a secret he would have disclosed it to a stranger and requested him not to

tell the plaintiff. But he was not asked to keep it a secret generally. Ainsworth is a small place and it must have come to the plaintiff's ears. The evidence of Hughes does not assist the plaintiff. The matter is thus left as a question of veracity between the plaintiff and Heap.

The defendant Heath, after obtaining the option, did two months' work on the claims with another person and spent a considerable sum of money, and on the 14th of October, 1897, these claims were bonded to Leo Alexander Scowden for $40,000.00, payable as to $1,000.00 before 25th October, and $3,000.00 on or before the 14th of November. The sum of $4,000.00 was paid, and out of this the plaintiff was paid $1,000.00 which he agreed to receive in satisfaction of the $1,250.00 which would not be due before July, 1898. He at the time he received this money knew of the agreement with Scowden, and in fact he knew the day it was executed and the amount of the option, but he neither took any steps nor made any suggestion of misrepresentation to either of the defendants, and never has until this action was brought. Scowden spent some $10,000.00 on the property and then threw it up.

The bill of sale from the plaintiff to Heath was dated the 13th of October, 1897, the day the claims were bonded to Scowden whereby the plaintiff sold and transferred to Heath the Tecumsie mineral claim, and by another bill of sale of the same date he transferred all his interest in the Pontiac which he claimed to be three-quarters.

Judgment.

The defendants, after Scowden had thrown up the above option, did the necessary assessment work on the claims and on the 29th of November, 1898, Heath transferred the said claims to the defendants, The Nelson-Slocan Prospecting and Mining Company, in consideration of paid up shares, but no cash passed, and these shares are only of a nominal value to-day.

The plaintiff claims in his action that the bill of sale to Heath be cancelled; that the bill of sale to the Company be cancelled, and in the alternative $40,000.00 damages and an attaching order on their stock in the defendant Company, and an injunction against the Company to restrain the disposal by them of the said mineral claims and an account of all ore sold.

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The defendants deny any misrepresentation and deny that they even told the plaintiff that any such discovery was made. The fact that the plaintiff was requested to go, and did go, up to the claims before he finally agreed to giving the defendant an option, is certainly not evidence of concealment or intention to deceive, but the reverse. The contention that Heap as a quarter owner of the Pontiac had a duty cast upon him to disclose any information that might affect the value of the claims is not borne out by the facts. An interest in a claim is not equivalent to a partnership. The owner is rather in the position of a co-owner, because the owners of shares in a mine can sell or mortgage their interest without reference to the other owners and their shares are liable to their separate debts. A miner has to represent his share in the work and that is all the duty the statute imposes upon him, and it is a further subject of remark that for two years the plaintiff never verbally or in writing gave to the defendants any intimation that he considered he had been deceived, but left the country and travelled about on the strength of the money he had received and when he returned still kept silent. He kept the purchase money knowing as much of the facts then as he does now. If he wished to disaffirm the transaction he must proceed within a reasonable time and while the parties remain in or can be restored to their original position: *Clough* v. *The London and North Western Railway Company* (1871), L.R. 7 Ex. 26. The defendants further rely on sections 24 and 50 of the Mineral Act, and section 14 of the Mineral Act Amendment Act. By section 34 of the Mineral Act the interest of a miner in his claim is equivalent to a lease for a year, and thus is an interest in land, and by section 50 no transfer of any mineral claim or of any interest therein shall be enforceable unless in writing signed by the transferrer, and by section 14 of Cap. 28, 1897, "no free miner shall be entitled to any interest in any mineral claim which has been located and recorded by any other free miner unless such interest is specified and set forth in some writing signed by the party so locating such claim." By section 29 of Cap. 34, 1896, "no free miner shall be entitled to hold in his own name, or in the name of any other person, more than one mineral claim on the same vein or lode except by purchase." The object of the

Judgment.

Mineral Act is that all dealings with claims should be in writing and recorded, and that no one should in any way lock up a large tract of land by locating in his own name, or the names of others, more than one claim on each vein or lode discovered. In this case it is in evidence that the plaintiff requested the loan of defendant Heap's name in direct violation of this Act. The effect of this transaction in my opinion is that the plaintiff never had any interest in the Pontiac claim. The whole transaction was an evasion of the Act and contrary to public policy, and therefore the plaintiff has no right of action in regard to the Pontiac claim. See *Pearce* v. *Brooks* (1866), L.R. 1 Ex. 213 and *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724, at p. 728, where Lindley, J. says: "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to rise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality." In addition to this obstacle the plaintiff is met by the other section to which I have referred. In the first place there is no writing from Heap to Alexander signed by Heap the registered owner. The learned counsel for the plaintiff suggested that the various bills of sale and transfers put in were sufficient to indicate that the defendant Heap was only holding the claim for the plaintiff. I fail to see that any such deduction can be drawn from the evidence, and I do not feel inclined to fritter away the restraints imposed by the statute by refined distinctions. If the Act is clear the natural construction must be given to it. The plaintiff conveys the Tecumsie and his interest in the Pontiac to Heap, but Heap is the recorded owner of the Pontiac and nowhere conveys any interest to the plaintiff. In this view of the law the question of misrepresentation, if any existed, and which the documentary evidence in my opinion does not substantiate, cannot even if it was proved, override the Mineral Act and under that Act the plaintiff has no right of action in respect to the Pontiac.

Judgment.

*Judgment for the defendant with costs.*

DUGAS, J.

1900.

June 25.

## VICTOR *ET AL* v. BUTLER.

*Yukon law—Mining regulations—Representation work—Rights of different Crown grantees to same ground.*

FULL COURT At Vancouver.

1901.

March 9.

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In July, 1898, plaintiff located and obtained a Crown grant for placer mining in respect of a claim, and on 25th January, 1898, one Mensing located a claim, and recorded it the next day, and on the succeeding 27th of October, a few minutes after midnight of the 26th, the defendant re-located it as ground abandoned and open to occupation on the ground of non-representation. The two claims overlapped. On 10th November, 1898, the defendant obtained her Crown grant for placer mining covering the ground in dispute and being a re-location of Mensing's old claim. The Gold Commissioner had made a rule that three months' continuous work in the year was sufficient, and by the regulations a claim was deemed abandoned after it had remained unworked on working days for the space of seventy-two hours.

*Held*, by the Full Court (MARTIN, J., dissenting), dismissing an action of trespass, that the defendant's Crown grant must prevail over that of the plaintiff.

APPEAL to the Full Court from the judgment of Dugas, J., in the Territorial Court of the Yukon Territory.

Statement.

On 5th July, 1898, the plaintiff Victor, located and staked the Gold Hill claim and on 23rd July, 1898, he obtained a Crown grant for placer mining. On 25th January, 1898, one Mensing located a claim, and recorded it on 26th January, 1898, and on the succeeding 27th of October, a few minutes after midnight of the 26th, the defendant for the reason that the claim had not been properly represented, re-located it as ground abandoned and open to occupation and entry. The two claims overlapped. On 10th November, 1898, the defendant obtained her Crown grant for placer mining, covering the ground in dispute and being her re-location of Mensing's old claim.

According to regulation 19, a claim shall be deemed to be abandoned and open to occupation and entry "when the same shall have remained unworked on working days by the grantee thereof or by some person on his behalf for the space of seventy-two hours, unless sickness or other reasonable cause be shewn, etc."

The Gold Commissioner had made a rule (verbal) that if the claim owner did three months' continuous work on the claim in a year, that was sufficient, but no period of the year was specially set apart for the performance of that work.

The question at the trial was which of these two grants was entitled to priority, and the learned Judge dismissed the plaintiff's action and decided in favour of the defendant.

The appeal was argued at Vancouver on 20th and 21st November, 1900, before McCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.

*Peters, Q.C.*, and *A. G. Smith* (of the Yukon bar), for the appeal: The defendant re-located on ground not open for location and before it had become vacant Dominion land. There was no time in which mining was generally suspended in that District, so the Gold Commissioner could not fix it, so the course he adopted was to make an informal verbal order or direction that a claim should have to be worked for a season of three months, and the balance of the year to remain a close season, therefore Mensing had up to twelve o'clock on night of 27th October, and seventy-two hours after before his claim was open to re-location.

Supposing there are two grants wrongly issued, ours is the earlier and entitled to the preference. The defendant is a trespasser: see Sedgwick on Trial of Title to Land, 549-50; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1; *Davison* v. *Gent* (1857), 1 H. & N. 744; *Taylor* v. *Parry* (1840), 1 Man. & G. 604; *English et al* v. *Johnson et al* (1860), 12 Morr. 202; *Attwood et al* v. *Fricot et al* (1860), 2 Morr. 305. No close season was fixed by the Gold Commissioner within the meaning of the interpretation clause of the Yukon Placer Mining Regulations of May 21st, 1897: see Orders-in-Council of 21st May, 1897 (p. lxxii., of 60 Vict.), and 18th January, 1898 (p. xxxix., of 61 Vict.)

Argument.

[MARTIN, J., referred to *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2) 39.]

*Davis, Q.C.*, for respondent: Under the regulations respecting the close season there must be a great deal of elasticity allowed and latitude given the Gold Commissioner who is far removed

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from the reach of the Government for a long period and there was a close season such as meets the spirit of the Act. What the Gold Commissioner did was to make a rule that if during the year a claim owner worked three months, that was sufficient—the effect of the rule was that in all he must shew three months' work—not continuous, but three months in all. The close season of nine months less the three days had gone by and the man could not by any possibility have done the three months' work; the three days form part of the nine months not of the three months.

Victor's grant of land already leased is not valid: see *The Queen* v. *Demers* (1893), 22 S.C.R. 482; Lindley on Mines, 363 and *Belk* v. *Meagher* (1881), 104 U.S. 279. Victor purported to locate a new claim, but defendant applied in a different way invoking the process applicable to forfeited ground. The Gold Commissioner must have cancelled Mensing's lease before he decided to give the new one to Mrs. Butler. He cited *Cooper* v. *The Board of Works for the Wandsworth District* (1863), 14 C. B.N.S. 180; *Osborne* v. *Morgan* (1888), 13 App. Cas. at 234-6; *Smith* v. *The Queen* (1878), 3 App. Cas. 614 and *Davenport* v. *The Queen* (1877), 3 App. Cas. 115.

Argument.

*Peters*, in reply: There is no evidence of cancellation.

*Cur. adv. vult.*

9th March, 1901.

McCOLL, C.J.: I think the appeal should be dismissed.

DRAKE, J.: In this case one Mensing located the ground in question in 1898, and obtained the ordinary grant from the Gold Commissioner. Victor took up a claim on vacant land and included in it a portion of the ground held under Mensing's grant: this he did in August, 1898. If Mensing was lawfully entitled to the possession of his claim at the date of Victor's record, Victor's record is invalid as far as regards the portion that overlaps Mensing's.

Judgment of DRAKE, J.

A person by clause 8 of the regulations of January, 1898, is entitled to take up vacant lands for mining purposes, whether vested in the Crown or otherwise. Under the regulations the

Gold Commissioner is entitled to fix a close time with regard to claims. According to the evidence, instead of making a close time applicable to all claims, he allowed each claim holder to work for three months in the year following the record and the other nine months were treated as close time. Whether this was a good practice or not is not in question here; it was the practice of his office and all the miners acted on it, and when they came to renew their claims they had to prove three months' work which was treated as sufficient. Mensing, therefore, had a year's lease, determinable on his neglecting to perform three months' work within the year. Whether he had abandoned his claim could not be ascertained until the nine months after his record had been made had expired, unless he obtained a cancellation before that time of his grant by the Gold Commissioner. Of this there is no evidence, therefore Victor's claim was not valid as far as regards the piece of land overlapping Mensing's. It was contended that when two grants of the same land had been made that the latter grant should prevail. I do not accede to this view. The fact of a grant having been made to Mensing precluded the issue of another grant over the same land until the first grant was cancelled by the Gold Commissioner for some of the reasons which gave him jurisdiction to cancel, or had expired by effluxion of time. When Victor made his application, the plan he filed with the Gold Commissioner, which was made on July 22nd, 1898, as appears by the exhibit, does not shew Mensing's claim at all, and does not agree with Exhibit "E." The Gold Commissioner seeing a plan which made no mention of the Mensing claim, and was apparently unoccupied land, came to the conclusion that no primary rights of any one else were affected and made the grant. There is no evidence that when Victor applied for a grant any irregularity was suggested as to Mensing's claim, or any cancellation made of his grant. In this view of Mensing's claim we have not to consider whether or not Mrs. Butler was right in taking up the Mensing claim when she did, because the plaintiffs cannot succeed unless they shew that they have a right either independent of or against Mensing. If Mensing's claim had expired or been cancelled after Victor's grant, and no one had taken up the land, it

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is probable that owing to the fact of Victor's grant having the land described by metes and bounds he might succeed in holding the claim against the Crown on the ground that a grantor cannot derogate from his grant. But as, in my opinion, Mensing's claim was in existence when Victor's grant was made, it cannot be said that Victor had a reversionary interest in this land dependent on Mensing's claim expiring or being cancelled, for this is what the plaintiffs' contention amounts to. Such a title was never contemplated by the mining regulations. If Mensing had retained his claim, Victor could not eject him or bring an action of trespass. He did not retain his claim, and the land thereby became open to re-location, and Mrs. Butler is a re-locator unaffected by Victor's grant.

Judgment of DRAKE, J.

It was contended that Mrs. Butler could not take up the claim until nine months plus seventy-two hours, and therefore her grant was invalid as against the plaintiff Victor, but the plaintiffs cannot set up a *jus tertii* to bolster up their case. This objection is one Mensing or his assign might have set up, and without deciding the effect and bearing of rule 39. In my opinion the appeal should be dismissed with costs.

Judgment of IRVING, J.

IRVING, J.: In my opinion both parties to this action jumped the claim before it was open for re-location, unless it can be established that the Gold Commissioner in pursuance of the powers conferred on him cancelled the Mensing location. I think in view of the fact that the Mensing location was made known to him at the time of Mrs. Butler's application we must presume that this was done.

At page 180 of the appeal book there are two plans, one is identified by the Clerk of the Court—the other is unidentified.

It is clear from Bolton's evidence that it was the unidentified plan that was filed at the time the Victor application was made. This unidentified plan does not disclose the fact that Victor was taking up, or intended to take up, any portion of the Mensing claim. I agree with the judgment just read.

Judgment of MARTIN, J.

MARTIN, J.: It is argued that no close season was fixed by the Gold Commissioner within the meaning of the interpretation clause of the Yukon Placer Mining Regulations of May 21st, 1897.

It appears from the evidence of the Mining Recorder that what the Gold Commissioner did was to lay it down, verbally, that if the claim owner did three months' continuous work on the claim in a year that was sufficient; this was the rule of the office. No period of the year was specially set apart for the performance of that work; so for nine months in the year the owner need not work his claim. It is objected that by this mode of procedure there was "no period of the year during which placer mining (was) generally suspended" as contemplated by the Act. From one point of view, that is undoubtedly correct, but from another it may be looked at differently. The period of suspension was general in that it affected all alike, and though the Gold Commissioner arrived at the result in a somewhat involved manner, I am unable to say, in view of the rather uncertain language of the statute, that he was wrong in principle; moreover, there is much to be said in favour of it as a practical application of the clause to the conditions of the country.

Mensing recorded his claim on the 26th of January, 1898, and on the succeeding 27th of October, a few minutes after midnight of 26th, the defendant, for the admitted reason that the claim had not been properly represented, re-located it as ground abandoned and open to occupation and entry. According to regulation 19, a claim shall be deemed to be abandoned and open to occupation and entry "when the same shall have remained unworked on working days by the grantee thereof or by some person on his behalf for the space of seventy-two hours, unless sickness or other reasonable cause be shewn, etc."

Judgment of MARTIN, J.

Applying the rule laid down by the Gold Commissioner, the close season existed for nine months, after which it became necessary for the owner to perform his work. But, as I interpret regulation 19, his claim did not become abandoned unless after the close season was over he made seventy-two hours default in his work—in other words, he had the nine months plus three days. So far as the close season was concerned that was, to use the language of this Court in *Woodbury* v. *Hudnut* (1884), 1 B. C. (Pt. 2) 39, at p. 42, "as if it were expunged from the calendar," and the seventy-two hours began to run against the claim-owner from the expiration of that season, and not before. It may

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be said that the result of this is that the required three months' work could not be performed within the year, but that period of three months must be taken to be subject to the further deductions permitted by the regulations. Up to the end of the nine months and seventy-two hours the claim was secured to Mensing, and the alleged location, before that time, by the defendant was, to further quote *Woodbury* v. *Hudnut, supra*, 40, "a merely unauthorized trespass," and an unsuccessful attempt to "jump" the claim.

Before Mensing's claim had run out, the plaintiff Victor, on the 5th of July of the same year, likewise located a claim which also embraced that part of Mensing's old ground now in dispute (but of this Victor was then ignorant) and, subsequently, on the 23rd of the same month, obtained from the Crown a grant thereof for the purposes of placer mining. On the 10th of November following, the defendant obtained a similar grant from the Crown, also covering the ground in dispute, being her re-location of Mensing's old claim.

The question is which of these two grants is entitled to priority?

Judgment of MARTIN, J.

It is not surprising that no authority upon the exact point has been cited, the circumstances being so unusual. In the regrettable absence, in a case of this importance and difficulty, of any reasons for judgment, we are deprived of the benefit of the views of the learned trial Judge, which would, doubtless, in view of his familiarity with the mining regulations, have been of assistance to us in deciding the questions at issue.

It is urged on behalf of the defendant that she is entitled to Mensing's claim on the ground that it was forfeited, and that it must be presumed in her favour that the Gold Commissioner had cancelled the entry thereto "upon obtaining evidence satisfactory to himself" under regulation 19, and in pursuance of her application for a grant, dated October 27th, 1898, made while Mensing's claim was still in force.

Assuming that we are justified in so presuming as regards the defendant's grant, then the same presumption arises, but with greater force, in regard to the plaintiffs' prior grant. There is no evidence of any intention to cancel the entry of Victor's

claim, and he was working it at the time of the defendant's relocation.

As I understand the contention of the plaintiffs' counsel, it is that they, having obtained a grant from the Crown on the 23rd of July, which by metes and bounds conveys to them that part of Mensing's claim now in dispute, are entitled to priority over the Crown's later grant to the defendant; and in support of this view it is pointed out that the defendant in no way claims under Mensing's title, but on the contrary relies on that title being destroyed. And it is further contended that even if both grants were wrongly or inadvertently issued, the earlier should prevail.

Under the existing circumstances, at least, it is difficult to see upon what ground the defendant's later grant should prevail against the plaintiffs' prior one. Assuredly she cannot invoke Mensing's title, for that title is, and was, as antagonistic to her title as to the plaintiffs'. Then, as between the grants themselves, her counsel, on the argument, took the stand that in the grant to the plaintiff Victor, the disputed corner of Mensing's ground, as counsel expressed it, "slipped in unnoticed." Supposing it did, does that give the defendant, who did not obtain a similar grant for months afterwards, a right to complain when she herself, strictly speaking, "jumped" Mensing's claim, and "jumped" it too soon? I confess I cannot see any reason, either at law or in equity, why the prior grant to the plaintiffs should be disregarded. If the defendant's contention is that she is at liberty to stake first, and then apply for cancellation, then that exactly fits Victor's case, except that Victor is in a better position than the defendant for three reasons, (1.) he is the prior locator; (2.) he is the prior grantee, and his grant defines his claim by metes and bounds; (3.) he was in possession when the defendant made her premature attempt to "jump."

Judgment of MARTIN, J.

It is opportune, here, to make some remarks on the possession of a mineral claim. Much attention has been given this subject by Courts in the United States under laws bearing a general similarity to our own. It has been repeatedly laid down "Possession is presumptive evidence of title; but it must be actual. By actual possession is meant a subjection to the will and dominion of the claimant." *Hess et al* v. *Winder et al*

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(1866), 12 Morr. 217, at p. 223, approving *Coryell et al* v. *Cain* (1860), 16 Cal. 567, and *English et al* v. *Johnson et al* (1860), 17 Cal. 108. The Court went on to say that it "recognizes a difference between the acts essential to indicate the possession and occupancy of agricultural land, and those necessary to shew occupancy and dominion of a mining claim. . . . . 'We think when a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy be only on or of a part, and though the party does not enter in accordance with mining rules or under a paper title.'" The question of constructive possession of a mining claim under a deed is discussed at pp. 224-6 of the same case, and the rule is laid down that "if a party relies on a constructive possession by deed, he must shew himself in the actual possession of a part of the land described in it, and the description must be definite and certain as to the boundaries of the land." The cases of *Attwood et al* v. *Fricot et al* (1860), 2 Morr. 305; *North Noonday Mining Co.* v. *Orient Mining Co.* (1880), 9 Morr. 531 and *Harris et al* v. *Equator Mining & Smelting Co.* (1881), 12 Morr. 175, 181 are to the same effect. See also Barringer & Adams on Mines, Chap. 13, p. 317; Lindley on Mines, p. 649 *et seq.* Applying the principle of the above decisions to the present case I am satisfied that the plaintiff Victor distinctly defined the boundaries of his claim, and also was in possession thereof at the time of the defendant's attempt to re-locate Mensing's ground, and that he, in effect, continued to maintain that position up to the commencement of this action. This point was urged by appellants' counsel as a strong element in their favour, and I am of opinion that it is so.

Judgment of MARTIN, J.

During the argument something was said about *jus tertii*, but I do not see how that doctrine applies to the case before us, seeing that both parties are, so far as regards Mensing, in exactly the same position, because they both staked a portion of his ground too soon, the plaintiff Victor inadvertently, and the defendant designedly; it must be common ground with each litigant that the other, as regards Mensing, was a trespasser, and it follows that neither can set up a *jus tertii* against the other.

The position of the matter, then, is this. The plaintiff Victor

receives a specific grant from the Crown of a certain mineral claim described by metes and bounds, and under and by virtue thereof occupies, defines, and works his claim. Some months afterwards, the defendant obtains a similar grant to a portion of the land already included within the metes and bounds of the former grant, and asks, in effect, that the former grant be set aside so far as the conflicting portion is concerned. And this request is made despite the fact that the applicant is the junior locator and the junior grantee. Conceding that both locators were, in strictness, at the outset, trespassers, how does that assist the defendant? In this country the spirit of the administration of the law relating to mining properties, is, as I understand it, quite apart from statutory provisions, to favour the title of the senior locator and senior grantee. And surely, as a matter of common sense and natural justice, that is the only broad rule to follow, unless it is proposed to foster litigation, and encourage "jumpers."

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If the defendant were relying on Mensing's grant, the result would be very different, because the plaintiffs, as against Mensing, would be in the same position that the defendant herein is as against them. But the foundation of the defendant's whole case is that Mensing's title had lapsed.

Judgment of MARTIN, J.

In my opinion, the plaintiffs' prior grant which conferred upon them for the term mentioned the exclusive right for mining purposes to the land in dispute, before the defendant made her premature location, should prevail against the defendant's later grant, so far as the conflicting portion thereof is concerned.

The appeal should be allowed with costs.

*Appeal dismissed.*

DRAKE, J.

1901.

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## REX v. NELSON.

*Criminal law—Obstructing a peace officer—Consent of accused not necessary to summary trial—Criminal Code, Secs. 144, 783-6.*

REX v. NELSON

A person charged with obstructing a peace officer in the execution of his duty may be tried summarily by a Magistrate without the consent of the accused.

*Semble*, A Magistrate is not bound to inform an accused of the exact sections of the Code under which the proceedings are being taken.

*The Queen* v. *Crossen* (1899), 3 C.C.C. 152, not followed.

APPLICATION for *certiorari* to remove into the Supreme Court a conviction of Richard Nelson who was convicted by the Police Magistrate of the City of Victoria for obstructing a peace officer in the execution of his duty. An affidavit of A. L. Belyea, counsel for Nelson, was filed in which it was sworn that at the opening of the case the Magistrate said he would dispose of it summarily under the provisions of the Summary Convictions Act, and that the Magistrate did not proceed as directed by section 786 of the Code, and that the said Nelson was tried and convicted without his the said Nelson's consent. Affidavits of the Magistrate and the Chief of Police were filed to the effect that the Magistrate informed Nelson's counsel, that as the case might be disposed of either under the summary convictions clauses of the Code, or under the clauses relating to the summary trial of indictable offences, it was unnecessary for him to state under which part of the Code he was proceeding, and he declined to limit himself to either part, saying, however, that he would dispose of it summarily (meaning, according to the Magistrate's affidavit, as distinguished from a preliminary hearing.)

Statement.

*Belyea, K.C.*, for the applicant.

*Maclean, D.A.-G.*, for the Magistrate.

8th June, 1901.

Judgment.

DRAKE, J.: This application is for a rule absolute for *certiorari* to quash a conviction of the Police Magistrate of Victoria on the

ground of want of jurisdiction to convict, the accused not having consented to be tried summarily.

The offence charged is for wilfully obstructing a peace officer in the execution of his duty. This is an offence under section 144, sub-section 2. That section enacts that "every one is guilty of an offence and liable on indictment to two years' imprisonment and on summary conviction before two Justices of the Peace to six months' imprisonment with hard labour, or to a fine of $100.00, who resists or wilfully obstructs any peace officer in the execution of his duty."

Then section 783 enacts that "Whenever any person is charged before a Magistrate with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, the Magistrate may, subject to the provisions thereinafter made, hear and determine the charge in a summary way." The jurisdiction of the Magistrate in British Columbia is absolute without the consent of the person charged, sub-section 3, of section 784 as amended by Cap. 46, 1900; but that amendment has an exception with respect to cases coming under section 785.

Section 785 is made applicable by the above amending Acts to all Police and Stipendiary Magistrates of cities and incorporated towns in Canada, and is in effect as follows: "If any person is charged with an offence for which he can be tried at the Court of General Quarter Sessions, then such person with his own consent, may be tried before such Magistrates as are mentioned in section 782." We have no Court of General Quarter Sessions here, but we have the Supreme Court which has all the powers of the Court of General Quarter Sessions; and the latter Court, by section 539, can try certain indictable offences; but by sub-section 3 of section 784, offences which come under sections 787 and 788 are not triable under section 785; and the offence here charged is punishable under section 788. I have referred to this section 785 because Mr. *Belyea* contended that the effect of it was in fact to give the accused the right of consent. It does not do so, it deals with offences triable at Quarter Sessions, excepting those offences which are dealt with by sections 787 and 788. He further argued that this offence was only triable under Part LV.,

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of the Code, which is headed Summary Trial of Indictable Offences, and was not triable under Part LVIII., which is called Summary Convictions. These two jurisdictions are quite distinct, and section 144 gives the Magistrates a summary jurisdiction and limits the penalty to six months' imprisonment or $100.00 fine. When the accused is tried under Part LV., the punishment is different, and he can be both imprisoned and fined.

Mr. *Belyea* relied on *The Queen* v. *Crossen* (1899), 3 C.C.C. 153, where the Appeal Court of Manitoba held in a similar case that the accused could only be tried under section 786, notwithstanding the provisions of section 144. No reasons are given for this judgment and although the Court giving this judgment is entitled to the greatest respect, yet until I have some reasons given for the views there adopted, I hesitate to follow it. To do so would be to ignore the language of section 144, to which, in my opinion, full effect can be given. Thus the accused can be tried summarily by the Magistrate under the summary conviction clauses of the Code, or he can be tried before a Magistrate as for an indictable offence. It is to be noted that sub-section (*e*) of section 783 includes in the definition of the offence other charges than that of resisting or wilfully obstructing a peace officer, and which are not included in section 144.

Judgment.

Mr. *Belyea* contended further that a Magistrate was bound to inform the accused of the exact sections of the Code under which the proceedings were taken. It happens that the evidence sometimes will sustain a charge under one section and not under another. If the information is laid under a particular section then the offence under that section has to be proved; but when it deals with an offence which may fall under one or more sections, or under the Common Law, then the conviction has to be looked to.

I think the rule should be refused, but I give no costs.

*Rule refused.*

## CAMPBELL v. UNITED CANNERIES.

McColl, C.J.

1901.

June 25.

CAMPBELL v. UNITED CANNERIES

*Revenue tax—Canners—Tackle furnished fishermen—Whether canners liable for revenue tax—R.S.B.C. 1897, Cap. 167, and B.C. Stat. 1899, Cap. 66.*

Where canners furnish fishermen with fishing apparatus, but there is no agreement binding the fishermen to sell their catch to the canners, the latter are not liable for the revenue tax in respect of such fishermen.

APPEAL by defendants to the County Court from an order made by R. A. Anderson, Stipendiary Magistrate, under the Revenue Tax Act, whereby the defendants were ordered to pay Colin S. Campbell, a Provincial Constable, the sum of $1,800.00 and $3.50 costs.

Statement.

*Martin, K.C.*, for the appellants.
*Bowser, K.C.*, for the Crown.

25th June, 1901.

McColl, C.J.: So far as appears by the evidence given before me, there was no agreement or arrangement between the appellants and any of the persons in respect of whom the revenue tax is claimed for the supply of any fish. On the contrary it was sworn distinctly that the boats and nets obtained by these persons from the appellants were sold outright at the time of delivery though not then paid for, and that although the appellants hoped to have the indebtedness thus incurred paid by the sale to them of fish to be caught by means of the apparatus so bought, yet the purchasers remained at perfect liberty to dispose of their entire catch if they thought fit.

Judgment.

It was urged by counsel for the respondent that such a transaction was so one-sided that I ought to find an implied agreement on the part of the purchasers to supply enough fish, if caught, to wipe out the indebtedness; and certain circumstances, as that the persons occupied, without rent, cabins owned by the appellants, were relied upon in support. There being no conflict upon the evidence, I cannot disregard the positive testimony given.

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The recent history of the canning industry on the Fraser River is common knowledge and need not be discussed here, but it affords reasons why the canners may perhaps think it expedient to deal with some of the fishermen in this way, which, indeed, was stated to be a practice common among the canners on the Fraser. Even if the practice was adopted to avoid coming under the Act, of which there was no evidence, nor was this even suggested, the sole question I have to determine would still remain, are the appellants, in the circumstances mentioned, within the Act? The answer depends upon the construction of R.S.B.C. 1897, Cap. 167, Sec. 2, Sub-Sec. 4, as amended by 62 Vict., Cap. 66, Sec. 2.

The former provides for (1.) the furnishing of a boat, etc., by a canner to a fisherman or other person in return for a portion of the fish to be caught in which case the parties take the chance of the catch being large or small or an average one; and (2.) an agreement for the sale to the canner of all or a portion of the fish at a certain price in consideration of the furnishing of the boat, etc., when the price of the fish is, of course, set off against the indebtedness of the fisherman or other person. The amendment extends the liability of the canner to persons employed by him indirectly through a contractor for labour.

It was strongly urged that the words "or in connection with his business" make the canner liable in the circumstances stated whenever the fish or a portion of them are afterwards sold to him; but, in my judgment, the words mean some relationship between the parties entitling the canner to share in the fish caught upon some terms. Here any benefit he may derive depends upon the honesty or good will of the fisherman or his view of what is best for his own future advantage.

Judgment.

The contention is too wide for it would make the canner liable for the tax payable by all persons who share in the work of catching any fish bought by the canner. The mere circumstance that the fisherman bought some of the apparatus from the canner without paying for it cannot in reason make any distinction. The appeal is allowed with costs.

*Appeal allowed.*

## OSLER v. MOORE.

DRAKE, J.

1901.

May 30.

OSLER v. MOORE

*Broker—Introduction of purchaser—Subsequent sale through other agent—Commission.*

Where a broker, on the instruction of the vendor, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent.

THIS was an action for commission on the sale of mineral claims. The trial took place at Nelson on 22nd and 23rd May, 1901, before DRAKE, J.

*R. M. Macdonald*, for plaintiff.

*W. A. Macdonald, K.C.*, for defendant.

30th May, 1901.

DRAKE, J.: The plaintiff is a broker, and the defendant instructed him to find a purchaser for the California Group which consisted of two claims on Toad Mountain. There was no price fixed, the plaintiff was to send any prospective purchaser to the defendant. The commission, according to the plaintiff, was to be ten per cent., but this the defendant denied. The evidence, however, satisfied me that ten per cent. was the usual and regular commission paid to brokers, when a sale was made through their intervention. The witnesses called to speak as to the commission stated that in all cases where the purchase was made partly in cash and partly in shares, or entirely in shares, the broker took his commission in shares and cash as the case might be at the rate of ten per cent.

Judgment.

The plaintiff had these claims on his hands in the Fall of 1897, and no revocation of his authority was ever made. The plaintiff sent and accompanied several persons to the claims but failed to find a purchaser until he introduced the claims to Mr. Hugh Sutherland, who examined the ground and was introduced to the defendant as a probable purchaser. The defendant had other claims in the neighbourhood. Eventually the defendant agreed with Mr. Sutherland for an option on the California and Boston,

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and also on the Deadwood. This option was contained in two separate agreements: the term was for six months. The option was $10,000.00 on the California and Boston and $20,000.00 on the Deadwood, $2,000.00 being paid in cash. The option was not completed, but the $2,000.00 was not repaid, and the defendant paid the plaintiff $100.00 and promised him another $100.00, but told him that if he had to repay the $2,000.00 the plaintiff would have to repay the $100.00. The promised $100.00 was not paid. Subsequently Mr. Sutherland renewed the negotiations through a Mr. Kydd, and the purchase was completed for $52,000.00, the defendant giving credit for the $2,000.00 cash received, and the remaining $50,000.00 was paid in shares. The evidence as to how the purchase money was distributed between the California Group and the Deadwood is not very clear, as the defendant refused to produce the documents relating to the sale, alleging they were in Mr. Kydd's hands; but there is evidence that at least $10,000.00 was paid for the California Group. The defendants contend that the plaintiff is entitled to no commission as it was through Mr. Kydd's agency that the final deal was closed. The cases bearing on the subject of agency are somewhat conflicting. In *Cunard et al* v. *Van Oppen* (1859), 1 F. & F. 716, the test there applied seems to be, was the purchaser found through the agent's introduction; and in *Green* v. *Bartlett* (1863), 32 L.J., C.P. 261, if the relation of buyer and seller was brought about by the act of the agent, the agent is entitled to commission, even though the sale was not actually carried out by him; and Mr. Justice A. L. Smith, adopted this definition in *Oetzmann and Co.* v. *Emmott* (1887), 4 T.L.R. 10.

Judgment.

Again, in *Burton* v. *Hughes* (1884), 1 T.L.R. 207, there the agent offered a house to Mr. Howes; the price he thought too high, and it was placed in another agent's hands, who advertised it for sale. A solicitor seeing the advertisement wrote to Mr. Howes who eventually purchased at a reduced rate. The owner paid commission to the second agent. The learned Judge held that the plaintiff in finding a purchaser had done all he undertook to do, and held him entitled to his commission.

Here the introduction undoubtedly took place through the plaintiff's agency, and the cash that was paid formed portion of

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the eventual purchase price. It may be that the vendor may have to pay two commissions, but that is through his own fault in not providing against such a contingency.

It is to be remarked that if a broker introducing an eventual purchaser should be excluded from his commission by reason of the vendor arranging with a friend to charge a commission, and should then set up such an arrangement in order to defeat the broker's claim, it would lead to consequences very prejudicial to honest and straightforward dealing. I therefore give judgment for the plaintiff for $1,000.00, to be reduced to $200.00 upon the defendant delivering to the plaintiff within one month 800 shares out of the 50,000 shares for which the California Group and the Deadwood were sold; amount of the counter-claim to be deducted from the $200.00. Costs of the action to be paid by the defendant—no costs of counter-claim.

Judgment.

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## COOKSLEY v. NAKASHIBA.

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COOKSLEY v. NAKASHIBA

*Summary Convictions Act—Appeal—Case stated—Transmitting case to District Registry.*

The provision in section 87 of the Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

THIS was an appeal, by way of case stated, from a conviction made on the 18th day of June, 1901, under the Immigration Act, B.C. Stat. 1900, Cap. 11, by George Pittendrigh, Stipendiary Magistrate sitting at New Westminster.

Statement.

The magistrate signed a case stated on the 27th of June, and accepted appellant's solicitor's undertaking for costs in lieu of recognizance provided by section 87 of the Summary Convictions Act. It appeared also that the appellant had not filed the case in the New Westminster Registry, as provided for by section 86

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of the Summary Convictions Act, but he did, however, on the 15th of July, 1901, obtain leave from MARTIN, J., to file the case in the Vancouver Registry, which was done.

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*Wilson, K.C.* (*Bloomfield*, with him): The appellant has not complied with the conditions precedent to the appeal and this Court therefore has no jurisdiction: see *Morgan* v. *Edwards* (1860), 29 L.J., M.C. 108.

Argument.

He was stopped and the Court called on

*J.A. Russell, contra*: Leave has been given and an order entered transmitting the case and it has been filed in the Vancouver Registry as ordered. The order also fixes the time for hearing the argument on this appeal.

17th July, 1901.

Judgment.

MARTIN, J.: The transmission of the case to the proper Registry as required by section 86 is a condition precedent to the jurisdiction conferred by sections 90 and 92, and since that provision of section 86 has not been complied with I cannot entertain the appeal: *Morgan* v. *Edwards* is in point.

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WALKEM, J.
1901.
April 15.

## *IN RE* FONG YUK AND THE CHINESE IMMIGRATION ACT.

IN RE FONG YUK

*Chinese Immigration Act, 63 & 64 Vict., Cap. 32—Prostitute—Evidence—Affidavits of Chinamen in English language.*

Evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in *habeas corpus* proceedings directed against the Collector of Customs who is detaining such immigrant for deportation to China on the ground that she is a prostitute.

An affidavit drawn up in a language not understood by the deponent, may be read in Court if it appears from the jurat that it was first read over and interpreted to deponent.

*In re Ah Gway* (1893), 2 B.C. 343, not followed.

Statement.

ORDER *nisi* to shew cause why a writ of *habeas corpus* should not issue directed to A. R. Milne, Collector of Customs for the

Port of Victoria, to bring up the body of the said Fong Yuk forthwith to undergo and receive all and singular such matters and things as shall then be considered of concerning her in this behalf. The facts appear in the judgment.

On the return before WALKEM, J., on 6th April.

*Alexis Martin*, for the Collector, proposed to put in affidavits shewing that the house in which Fong Yuk formerly lived in Victoria was a house of ill-fame. He cited *Regina* v. *McNamara* (1891), 20 Ont. 489 and cases there cited.

*Barnard*, in support of the rule, objected, contending that evidence of general reputation was not admissible. He cited American and English Encyclopædia of Law, Vol. 9, pp. 531-2.

The evidence was admitted and judgment was reserved.

15th April, 1901.

WALKEM, J.: In this case, I issued an order *nisi*, to be served on the Collector of Customs, calling upon him to shew cause why a writ of *habeas corpus* should not issue in favour of Fong Yuk, a Chinese woman, for the purpose of having it decided whether she should be released from custody, or, on the other hand, detained, and deported to China under the provisions of the Chinese Immigration Act, 1900. By section 12 of the Act—

"No controller or other officer charged with the duty of assisting in carrying the provisions of this Act into effect shall grant a permit allowing to land from any vessel, nor shall any conductor or other person in charge of any vehicle bring into Canada, either as an immigrant, or as an exempt, or as in transit, any person of Chinese origin who is (amongst others)

"(*d.*) A prostitute or (person) living on the prostitution of others."

Judgment.

The woman was a passenger by the Empress of Japan that lately arrived here from Hongkong, and, when questioned by the customs authorities, through their interpreter, Lee Mong Kow, admitted that before leaving this Province for China, as she did in August last, she had been leading the life of a prostitute. As Lee Mong Kow's evidence as to an interview that he had had with Mr. *Wootton*, the woman's solicitor, has been proved to be untrue, I am asked to regard all his evidence as untrust-

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worthy. But I must give credit to that portion of it which refers to the admission made by the woman, as it was corroborated by Miss Morgan, who was present, and who has satisfied me that her knowledge of the Chinese language was sufficient to enable her to fully understand all that passed between the interpreter and Fong Yuk. Miss Morgan is connected with a local philanthropic institution which has been established for the purpose of reclaiming and reforming fallen girls and women of the Chinese race; and I think it is only due to her, and the institution, to say that her conduct in this matter, as well as her evidence, which was given under very trying circumstances, is deserving of great praise.

Fong Yuk now states that she never made such an admission, and, more than this, could not have made it, as she had led a proper life here with one Low Wing, to whom, as she states, she had been married in Canton before she came here. The evidence of both of them is so very contradictory on material points as to be unworthy of belief, and it convinces me that they were never married. Independently of this, the woman was consigned on the steamship's manifest, very much like a human chattel, and, not as a married, but as a single, woman to a Chinese firm here, and that firm has hitherto abstained from making any claim for her; and, moreover, the reputed husband has made none. (Here, the learned Judge pointed out the contradictory statements made by Low Wing and the woman, as to their alleged marriage in China.)

Judgment.

After their alleged marriage Low Wing left for Victoria, and was a year here before the woman arrived in the city. This was about eight years ago. They both say—and the evidence is overwhelmingly to the contrary—that they lived together as man and wife whilst here up to the time that Fong Yuk left for China in August last. They, moreover, state that the last house they lived in was No. 167 Government Street. A good deal of evidence of a general character has been given to the effect that the house had the reputation of being one of ill-fame. It has been objected to, but as the case before me is not a case against the woman for keeping a house of that sort, I consider that it is admissible, as evidence of the same class was admitted, under

somewhat similar circumstances, by Lord Hardwicke, in *Clark v. Periam* (1742), 2 Atk. 339. His Lordship's decision in that respect seems never to have been questioned, although it was given over one hundred and sixty years ago.

Another circumstance which leads me to believe that Low Wing and the woman were never married is, that the woman was married to Lum Ton in Victoria in June, 1895, and cohabited with him for a considerable time, and until, as he says, she drove him away. She denies this; but a marriage certificate, dated the 20th of June, 1895, signed by the Rev. Mr. Cleaver, as officiating minister, is in evidence, and shews that her statement is untrue. Her name is entered in the certificate as Ah Sing—one of four names which she seems to have adopted. Lum Ton has identified the certificate, and he states that he lived with her for a considerable time after their marriage, and only left her as she insisted upon his doing so. While he was living with her he only saw Low Wing once, and that was, momentarily, at the door of his house.

There is no occasion to make any order quashing the writ of *habeas corpus* as it has not been issued; but the order *nisi* must be discharged. The result is that the woman must remain, as at present, in the custody of the customs authorities for the purpose of deportation to China.

Judgment.

The statute is silent as to costs; and as it makes a Chinese prostitute's entry into Canada a criminal offence punishable by imprisonment, as well as deportation, the contention that it falls within the Judicature Rules in regard to costs cannot be sustained.

This is, as I am informed, the first case of the kind that has come before the Court under the recent statute.

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During the hearing his Lordship refused to follow *In re Ah Gway* (1893), 2 B.C. 343, and allowed to be read affidavits of Chinamen which were in the English language, but which as was stated in the jurat had been read over and explained to the deponents in the Chinese language.

MARTIN, D.L.J.A.

1901.

April 16.

SMITH v. EMPRESS OF JAPAN

# IN ADMIRALTY.

## SMITH *ET AL* v. THE STEAMSHIP EMPRESS OF JAPAN.

*Maritime law—Collision—Barque approached by steamer—Manoeuvres.*

Where a steamer proceeding on a course north seventy-two degrees west, and a barque sailing on the starboard tack within about seven points of the wind whose direction is east north-east, the barque is not an overtaken ship within the meaning of the regulations.

ACTION of damage by collision tried at Victoria on 11th, 12th, 13th and 15th April, 1901, before MARTIN, Deputy Local Judge in Admiralty with Lieut. Montague L. Hulton,* R.N., and Lieut. James D. D. Stewart,† R.N., as assessors. The plaintiffs were the owners of the barque Abbey Palmer. The remaining facts appear in the judgment.

Statement.

*W. J. Taylor, K.C.*, for plaintiffs.

*Davis, K.C.* (*Helmcken, K.C.*, and *Luxton*, with him), for defendants.

16th April, 1901.

MARTIN, D.L.J.A.: From the evidence I find the following to be the material facts of this case: A few minutes after three o'clock on the morning of the 6th of November, 1900, a collision occurred, some ten miles from Cape Beale, between the barque Abbey Palmer and the steamship Empress of Japan. At that time the barque's course was close-hauled on the starboard tack sailing within six to seven points of the wind, and the direction of the wind was east north-east true. The course of the steamship when the ships first sighted each other was north 72 degrees west true, and her speed about 14 knots. The weather was comparatively clear, moon nearly full, but obscured by passing clouds. It is admitted that the barque was shewing her side lights according to the regulations. But it is contended that she was

Judgment.

* First Lieut. H.M.S. "Amphion."

† Navigating Lieut. H.M.S. "Amphion."

an overtaken vessel, and consequently should have shewn from her stern a white light or flare-up light, as required by Article 10; and on the assumption that it was the duty of the barque to shew a stern light (which admittedly she did not) it was strongly urged that the barque, by reason of that breach of the regulations, could not in any event recover—*The Khedive* (1880), 5 App. Cas. 876; *The Main* (1886), 11 P.D. 132.

The question as to what an overtaken ship is recently came before this Court in the case of *The Inchmaree Steamship Co.* v. *The Steamship Astrid* (1898), 6 Exch. 178; and in appeal (1899), 6 Exch. 218, and the definition of Lord Esher in *The Franconia* (1876), 2 P.D. 8, approved of, which definition has been adopted in terms in Article 24:

"Art. 24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

"Every vessel coming up with another vessel from any direction more than two points abaft her beam, *i.e.*, in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

Judgment.

"As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way."

Under this rule I must be satisfied that the Empress was in such a position in reference to the barque that the former was unable to see either of the side-lights of the latter. The barque kept her course, as was her duty—*Brine* v. *The Steamship Tiber* (1900), 6 Exch. 410; Article 21—and so far from being satisfied that the steamer could not have seen either of the barque's side-lights, I am convinced that the green light of the barque should have been visible to the Empress.

My attention has been called to what Lord Esher says in *The*

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1901.

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*Main*, p. 130, "We must lay down that where the leading ship has the opportunity of seeing where the other ship is, and ought to see that the hindmost vessel is going faster than she is, and is approaching from any direction in such a position that she (the hindmost ship) cannot see her lights, the obligation arises to shew a stern light." All I can say is that the facts herein do not bring this case within that language, despite the ingenious and able argument of the defendants' counsel. I may add, as a matter of precaution, in case it might be considered that the question of overtaken ship or not is one on which the views of the assessors should be stated, that they are of the same opinion as myself.

I am advised by the assessors that as a question of good seamanship there was no manoeuvre which the barque should or could have executed to avoid the collision.

Under such circumstances it was the duty of the steamer to conform to the following Articles:

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Judgment.

But instead of so doing a grave error in judgment was made by those in command of the steamer, and I am advised by the assessors that it was a wrong manoeuvre on the part of the second officer to port his helm and seek to cross ahead of the barque; and assuming that he saw no lights he should have eased his speed to ascertain the nature of the object seen, and after having sighted the green light he ought then to have starboarded his helm, and if necessary reversed the port screw, and so passed under the barque's stern.

Further, assuming that the captain had only a minute in which to act after he came on the bridge, the risk of collision might even then have been very considerably diminished, if not avoided, had he reversed both engines instead of the starboard one only.

I may say that the advice of the assessors above given coincides with my own opinion of the matter.

Much was said, naturally, as to the look-out kept on the Empress, and it is impossible in my opinion to come to any other conclusion than that it was very far from being of that vigilant character one would expect to find on such a vessel. The evidence of Daly has been specially attacked, but at least the defendants cannot quarrel with his statement on his examination *de bene esse* at the time when he was their own witness, and his evidence then was that he sighted and reported the barque when she was about three and a quarter miles off.

I feel bound to say that so far as the captain and second and fourth officers of the Empress are concerned, their lack of exact knowledge in regard to the handling of their ship came as a surprise to the Court, nor did their evidence as a whole in other respects impress us favourably, particularly that of the captain and second officer Davidson. The impression left on my mind is that something which would throw more light on this accident has not been forthcoming.

No useful object would be accomplished by here analyzing the various more or less conflicting statements of a number of witnesses, and I shall content myself with saying that I find no difficulty in accepting the barque's account of the cause of the collision as being straightforward and consistent, regarding that of the steamer as lacking those elements which carry conviction.

Judgment.

Taking the evidence as a whole I find that the barque was in no way to blame, and I attribute the cause of the accident to the lack of a proper look-out on the Empress and to her executing the wrong manoeuvre above mentioned.

It follows that judgment should be entered up in favour of the plaintiffs with costs, and the counter-claim dismissed with costs; there will be a reference to the Registrar, assisted by merchants, to assess damages.

FULL COURT
At Victoria.

1901.

June 19.

HICKINGBOTTOM
v.
JORDAN

## HICKINGBOTTOM v. JORDAN.

*County Court—Practice—Notice of trial—Power of Judge to abridge.*

A County Court Judge has no jurisdiction to abridge the six clear days notice of trial required to be given by section 92 of the County Courts Act.

Statement.

APPEAL from the order of P. McL. FORIN, Deputy Judge of the County Court of Kootenay, whereby he changed the day for the trial of the action from June 20th (the day fixed by the Registrar of the Court and notice whereof was duly given to the appellant), and appointed June 1st. The facts appear in the following judgment of the learned Deputy County Court Judge delivered 31st May, but the order was made on 29th May.

Judgment.

This was an application by the defendant herein to fix a day for the trial of this action and for directions. In support of said application was read the affidavit of the defendant duly sworn to on the 22nd of May, 1901. The facts of the matter as set forth in said affidavit are briefly as follows: The defendant herein was served with the plaint and summons herein on the 8th of May instant, at which time he was also placed under arrest on an order of this Court under the provisions of the "Arrest and Imprisonment for Debt Act," being Chapter 10, R.S.B.C. 1897. The said defendant duly paid into Court the amount of the debt sued for and $100.00 additional to answer costs and then applied to the plaintiff for his consent to an early trial of this matter, I having consented to hear same. The plaintiff refused to consent to an earlier hearing than the 20th of June, prox., which is one of the sittings of the Court appointed by his Honour, Judge FORIN, and then this application was brought. The defendant alleged that he was detained here at great expense and inconvenience, as he had sold out his business on the 1st of May, and under the circumstances and as in answer to these statements of the defendant there was but the verbal statement of counsel for the plaintiff that it was not con-

venient for him to proceed at an earlier date than the 20th of June, prox., and under the authority given by section 60 of the County Courts Act, being Chapter 52, R.S.B.C. 1897. and by Order I., r. 1, of the County Court Rules, 1885, I made order herein fixing the trial of this action for Saturday, June 1st, 1901.

The plaintiff appealed to the Full Court and the appeal was argued at Victoria on 19th June, 1901, before WALKEM, IRVING and MARTIN, JJ.

*Duff, K.C.*, for appellant: In arriving at his decision the Judge erred in thinking the onus was on us, whereas the onus was on the other side to shew it was absolutely necessary for them and that it would do us no harm. He had no power to make this order at this time. See Section 92 of the County Courts Act which in effect gives the defendant six days to prepare for trial, and there is no section allowing for enlargement or abridgement of time. As to Order XXXII., r. 13, the rules must not be inconsistent with the Act.

*A. E. McPhillips, K.C.*, for respondent: The plaintiff filed no materials to shew that he would be prejudiced or inconvenienced in any way—he only protested. The Judge had jurisdiction under section 60 of the Act. The plaintiff had the defendant imprisoned and puts him to the expense of waiting in Rossland till the 20th of June, and the only ground he shews against an earlier trial is that he doesn't want it earlier. He cited Order I., r. 1; *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247; *Ebbs* v. *Boulnois* (1875), 10 Chy. App. 479; *Macdougall* v. *Paterson* (1851), 11 C. B. 755 at p. 773; *The River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743; *Churchill* v. *Crease* (1828), 5 Bing. 177; *In re Bethlem Hospital* (1873), L.R. 19 Eq. 457; *Stone* v. *The Mayor, Aldermen, and Burgesses of Yeovil* (1876), 1 C.P.D. 691; *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Co.* (1882), 9 Q.B.D. 648 at p. 660, is an authority to shew that a rational and beneficial meaning must be given to the sections. He cited also *Dryden* v. *The Overseers of Putney* (1876), 1 Ex. D. 223 at p. 232.

Argument.

*Per curiam:* The learned Judge had no jurisdiction to

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abridge the time, six clear days, required to be given by section 92 of the Act. The appeal is allowed with costs.

*Appeal allowed.*

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MARTIN, J. 1901. July 30.

BENTLEY v. BOTSFORD

## BENTLEY *ET AL* v. BOTSFORD AND MACQUILLAN.

*Mining law—Certificate of Improvements—Application for by co-owner.*

A part owner of a mineral claim may apply for a certificate of improvements under section 36 of the Mineral Act.

THIS was an action purported to be brought as an adverse action under section 37 of the Mineral Act. For the purposes of this report all the facts necessary to be stated appear in the judgment.

The trial took place at Vancouver before MARTIN, J., on 19th July, 1901.

*Martin, K.C.*, and *E. J. Deacon*, for plaintiffs.

*Sir C. H. Tupper, K.C.*, and *Peters, K.C.*, for defendant Botsford.

*Duncan*, for defendant Macquillan.

30th July, 1901.

MARTIN, J.: The remaining point herein is, can a part owner of a mineral claim apply for a certificate of improvements under section 36 of the Mineral Act. That depends on the language of the statute, which provides:

" Whenever the lawful holder of a mineral claim shall have complied with the following requirements, . . . . he shall be entitled to receive from the Gold Commissioner a certificate of improvements in respect of such claim. . . . ."

Judgment.

It is contended by the plaintiffs (the owners of three-eighths of the claim in question, the defendants being the owners of five-eights thereof) that the general effect of sections 36 and 37 is to shew that the statute contemplates all the interests being

represented in the application. The best way to arrive at what is contemplated by the statute is to weigh the language of the section in question in the light of the interpretation placed upon it by the Act itself.

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For the purposes of this case the meaning of "lawful holder" has been and may properly be taken to be equivalent to "owner," or "owners," the singular including the plural.

"A mineral claim," it is declared by section 2, "shall mean the personal right of property or interest in any mine;" and "'mine' shall mean any land in which any vein or lode or rock in place shall be mined for gold or other minerals, precious or base, except coal."

Applying the above interpretations to the language in question it appears to me to be clear that the section must in its widest sense be construed as reading "Whenever the lawful holder (or owner) of an interest in any mineral claim, etc., etc." Such a construction would include the defendants and since the right to apply is thus conferred in plain language it would require an equally plain declaration of intention to take that right away.

In coming to this conclusion I have not lost sight of the difficulties which may arise as suggested by plaintiffs' counsel, but the apprehension of difficulties does not justify my preventing the defendants from resorting to the exercise of statutory rights.

Judgment.

Holding this view it becomes unnecessary for me to consider the objection raised by defendants' counsel to this action not being maintainable as an adverse action under section 37.

Judgment will be entered in favour of the defendants with costs.

*Judgment for defendants.*

WALKEM, J.

1898.

April 10.

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1899.

Jan. 9.

CLARK v. HANEY AND DUNLOP.

CLARK v. HANEY AND DUNLOP

*Mining law—Adverse proceedings—Nature of—What plaintiff must shew.*

Adverse proceedings are essentially ejectment, not trespass actions, and the plaintiff must succeed by the strength of his own title, and it is part of the plaintiff's case to affirmatively shew due location of his claim.

ACTION of adverse claim tried before WALKEM, J., at Nelson on 27th July, 1897. The facts appear in the judgment.

*Davis, Q.C., Bodwell* and *Bowes*, for plaintiff.

*Wilson, Q.C.*, and *John Elliot*, for defendants.

10th April, 1898.

WALKEM, J.: The plaintiff has brought these adverse proceedings to establish his right to the possession of certain mineral land which is included in his location named the Olivette and for which as the Legal Tender, the defendant Haney is applying for a Crown grant under the mineral laws in force prior to 1891, the Legal Tender having been located under the Act of 1888. Prior to the location and record of the Legal Tender the same ground had been located and recorded, *viz.*, in August, 1890, by one Thomas Dunlop, who died four months afterwards. His brother became administrator to his estate, and has been made improperly so, as I think, a defendant herein, for he has not applied for a Crown grant. However, he has put in no defence or disclaimer.

Judgment.

The present proceedings are in the form of trespass, instead of ejectment, *e.g.*, "the defendants have broken into and are trespassing upon the said Violet (amended to Olivette) mineral claim ground and have committed waste therein." Trespass is not the proper action for testing a question of title. Mere possession is sufficient to support trespass. A tenant, for instance, although he is not at liberty to dispute his landlord's title, may maintain trespass against him.

"Trespass lies to injury either to real or personal property or to the person accompanied *with immediate violence*, but where

the plaintiff seeks to recover land itself, he must do so by ejectment." (Smith's Action at Law, 45 and 414, and see Stephen on Pleading, 7th Ed.)

Since the Judicature Acts, ejectment has been abolished and an action for the possession of land substituted for it, but the change is merely one of nomenclature. In the United States "the distinct names of various actions have been abolished, but not the distinctions between them; the term 'ejectment' has its specific application as formerly," and, "it is the proper to bring and the one, in fact, generally brought in support of an adverse claim." (Morrisson's Mining Rights, 250; and *Becker* v. *Pugh* (1887), 13 Pac. 906.)

The exception is where the plaintiff is in possession, which is not this case, when his proceedings must be for equitable relief (*Book et al* v. *Justice Min. Co.* (1893), 58 Fed. Rep. 827.) I mention these American authorities because our system of adverse proceedings is borrowed to a certain extent from the United States.

The alleged trespass has not been proved; nor has it been shewn that the location of the Olivette is a valid one. The plaintiff bought the Olivette from one Enslow who located it on the 26th and recorded it on the 27th of February, 1895. The location was therefore made under section 4 of the Mineral Act Amendment Act of 1894. By that section "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 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 the 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.'

Judgment.

"All the particulars required to be put on No. 1 post shall be

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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.

"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.'"

A "legal post" as mentioned in the above section, is defined by the Mineral Act of 1891, to be "a stake standing not less than four feet above the ground, and squared or faced on four sides for at least one foot from the top, and each side so squared or faced shall measure at least four inches on its face so far as squared or faced, and any stump or tree cut off and squared or faced to the above height and size."

This definition of a legal post has been repeated in the successive Mineral Acts of 1893, 1894 and 1896. It was first adopted, as to the height of post and its dimensions at the top as far back as 1867, or over thirty years ago. (See Revised Laws No. 90, Sec. 56.) All this tends to shew that the Legislature meant that it should be strictly complied with. The expressions "not less than" and "at least" must therefore be given their ordinary meaning.

Judgment.

No evidence was given on behalf of the plaintiff that he had any boundary posts or discovery post or a defined location line, although the validity of his location in all these respects is specifically denied in the defendants' pleadings. Except a plaintiff's case is admitted, he must prove it or fail. It is no answer in a question of title, to say, as has been said here, that the defendant's pleadings shew that he too has a defective title. Assuming in favour of the plaintiff that this action is in the nature of ejectment he could only succeed by the strength of his own title.

What little evidence there is as to the location has been produced by the defendants' counsel. It goes to shew that post No.

2 is on the Le Roi Company's ground; and that instead of its top being at least four inches square for a foot downwards it is only three and a half inches on three sides and three and a quarter inches on the fourth, and, in each case, for only four inches downwards. No evidence has been given as to the height of this or of No. 1 post or of the discovery post. It has, therefore, not been shewn that any one of them is a legal post. Moreover, the notice on post No. 1 does not comply with the terms of the statute, as it omits to state the number of feet to the right and to the left of the location line and also omits the words "Initial Post."

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It is, consequently, impossible for the Court to grant that part of the plaintiff's prayer for relief which asks, "that it may be declared that the Olivette mineral claim is the only valid and existing location on the ground." For these, and the reasons already given, the action must be dismissed with costs.

Judgment.

The plaintiff appealed to the Full Court and the appeal was argued at Victoria on 7th November, 1898, before McCOLL, C.J., IRVING and MARTIN, JJ.

*Davis, Q.C.* (*Duff*, with him), for appellant.
*Wilson, Q.C.*, for respondent.

Judgment was reserved and on 9th January, 1899, judgment (oral) was given dismissing the appeal.

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NOTE.—See now Statutes 1898, Cap. 33, Sec. 11.

IRVING, J.

1900.

Nov. 23.

FULL COURT AtVancouver.

1901.

Aug. 8.

NIGHTINGALE v. UNION COLLIERY CO.

## NIGHTINGALE v. UNION COLLIERY CO.

*Negligence—Contractor injured on defendant's train—Inconclusive findings of jury.*

The plaintiff's intestate had a contract with the defendant Company to repair a bridge, and the jury found *inter alia*, that he went thither on such business on a coal train without any ticket, but with the consent of the officer in charge, and that the latter had no authority, unless by custom, to allow the deceased to travel on the train.

*Held*, by the Full Court, reversing IRVING, J. (DRAKE, J., dissenting), that the findings were inconclusive and that there should be a new trial.

NIGHTINGALE v. UNION COLLIERY CO.

ACTION by Margaret Nightingale, widow and administratrix of Richard Nightingale for damages for his death alleged to have been caused by defendants' negligence.

The defendants own and work a colliery in Vancouver's Island, and in connection therewith they operate a short line of railway mainly used for transport of their coal. On two days of the week they run a passenger train. The plaintiff's husband had a contract with the defendant Company to do some work at the Trent River Bridge, and on the day in question instead of travelling by the passenger train he got on the engine of the coal train. He had no ticket and there were also on the engine (in addition to those in charge) two Japs and two women. The engine in use was a new one and although the engine previously used had a notice posted up on it that no one was allowed to ride on the locomotive or cars, this one had no such notice, but the engineer (Walker) had strict orders against allowing any one on the engine. The Company's officers and servants and other persons authorized by defendants' Manager used to ride on these coal trains and on two previous occasions Richard Nightingale rode on the engine, once at least with Mr. Little, the Manager. When the train reached the middle of the bridge, the bridge gave way and the train was precipitated into the valley underneath with the result that Richard Nightingale and others on the train were killed.

Statement.

The trial took place at Vancouver in June, 1900, before IRVING, J., and a special jury, who found the following verdict:

(1.) Were the defendants negligent in the matter of repairing, maintaining or inspecting the bridge or rolling stock? Yes.

(2.) Was the cause of the accident one which could have been detected if defendants had used ordinary care and skill? Yes.

(3.) Was the plaintiff at the time of his accident engaged on his own private business (*i.e.*, going to Nanaimo) or going to work on the Company's contract? That he was going to work on the Company's contract.

(4.) Was the contract into which he had entered one which required the personal doing of the work (in whole or in part) by himself, or was he at liberty to go or send some one else, as it suited him? It required his personal supervision but not necessarily his continual presence.

(5.) Are there any circumstances in the case from which a consent on the part of the defendants to carry the deceased as a passenger on their coal train can be implied when travelling in connection with their business? Yes.

(5*a*.) Did the defendants or the officer in charge of the coal train consent on this occasion to so carry the deceased? Yes, the officer in charge.

(6.) Had Walker charge of the train? Yes.

If yes, had he any authority to invite the deceased to travel as a passenger? No (unless by custom.)

Statement.

(7.) Are there any circumstances in the case from which a consent on the part of the defendants to carry the deceased as a passenger on their coal train can be implied, except when he was travelling in connection with the Company's business? No.

If yes, what are they?

(8.) Damages and how apportioned? $7,000.00.

To step-daughters, Emily (aged 17) and Mary (aged 15) $500.00 each; To son, Albert (aged 5) and daughter, Florence (aged 3) $2,000.00 each; and to plaintiff $2,000.00.

*Macdonell* and *Cutten*, for plaintiff.

*Pooley, Q.C.*, and *Luxton*, for defendant Company.

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NIGHTINGALE v. UNION COLLIERY CO.

23rd November, 1900.

IRVING, J.: I think judgment must be entered for the plaintiff on the findings of the jury.

The right to maintain this action does not depend on the plaintiff establishing any contractual relation It is sufficient that he was received or permitted by them to ride in their train along their line of railway. He was in fact a passenger, something more than a mere licensee (*Holmes* v. *The North Eastern Railway Company* (1869), L.R. 4 Ex. 254), and the fact that he was a passenger cast a duty on the defendants to carry him safely. To carry or attempt to carry their passengers over bridges which are dangerous is a misfeasance for which they are liable: *Foulkes* v. *The Metropolitan District Railway Company* (1879), 4 C.P.D. 267; (1880), 5 C.P.D. 157; *Austin* v. *The Great Western Railway Company* (1867), L.R. 2 Q.B. 442; *Jennings* v. *The Grand Trunk Railway Company* (1887), 15 A.R. 477.

This case differs from the two cases *Graham* v. *Toronto, Grey, and Bruce Railway Company* (1874), 23 U.C.C.P. 541 and *Sherman* v. *The Toronto, Grey, and Bruce Railway Company* (1874), 34 U.C.Q.B. 451, cited by plaintiff's counsel, because in those cases there was no evidence to shew that defendants consented to the use of the cars by the injured persons (p. 463), nor was there anything from which such a consent of the defendants could be presumed.

Judgment of IRVING, J.

Here we have a finding that in this case there were circumstances from which such consent could be implied when plaintiff was (as he in fact was on the day in question) travelling in connection with their business. The consent of the officer in charge of the train given under such conditions has quite a different effect from the permission of the engine driver in the *Toronto Grey, and Bruce* cases.

The case of *Stoker* v. *The Welland Railway* (1863), 13 U.C. C.P. 386, was a case of master and servant. *Lygo* v. *Newbold* (1854), 9 Ex. 302, turned to a certain extent on contributory negligence and there was absent from that case the consent of the master. *Burke* v. *B.C. Electric Railway Company, Ltd.* (1900), 7 B.C. 85, differs again; there was an element of fraud underlying the use of the defendants' premises; nor was

there in that case anything in the nature of a "trap."

The questions and answers may be open to criticism as were those submitted in *Smith* v. *Baker & Sons* (1891), A.C. 325, *per* Lord Watson at pp. 351 and 352, but these should receive a fair construction (p. 350) and should be examined in the light of the facts disclosed in evidence for the purpose of appreciating their effect (p. 350), *c.f. The Canada Central Railway Company* v. *McLaren* (1883), 8 A.R. 564 at p. 596, and with a due regard to the points discussed at the trial, *Manners* v. *Boulton* (1843), 6 U.C.Q.B., O.S. 668; *Eades* v. *McGregor* (1859), 8 U.C.C.P. 262; *The Grand Trunk Railway Company of Canada* v. *Rosenberger* (1884), 9 S.C.R. 325; *Nevill* v. *The Fine Arts and General Insurance Company, Limited* (1897), A.C. 76 and *Clifford* v. *Thames Iron Works and Shipbuilding Company* (1898), 1 Q.B. 314.

The Company appealed to the Full Court and the appeal was argued at Vancouver on 6th March, 1901, before McColl, C.J., Drake and Martin, JJ.

*Luxton*, for appellant: Nightingale was not a passenger nor an employee—he was stealing a ride. Invitation or consent must be shewn in order to make Company liable. There is no evidence of custom and it was not found as a fact—at the most all the custom shewn is as regards the employees of the Company. He cited *Lygo* v. *Newbold* (1854), 9 Ex. 302; *Austin* v. *The Great Western Railway Company* (1867), L.R. 2 Q.B. 442; *Holmes* v. *The North Eastern Railway Company* (1869), L.R. 4 Ex. 254; *The Great Northern Railway Company* v. *Harrison* (1854), 10 Ex. 376; *Graham* v. *Toronto, Grey, and Bruce Railway Company* (1874), 23 U.C.C.P. 541; *Sheerman* v. *The Toronto, Grey, and Bruce Railway Company* (1874), 34 U.C.Q.B. 451; *Canadian Pacific Railway Co.* v. *Johnson* (1890), 6 M.L.R., Q. B. 213; *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115 and *Degg* v. *The Midland Railway Company* (1857), 1 H. & N. 773. As to general custom and user see *The Grand Trunk Railway Company of Canada* v. *Anderson* (1898), 28 S.C.R. 541; *Blackmore* v. *The Toronto Street Railway Company* (1876), 38 U.C.Q.B. 172 and *Burke v. B. C. Electric Railway Co., Ltd.* (1900), 7

Argument.

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B.C. 85. A volunteer must take things as he finds them: *Gallagher* v. *Humphrey* (1862), 6 L.T.N.S. 684; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731. He cited also *Hammack* v. *White* (1862), 11 C.B. N.S. 588 *Eaton* v. *The Delaware, Lackawanna and Western Railroad Company* (1874), 57 N.Y. 382; *Files* v. *Boston & A. R. Co.* (1889), 21 N.E. 311; *Powers* v. *Boston & M. R. Co.* (1891), 26 N.E. 446 and *Virginia Midland R. Co.* v. *Roach*, 34 Am. & Eng. R. Cas. 271.

*Macdonell* (*W. C. Brown*, with him), for respondent, read from the evidence to shew that there was sufficient to warrant jury in finding as they did. He cited *Waterbury* v. *New York C. & H. R.R. Co.* (1883), 17 Fed. Rep. 671; *Nashville and Chattanooga R.R. Co* v. *Erwin* (1882), 3 Am. & Eng. R. Cas. 465; *Prince* v. *International and Great Northern R.R. Co.* (1885), 21 Am. & Eng. R. Cas. 152 and *Foulkes* v. *The Metropolitan District Railway Company* (1880), 5 C.P.D. 157. As to negligence, *res ipsa loquitur*.

*Luxton*, in reply, cited *Royal Mail Steam Packet Company* v. *George & Branday* (1900), A.C. 480.

*Cur. adv. vult.*

8th August, 1901.

Judgment of McCOLL, C.J.

McCOLL, C.J.: In my opinion the findings of the jury are inconclusive upon the question whether the notice forbidding riding on the engine was ever enforced and the further question whether such riding had not been actually permitted in such a conspicuous way and for so long a time before the accident as to make the defendants liable; and I think with some doubt, especially in view of the opinion of Mr. Justice DRAKE, that the plaintiff is not entitled to judgment as the case stands. I am in favour of granting a new trial, the costs of the appeal as well as of the first trial to abide the event.

Judgment of MARTIN, J.

MARTIN, J.: After a mature consideration of the facts of this case, and of the authorities cited, I have come to the conclusion that the findings of the jury are incomplete and inconclusive and, consequently, that the judgment entered in favour of the plaintiff cannot stand.

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With every disposition to reconcile the answers to the questions left to the jury, I am of the opinion that the sixth answer leaves the whole matter at large by finding that the "officer in charge" had no authority "unless by custom;" thus leaving still undetermined the crucial question as to whether there was any such custom or not; and there must, consequently, be a new trial.

DRAKE, J.: The defendants own and work a colliery in Vancouver's Island, and in connection therewith they operate a short line of railway mainly used for transport of their coal. On two days of the week they run a passenger train. The plaintiff's husband had a contract with the defendant Company to do some work at the Trent River Bridge, and on the day in question instead of travelling by the passenger train he got on to the engine of the coal train. He had no ticket, and the engine driver had no right to admit him on the engine. On the day in question there were two women and two Japs on the engine, according to the evidence of Grant, the fireman. Some engines had a notice posted up that no one was allowed to ride on the locomotive or coal cars; the engine in question had no such notice, but the engineer, Walker, had strict orders against allowing any one on the engine. The evidence further discloses the fact that the Company's servants used to ride on these coal trains, as well as the officers of the Company, and other persons who were authorized by Mr. Little, the defendants' Manager; and on two previous occasions the deceased rode on the engine, once at least with Mr. Little. The train reached the middle of the bridge, and an accident occurred by which the deceased and others on the train met their death. What caused the accident, whether the weakness of the bridge, or the engine leaving the rails, is not clear; but the jury found—[Setting out the verdict.]

Judgment of DRAKE, J.

The answers to (5*a*.) and (6.) shew that the officer in charge of the coal train, that is the engine driver, consented to carry the deceased, but he had no authority to do so unless by custom. Walker was the engine driver, and the effect of these answers is doubtful as the jury do not find as a fact that there was any custom, and do find he had no authority to invite the deceased to

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ride with him. And then the answer to (5.) is that there were circumstances from which it could be implied that the defendants consented to carry the deceased as a passenger when travelling in connection with their business. What those circumstances were is left in doubt. Travelling in connection with the Company's business is a different thing from travelling on their business; but from the evidence the work the deceased was employed in was to repair the bridge in question under a contract. The defendants were apparently under no obligation to find him transport while doing this work.

The findings on the first three questions submitted indicate that in the jury's opinion the accident was a preventable one, and therefore the defendants were guilty of negligence.

Even if the defendants were negligent that will not make them responsible in this action unless there was some duty imposed on them to carry safely, or unless there was some custom which was recognized by the Company. The engine driver had no express authority to invite or allow strangers to ride on the engine, and there apparently was no urgent necessity for the deceased so to travel, as he could have gone on the ordinary passenger train which left that day shortly after the coal train. It is urged that under the circumstances the deceased was a volunteer and not a passenger for whose safety a railway company is held responsible; and the same ground was urged on the motion for non-suit at the close of the plaintiff's case. The law implies a duty to a passenger to carry safely, and this is based on the fact that he is a passenger: see *Austin* v. *The Great Western Railway Company* (1867), L. R. 2 Q.B. 442. A passenger is not necessarily one who has entered into a contract to be carried for reward, but he is one who is lawfully on a train and not a trespasser.

Judgment of DRAKE, J.

It is not any servant of a railway company that can invite persons to travel on his employer's line, in order to make them responsible he must be acting within the scope of his authority. *Mitchell* v. *Crassweller* (1853), 13 C.B. 237 and *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476. An engine driver, though in charge of the train is not entitled to invite strangers to ride with him, particularly when he knew that in so doing he was acting contrary to the rules of the Company, but the jury find a

consent by the defendants to carry the deceased through their officer, Walker. The case of *Lygo* v. *Newbold* (1854), 9 Ex. 302, which the defendant relies on, shews that where a defendant sent his cart to carry goods for the plaintiff, she, with the consent of the defendant's servant, rode in the cart and was injured. She was not entitled to recover as the defendant had not contracted to carry her, and she rode in that cart without his authority; and in *Moffatt* v. *Bateman* (1869), L.R. 3 C.P. 115, it was held that where one drives another gratuitously he is not liable for injury to the person so driven unless there is such negligence as would render a gratuitous bailee liable; and in *Blackmore* v. *The Toronto Street Railway Company* (1876), 38 U.C.Q.B. 211, it was held that an injury sustained by a mere volunteer travelling on a street railway car without the license of the defendant gives no cause of action. See also *Holmes* v. *The North Eastern Railway Company* (1869), L.R. 4 Ex. 259, where Bramwell, B., says if the plaintiff had gone where he did by the mere license of the defendants he would have gone subject to all the risks of his going; and again in *Wright* v. *The London and North Western Railway Company* (1876), 1 Q.B.D. at p. 256, says it is settled that if a man's servant invites a friend as a mere volunteer to take part in a dangerous duty, and he meets with injury in the course of it, the master is not liable; and clearly Bramwell, B., in discussing the effect of *Holmes* v. *The North Eastern Railway Company, supra*, says that case decided that when a man is on a railway company's premises for the purposes of carrying into effect a contract of carriage and delivery, and gets the assent of the company to assist, the plaintiff is entitled to redress if injury ensues, as he is not a mere volunteer. In *Graham* v. *The Toronto, Grey, and Bruce Railway Company* (1874), 23 U.C.C.P. 541, it was held that when the plaintiff for his own convenience rode on a car with the consent of the engine driver or conductor, the defendants were not liable. The effect of these cases is that unless there is some duty cast upon the carrier to carry safely, or unless the person carried is on the train with the express or implied assent of the defendants, the carrier is not liable unless the injury was caused by such gross negligence as to be in itself an active wrong.

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There is evidence here that the engine driver on this occasion carried other persons on the engine than the deceased, and apparently his was not an exceptional case; and it is reasonably clear that it was not an unusual proceeding to do so. This practice apparently existed although contrary to the regulations, and there is some evidence in support of the fifth finding. Such being the case it can hardly be said that the deceased was a trespasser, or mere volunteer; and although the findings of the jury are rather difficult to reconcile, yet there is some evidence which will support them, and I think the appeal should be dismissed with costs.

*New trial ordered.*

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WALKEM, J. (In Chambers.)

1901.

May 4.

VANCOUVER AGENCY v. QUIGLEY.

VANCOUVER AGENCY v. QUIGLEY

*Practice—Special indorsement—Omission of words "Statement of Claim"—Order XIV.*

A special indorsement, in order to support a judgment under Order XIV., must be headed with the words "Statement of Claim."

SUMMONS for judgment under Order XIV.

*Bowser, K.C.*, for application.

*Creagh* (*Davis, Marshall & Macneill*), *contra*, took the preliminary objection that the writ was not specially indorsed in that the words "Statement of Claim" were omitted, and cited in support, *Cassidy & Co.* v. *M'Aloon* (1893), 32 L.R. Ir. 368.

WALKEM, J., held that the objection was fatal and dismissed the application with costs.

*Summons dismissed.*

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## RICHARDS v. BANK OF B. N. A.

MARTIN, J.

1901.

July 30.

RICHARDS v. BANK OF B. N. A.

*Banker's lien—Overdrawn accounts—Partner's separate account.*

Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts.

ACTION for damages tried at Vancouver on 22nd July, 1901, before MARTIN, J. In July, 1900, Richards & Riley had a partnership account in the Bank of B. N. A. On July 21st, they sold out their hotel business to one Johnson, it being agreed that Johnson was to take over the business as it stood, pay all debts and get in any outstanding assets; the balance in the Bank standing to the credit of the firm to be applied to the payment of hotel debts.

On July 24th, the plaintiff Richards went to the ledger-keeper of the Bank and asked for the firm's correct balance as he was retiring from business and wished to close up the account, the pass-book then having been in the Bank for some days and no cheques having been issued. The ledger-keeper wrote the balance in the bank-book in pencil as it was shewn in his books, Richards then went back to the hotel and with his partner drew cheques to pay hotel debts to the full amount of the balance. All cheques on this partnership account had to be signed by both E. W. Richards and Molly Riley.

Statement.

About this time Richards opened another account in his own name with the Bank of B. N. A. At the end of the month the Bank found that the ledger-keeper had made a mistake in their books and had given Richards & Riley a credit balance of $200.00 more than they were entitled to. This was the balance they had given to Richards.

Richards was informed of this by the Bank officials and he told them if they would go to the hotel they could arrange the matter with the new proprietors.

About the end of August he was informed by the Bank that as there had been an overdraft of $199.97 on the partnership

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account the amount had been charged to his private account; he never acquiesced in this, but drew all the rest of the money out of his private account.

In December he issued a cheque to Carmichael & Dickie on his private account with the Bank of B. N. A. for $199.97, this cheque was duly presented for payment and refused.

*Pottenger* and *Kappele*, for plaintiff.
*Bowser, K.C.*, for defendant.

30th July, 1901.

MARTIN, J.: With some reluctance, and on the authority of *Watts* v. *Christie* (1849), 11 Beav. 546, *Wolstenholm* v. *The Sheffield Union Banking Company, Limited* (1886), 54 L.T.N.S. 746, and Lindley on Partnership (1893), 303-8, 676-7, I have come to the conclusion that the defendant Bank was not legally justified in charging up against the plaintiff's account the overdraft of $199.97 of the partnership of Richards & Riley. And, consequently, the defendant should have paid the plaintiff's cheque for $199.97 when it was presented on the 22nd of December, 1900. It follows that the plaintiff is entitled to recover that sum from the defendant.

As to damages, in my opinion all that the plaintiff is entitled to under the peculiar circumstances is interest at the legal rate from the time of such presentment.

Judgment.

In regard to costs, in view of the mean advantage the plaintiff has taken of the defendant's mistake, and the aggressive nature of this action, I feel that this is a case wherein, to mark the Court's displeasure of such a line of conduct, the plaintiff should be deprived of costs.

*Judgment for plaintiff.*

## OPPENHEIMER v. OPPENHEIMER.

DRAKE, J. (In Chambers.)

1901.

Sept. 24.

OPPENHEIMER v. OPPENHEIMER

*Practice—Special indorsement—Signature of plaintiff's solicitor—Order XIV.*

A special indorsement, in order to support a judgment under Order XIV., must contain the signature of the plaintiff's solicitor.

SUMMONS for judgment under Order XIV.

*A. E. McPhillips, K.C.*, for application.

*C. B. Macneill, contra*, took the preliminary objection that the writ was not specially indorsed in that it was not signed by the plaintiff's solicitor.

24th September, 1901.

DRAKE, J.: The plaintiff applied for judgment under Order XIV. The defendant objects that the writ is not specially indorsed inasmuch as the statement of claim is not signed by the solicitor as required by r. 15 and Appendix A., Form 2. The plaintiff contends that if the writ clearly states the claim made with sufficient particularity it is a sufficient compliance with the rules without any signature as a statement of claim. Rule 83 requires a writ to be specially indorsed before any application can be made for judgment under Order XIV. The forms require that the indorsement should contain a statement of claim with particulars, the place of trial and the signature of the solicitor or of the plaintiff if he acts in person. It is true this is a technical objection, but as Order XIV., gives special facilities in proper cases to a plaintiff he should in my opinion strictly conform with the rules. I consider that the non-compliance with the form is an irregularity and refuse the order. The costs will be the defendant's costs in the cause in any event.

Judgment.

*Summons dismissed.*

FULL COURT
At Victoria.

1898.

Oct. 20.

## CALLANAN v. GEORGE.

*Mining law—Legal posts—Stone mounds in lieu of stakes not good—Mineral Act, 1896, Cap. 34, Sec. 16.*

CALLANAN v. GEORGE

The erection of stone mounds as posts Nos. 1 and 2, is not a compliance with section 16 of the Mineral Act, which requires such posts to be of wood.

APPEAL from the judgment of MCCOLL, J., dated 2nd May, 1898.

The appeal was argued at Victoria on 12th July, 1898, before the Full Court, consisting of WALKEM, DRAKE and IRVING, JJ.

Statement. The facts sufficient for this report appear in the judgment of DRAKE, J., on appeal.

*Wilson, Q.C.*, and *A. E. McPhillips*, for appellants.
*Davis, Q.C.*, and *Bodwell*, for respondents.

20th October, 1898.

DRAKE, J.: The short point raised in this appeal and the only one argued was whether the plaintiffs in locating certain mineral claims, described as the Nashville, Charleston, and Westminster, in the West Kootenay District, and marking out the same were justified in using mounds of stone in lieu of the legal posts required by section 16 of the Mineral Act, R.S.B.C. 1897, Cap. 135,

Judgment of DRAKE, J. and further that the learned trial Judge should, under sub-section (*d.*) of the same section, have treated this as a *bona fide* attempt to comply with the provisions of the Act and that the non-observance of the mode of marking out the claims, required by the Act, was of such a character as not to mislead other persons desiring to locate claims in the vicinity.

The Act which we have to consider is the result of over thirty years experience. The first Act was No. 90, 1867, Revised Statutes of 1871, where all claims were to be marked by four pegs, four inches square and not less than four feet above the ground; from that time downward claims have always had to be

marked out by pegs or stakes of the dimensions mentioned, but the position required for the stakes or pegs has varied.

Section 2 enacts that legal posts shall mean a stake standing not less than four feet above the ground, and squared or faced on four sides at least one foot from the top, and each side so squared or faced shall measure at least four inches on its face so far as squared or faced, and any stump or tree cut off and squared or faced to the above height or size; provided when survey is made the centre of the tree or stump where it enters the ground, shall be taken as the point to or from which measurement shall be made.

Section 16 says a mineral claim shall be marked by two legal posts numbered 1 and 2 and the line between these posts shall be known as the location line. This line shall be marked by the locator, 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 or erect monuments of earth or rock not less than two feet high and two feet in diameter at the base.

It is well known that many mineral claims are located where there is no timber or underbrush; some above the timber line as on the mountains. The Legislature requires that in all cases there must be stakes for the No. 1 and 2 posts. If a stone post was to be sufficient the term "legal post" would not have been defined as a stake, and the ordinary meaning must be given to the words used by the Legislature unless the context shews that some other meaning was intended. We have no doubt, on the construction of these sections, that a wooden post or stake is intended and that a pile of stones or any other mark is not a compliance with the Act. We are also of opinion that any other mode of marking out a claim, than that defined by section 16, is calculated to mislead. The system of wooden posts has been universal in the Province for thirty years and prospectors naturally look out for posts. Stone mounds, in a mountainous country abounding with rocks, would not attract any attention and would be calculated to mislead. It is not necessary to lay down any rule of construction as to sub-section (*d.*) of section 16, each case must depend on its own merits; but

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it is not intended that the requirements of the statute are to be ignored. Those requirements may be imperfectly carried out, but to hold that the Court can permit the formalities and restrictions, imposed by the statute, to be abolished and others substituted, would place the Judge in the position of the Legislature. Such a construction is unreasonable and was never contemplated. The appeal must be dismissed with costs.

WALKEM and IRVING, JJ., agreed.

*Appeal dismissed.*

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McCREIGHT, J.
1896.
Nov. 19.

## BLEEKIR *ET AL* v. CHISHOLM *ET AL.*

*Mining law—Location on line of ledge or vein imperative—Burden of proof —Mineral Act Amendment Act, 1894, Cap. 32, Sec. 4.*

BLEEKIR v. CHISHOLM

The Blue Bird mineral claim was located 20th April, 1895, and recorded 3rd May, 1895, and on 21st April, 1896 (before it would have lapsed if duly located), the defendants located the Red Oak claim over the same ground, and after lapse the plaintiffs located over the same ground the Back Pay claim and attacked the defendants' title.

*Held*, by McCREIGHT, J., that as the location line of the Blue Bird was not placed as near as possible on the line of the ledge or vein its location was bad and that the location of the Red Oak was good.

The provisions of the Mineral Act as to location are imperative.

ACTION of adverse claim tried before McCREIGHT, J., at Rossland in September, 1896.

*A. H. MacNeill*, and *F. M. McLeod*, for plaintiffs.
*Hamilton*, for defendants.

19th November, 1896.

Judgment.

McCREIGHT, J.: The question in this case appears to be whether the Red Oak claim having been located before a year from the location or rather the record of the Blue Bird mineral claim had expired, and the Back Pay having been located after

the expiration of such year the Red Oak or the Back Pay is entitled to the lands and minerals claimed by both claim owners.

I may observe that section 24 of the Mineral Act of 1891, in dealing with the duration of the claim refers to the time of the "recording of the same."

The location of the Blue Bird took place on the 20th day of April, 1895, and the record on the 3rd of May, 1895. No doubt by the Mineral Act, 1891, as already referred to, any free miner having duly located and recorded a mineral claim is entitled to hold the same for a period of one year from the recording of the same. The Red Oak appears to have been located on the 21st of April, 1896, and *prima facie* too soon with reference to so much of the ground included therein as appears to be likewise included in the Blue Bird and Back Pay. But the defendants representing the Red Oak attack the location of the Blue Bird as having failed to satisfy certain statutory requirements in the Mineral Acts, and that chiefly referred to and relied upon by them is that the Blue Bird location line is bad because such location line is not placed on or as near as possible on the line of the ledge or vein: see B. C. Statute, 1894, Cap. 32, Sec. 4. Before proceeding further I would here refer to a map prepared by Mr. Ellicott, a Provincial Land Surveyor, and as far as I can judge carefully prepared. The objection that the measurements were trigonometrical measurements, and not actual measurements, I cannot attend to, as I believe measurements on any large scale or in irregular ground are thus made—and if carefully made must be accurate—"and a claim is to be measured irrespective of inequalities on the surface of the ground or trigonometrically": B. C. Statute, 1894, Cap. 32, Sec. 4. At all events I cannot say that the value of the map is much if at all affected by the evidence of the plaintiff Bleekir, who does not appear to be a surveyor, admits he made no measurements, and that his diagram is not made to scale. He, moreover, says that the Red Oak was staked over the whole of the Blue Bird ground, whilst the surveyor's map seems to shew that this remark holds good as to only about one-third of the Blue Bird, and lastly, though the diagram was produced, it seems not to have been put in evidence by plaintiff's counsel. The objection that the

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location line of the Blue Bird was not placed as near as possible on the line of the ledge or vein, seems to me to be serious. There can be no doubt of the fact that it was not so placed, for the evidence of Bleekir when asked what he did when he located the Back Pay mineral claim is that "I started to run my line the same way as the Blue Bird line and blazed a line about 200 feet. I changed my line and ran my location in a westerly direction, instead of southerly because I was, etc.—the location line of the old Blue Bird was southerly." See also the evidence of Merrill and Waterhouse. He is asked to draw a line representing the Back Pay, then he is asked to draw the Blue Bird line—"the respective distances shewing where they cross." Then Waterhouse is asked "The two lines are at right angles, about at right angles? A. Well as near as I can tell they are about twenty or thirty feet apart I should judge." No doubt he mistook feet for degrees. This piece of evidence is criticized by counsel for the plaintiff in his argument, but my own note is that Waterhouse says the Discovery Post of the Blue Bird and Back Pay are on the same ledge—now Bleekir deliberately departed from the Blue Bird location line evidently thinking it to be incorrect, and chose one instead going to the Discovery Post of the Blue Bird, and seems to have placed his Back Pay Discovery Post close to the other Discovery Post, and as the law required on his location line, and "as near as possible" to the ledge. This all appears very clearly from Ellicott's map, where the deviation of the Blue Bird location line from the line of the ledge, and Bleekir's location line appears to be between forty-five and ninety degrees. It is said that the burden of proof of the deviation of the Blue Bird line and that it was unnecessary, is on the defendants. Supposing that to be so, and I am not sure that it is, I think the evidence I have referred to amply satisfies that burden. Bleekir's evidence and conduct shews the deviation, and that there would have been no difficulty in running the location line of the Blue Bird along the ledge as he seems to have done with the Back Pay. It is said that this objection should have been specifically raised in the pleading, but the answer is that the evidence was introduced without, as far as I know, any objection, and moreover consists not of evidence

Judgment.

brought forward by the defendants, but of voluntary statements made by the plaintiff and his witnesses, and having been introduced I must deal with it. Bleekir was evidently anxious to locate along the ledge and comply with the law, and to prove that he did so, and I don't think he would or could have called witnesses to prove the reverse, or that there would have been any use in doing so—there was no surprise on the plaintiffs, no suggestion of another ledge, and the action of the three Companies shews that they were thinking of no ledge save that along which Bleekir ran his location line for the Back Pay: see Ellicott's map where the three Discovery Posts are all close together. This map can hardly be considered as evidence hostile to the plaintiffs, for it represents the deviation as less than what I gather from the evidence of Waterhouse and Bleekir, or at all events the latter, though more than sufficient to amount to non-compliance with the law. I think the provisions as to location in Cap. 32 of 1894, must be construed as conditions precedent or imperative to a good location, see especially the "Examples of various modes of laying out claims." I believe they have been always looked upon as imperative, and if they are to be construed as directory they might as well be repealed, and I gather from section 16 *(d.)* of the Mineral Act of 1896, that the Legislature always considered them to be imperative prior to the passage of that Act. I have already said, though I scarcely thought it necessary, that I thought no burden of proof should be cast on the defendants, and this will appear plain by a simple pleading test.

Judgment.

Counsel for the Back Pay says: "The next objection taken to the validity of the Blue Bird is that the posts of the Blue Bird were not placed as nearly as possible on the line of the ledge or vein. In order to ascertain whether that was done or not, it is first necessary to shew where the line of the ledge or vein is, and then that the Blue Bird line is not as nearly as possible along such line. The burden of proof of both these questions lies on the defendants. The record having been issued and admitted in evidence for the Blue Bird *prima facie* everything leading up to that record was regular."

Now I don't know that there is any presumption in favour of

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the location of a claim that the proceedings of the free miner have been regular except perhaps under section 28 of the Mineral Act of 1896, not applicable in favour at least of the plaintiffs in this case, but the case of *Toleman* v. *Portbury* (1870), L.R. 5 Q.B. 295, shews that the burden of proof as to where the line of the ledge of the Blue Bird is would lie in this case on the plaintiffs, and not on the defendants, owners of the Red Oak. The plaintiffs (I will suppose) complain that the Red Oak parties have no claim to the ground in dispute through having located too soon. The defendants (I will suppose) plead that the Blue Bird location line is bad as not having been "along the line of the ledge or vein, or as nearly as possible along such line." The plaintiffs must reply traversing this allegation and then the language of Baron Channell, an eminent pleader, applies: "I agree that where there is an allegation in language which is negative, if that is traversed, the party who traverses the negative allegation has substantially the burthen of proof thrown upon him." Of course Baron Channell's remarks equally apply whether we are supposing the case of questions in separate defences, or one defence raising both questions as seems to be the correct course. I think according to the above doctrine the burden of proof is cast on the plaintiffs, although I think the defendants principally through the plaintiffs' witnesses have fully proved their defence, but I thought it better not to leave the point of law in doubt. I think the location of the Blue Bird was bad and therefore did not interfere with the location of the Red Oak, and that the plaintiffs' case must be dismissed with costs.

Judgment.

*Action dismissed.*

## MANLEY v. COLLOM.

WALKEM, J.

1900.

Dec. 22.

FULL COURT At Victoria.

1901.

Oct. 16.

MANLEY v. COLLOM

*Mining law—Miner's license—Legality of—Location—Approximate compass bearing—Re-location—Permission of Gold Commissioner—Mineral in place—Defects cured by certificates of work—Mistakes of officials—Mineral Act, Secs. 28, 29, 32, 34 and 53.*

In November, 1897, Cooper having already located a claim on the same lode, located the Native Silver claim in the name of Halpin, who transferred in December, 1897, one-half to Cooper and the other half to Haller who sold to plaintiff in July, 1900, the usual certificates of work having been obtained in the interim. Defendant, who knew of the error in the description of the compass bearing and of the issue of such certificates, on failing to effect a purchase of the claim from Cooper and Haller, located the same ground as the Arlington Fraction, and on obtaining the usual certificates of work, applied for Crown grant.

*Held*, in adverse proceedings, affirming WALKEM, J. (DRAKE, J., dissenting), that the defendant not being misled, the irregularities in the plaintiff's title were cured by section 28 of the Mineral Act.

*Callahan* v. *Coplen* (1899), 30 S.C.R. 555 and *Gelinas et al* v. *Clark* (1901), 8 B.C. 42, specially considered.

APPEAL from the judgment of WALKEM, J., dated 22nd December, 1900, whereby judgment was pronounced in favour of the plaintiff, and the Native Silver Fraction mineral claim held to be a good, valid and subsisting mineral claim as against the defendant's mineral claim, the Arlington No. 1 Fractional.

On 6th August, 1897, one Cooper located the Arlington Fraction for one Haller in Haller's name, Cooper having already located another claim, the Arlington No. 2 on the same lode. The Arlington Fraction thus located was intended to cover the ground lying between the Arlington and the Burlington claims, but afterwards it was discovered that it did not, so Haller by arrangement with Cooper, filed an abandonment and on the same day, 20th November, 1897, Cooper located all the ground as the Native Silver Fraction in the name of one Halpin. Cooper recorded the claim the next day and on 2nd December, 1897, got a bill of sale from Halpin of one-half for himself and the other one-half for Haller. No agreement was ever made between

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Cooper and Haller, but Cooper considered himself entitled to a half-interest in the Arlington Fraction, and after the Native Silver Fraction was located he obtained from Halpin a bill of sale of one-half for Haller. In the recorded description of the Native Silver Fraction's location line there was a deviation of eighty-four degrees from the true compass bearing.

Haller's mining licenses dated 9th August, 1898, and 5th August, 1899, were issued and signed at Sandon by E. M. Sandilands, who acting on instructions from the Government Agent at Nelson, received the blank forms from the Mining Recorder at New Denver, and accounted to the Government for moneys received for mining licenses.

On 25th April, 1900, the defendant located the same ground as the Arlington Fraction No. 1, having previously tried to purchase the interests of both Haller and Cooper and knowing that they had recorded certificates of work in respect of it and subsequently he did purchase Cooper's interest.

The defendant was the Managing Director of the Arlington and Burlington mines and the claim in dispute being the fraction between, he wanted it to work on in connection with the other two. He knew where it was and was not misled by the errors in description.

On 19th July, 1900, Haller sold his half-interest to the plaintiff who knew that defendant was applying for a certificate of improvements.

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Certificates of work in respect of the Native Silver Fraction claim were recorded on 7th October, 1898, 15th November, 1899, and 31st August, 1900. The defendant after purchasing began work at once and obtained five certificates of work in respect of the Arlington No. 1 Fraction, the first being recorded 1st August, 1900, and the other four 10th October, 1900, and applied for a Crown grant whereupon the plaintiff brought an action of adverse claim.

The trial took place at Nelson on 31st October, and 1st, 2nd, 6th and 7th November, 1900, before WALKEM, J.

*Galliher* and *P. E. Wilson*, for plaintiff.
*W. A. Macdonald, Q.C.*, for defendant.

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On 22nd December, 1900, his Lordship gave judgment in favour of the plaintiff.

The defendant appealed to the Full Court on the grounds amongst others (1.) that in the recorded description of the Native Silver Fraction's location line there was a deviation of eighty-four degrees from the true compass bearing; (2.) that Haller's mining licenses of 9th August, 1898, and 5th August, 1899, were bad; (3.) that the locator of the Native Silver Fraction did not find mineral in place and (4.) that the location of the Native Silver Fraction was a location over an abandoned claim by the same people, and was illegal under section 32 of the Act.

The appeal was argued at Victoria on 10th, 11th, 13th and 14th June, 1901, before DRAKE, IRVING and MARTIN, JJ.

*Davis, K.C.* (*W. A. Macdonald, K.C.*, with him), for the appellant: There was a contravention of sections 29 and 32 of the Act because Cooper must be considered as locating either in his own name or Haller's; a miner's license is personal to himself and is marked "not transferable." There is a statutory procedure of location by an agent for a free miner, but here there was a location in the name of a person who has not and never expected to get an interest in the claim. Cooper had already located the Arlington and Haller the Arlington Fraction, so their rights on that particular vein or lode were exhausted. The original location being void cannot be made good by any subsequent transaction, see *Alexander* v. *Heath et al* (1899), 8 B.C. 95. See also *Connell* v. *Madden* (1899), 6 B.C. 531; *Dunlop* v. *Haney et al* (1899), 7 B.C. at p. 5 and *Hooper* v. *Coombs* (1888), 5 Man. 65. The statute says that mineral in place must be found, but here the evidence is that float, which is not mineral in place, was found. As to compass bearing there was an error of eighty-four and a half degrees and it cannot be said that such an error is not calculated to mislead. The provisions of the Act are imperative with three sections containing curative provisions—sections 16, sub-section (*g.*), 28 and 34.

Argument.

The effect of section 34 in *Gelinas et al* v. *Clark* (1901), 8 B.C. 42, was decided without allowing me an opportunity to argue the point and it is a decision (not of a majority of the Court) against

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the prior rulings of this Court, see *Atkins* v. *Coy* (1896), 5 B.C. 6; *Cranston et al* v. *The English Canadian Co.* (1900), 7 B.C. 266; *Dunlop* v. *Haney et al* (1899), 7 B.C. 1; *Clark* v. *Haney* (not reported*) and *Pavier* v. *Snow* (1899), 7 B.C. 80.

*Callahan* v. *Coplen* (1899), 7 B.C. 422 is an authority that section 28 cures only minor irregularities such as do not go to the root of title and the decision on appeal (1899), 30 S.C.R. 555, shews that the Crown only can invoke that section. *Gelinas* v. *Clark* is inconsistent with *Callahan* v. *Coplen* and should not be followed. [*Duff*, objected, that in *Jordan* v. *McMillan* (1901), 8 B.C. 27, the Court had allowed a preliminary objection to an argument based on Privy Council decisions on the ground that the point was covered by a previous decision of this Court.]

The objection was overruled, MARTIN, J., observing, that the judgment of the Chief Justice in *Jordan* v. *McMillan* proceeded on the ground that the previous decision of this Court was given by a majority of the Judges composing the Court.

The provisions of the Act are imperative, see *Peters* v. *Sampson* (1898), 6 B.C. 405 and *Bleekir* v. *Chisholm* (not reported.†) There is no evidence here of any attempt to get a proper compass bearing or of any *bona fide* attempt whatever—see *Callanan et al* v. *George et al* (not reported.‡)

Haller's certificate issued by Sandilands was bad as there is no provision in the Act for such a procedure.

Argument.

*Duff, K.C.* (*J. H. Lawson, Jr.*, with him), for respondent: The defendant was not misled by the error of Cooper who had no fraudulent object, for when he located, all he wanted was to cover the ground between the Arlington and the Burlington. In his judgment in the Supreme Court of Canada in *Callahan* v. *Coplen*, Mr. Justice Gwynne is dealing with the question of title to a claim, but not as to the validity of the claim *ab initio*—it was a question of boundaries and estoppel, and what he said about section 28 was a reservation of the point and not a decision on it. The contention that the Supreme Court of Canada in *Callahan* v. *Coplen* must have affirmed the reasons of the Full Court is erroneous—the decision was affirmed on different grounds thus

*Since reported *ante* at p. 130. † Since reported *ante* at p. 148. ‡ Since reported *ante* at p. 146.

shewing the Supreme Court did not agree with the reasons of the Full Court, see *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 111 and Encyclopædia of the Laws of England, Vol. 10, p. 203.

*Gelinas* v. *Clark* is a binding decision as to the meaning of *Callahan* v. *Coplen* and that the latter decision is not applicable to the question in this case, and it and *Peters* v. *Sampson* (1898), 6 B.C. 405 should be followed. See *Osborne* v. *Morgan* (1888), 13 App. Cas. 227; *Lavy* v. *London County Council* (1895), 2 Q.B. 577; *The London Street Tramways Company, Limited* v. *The London County Council* (1898), A.C. 380; *Casson* v. *Churchley* (1884), 53 L.J., Q.B. 336; *The Queen* v. *De Grey* (1900), 1 Q.B. 524 and *Pledge* v. *Carr* (1895), 1 Ch. 52.

As to the contention that Cooper did not discover rock in place, there is ample evidence that he did and it does not follow that because he found float he did not find mineral.

As to compass bearing; any defect was cured by section 16 sub-section (*g.*) as there was a *bona fide* attempt to comply with the Act, and taking the record and affidavit together no one could have been misled and Collom admits he was not misled.

The prohibition in section 29 is against the holding (not the locating) of more than one claim on the same vein by the same miner. To be a fraud on a statute there must be a contravention of the statute—see *Barton* v. *Muir* (1874), L.R. 6 P.C. 134 and *Davis* v. *Stephenson* (1890), 24 Q.B.D. 529.

Argument.

As to re-location without permission, *Granger* v. *Fotheringham et al* (1894), 3 B.C. 590 is an authority, allowing what was done here and it has received legislative sanction and should be followed: see *Casgrain* v. *Atlantic and North-West Railway Company* (1895), A.C. 282; *Pugh* v. *Golden Valley Railway Company* (1880), 15 Ch. D. 334 and cases cited in *Jardine* v. *Bullen* (1898), 7 B.C. 471; *Foskett* v. *Kaufman* (1885), 16 Q.B.D. 279; *Jay* v. *Johnston* (1895), 1 Q.B. 25; *Danford* v. *McAnulty* (1883), 8 App. Cas. 456; *Ex parte Wier* (1871), 6 Chy. App. 875; *Ex parte Campbell* (1870), 5 Chy. App. 703; *Greaves* v. *Tofield* (1880), 14 Ch. D. 563 and *Clark* v. *Wallond* (1883), 52 L.J., Q.B. 323.

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The licenses were issued under the direction of a Government official and any defects are cured by section 53.

*Davis*, replied.

*Cur. adv. vult.*

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DRAKE, J.: This is an appeal by the defendant against a judgment in the plaintiff's favour. The ground in dispute was ground lying between the Arlington No. 2 and the Burlington No. 2. The ground was first taken up by a man named Cooper on August 6th, 1897, in the name of Haller, and under the name of Arlington Fraction mineral claim, and was abandoned by the locator on the 29th of November, 1897, and re-located by Cooper for one Halpin on the same day.

Cooper was the locator of the Arlington No. 2 on the same lode. He therefore could not locate another claim on this lode under section 29 of the Mineral Act, Cap. 135, of the Revised Statutes, either in his own name or in the name of any other person. Haller having abandoned the claim to the Fraction could not re-locate the same without the written permission of the Gold Commissioner under section 32, neither could he hold an interest in any portion of such mineral claim by location without such permission.

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From the evidence of Cooper it is apparent that Haller's name was used to locate this Arlington Fraction on the terms that he and Cooper were each to have a half-interest in the claim; but no written agreement was made. It was therefore an agreement that could not be enforced at law under section 50. Cooper and Haller both being aware of these sections in the Mineral Act, in preference to applying to the Commissioner for leave to re-record, thought it more advisable to abandon the claim and file the notice of abandonment; and the evidence is sufficiently clear to shew that this was done at Cooper's suggestion. Cooper then obtained the miner's license of Halpin and located the Fraction in his name as the Native Silver Fraction. Haller expected to have one-half the claim thus located by Halpin, and this was in fact the way the scheme worked out. Cooper obtained from Halpin two conveyances, each of half of the

claim, one in Haller's name and the other in Cooper's, and this course was adopted in order to evade the statute.

The defendant on examining the ground found the plaintiff's stakes, and on comparing them with the record of the claim found that the compass bearings did not include the land between the Arlington and Burlington claims. The plan, Exhibit A3, shews the Burlington as lying almost due north of the Arlington No. 2.

The plaintiff's description as sworn to by Cooper, his agent, gives the boundaries on the north by vacant, meaning vacant ground, on the south by vacant (ground), on the east by Burlington, on the west by Arlington; whereas the true description of the vacant ground between the Burlington and Arlington would be bounded on the north by the Burlington, on the south by the Arlington, on the east by vacant ground, and on the west by vacant ground. The land in fact described by the plaintiff in his record can not be made out on the ground from his description. The term "approximate compass bearing" will not cover an error as great as this. The evidence of Herbert C. Twigg, a P. L. S., a witness called by the plaintiff, shews that the record was in accordance with the notice on the initial post, which stated that No. 2 post was 700 feet in an easterly direction; and of the ground claimed 750 feet lay to the right, and 750 to the left of the location line. The initial post is on the north boundary of the Arlington, and 560 feet from the northeast corner of the Arlington No. 2; and the No. 2 post if placed in accordance with the notice on the initial post would be found very near the northeast corner of Arlington No. 2; whereas in fact it is due north on the ground. In other words it is placed almost at a right angle to the place where it ought to be if it followed the written description.



On examining the ground the defendant saw that no vacant ground between the two claims had been properly staked. He therefore, on the 25th of April, 1900, staked this ground as the Arlington Fraction No. 1, and obtained five certificates of work. The first was dated 1st August, 1900; the second was dated 19th October, 1900, to apply for the year ending 9th May, 1902; the third of same date applied for the year ending 9th May, 1904;

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and the fourth for the year ending 9th May, 1905. Under the Act, for every $100.00 of work done on a mineral claim the party is entitled to a certificate for twelve months, and can do the equivalent of three or four years' work at once and obtain the certificates for the number of years the work represents.

One Henry Brown, on the 7th of October, 1898, obtained a certificate for work on the Native Silver Fraction, but it is not expressed whether this was done by him as an agent or on his own account, which the Act requires.

Robert Cooper obtained a certificate of work on 15th November, 1899, for work done on the same Fraction, but he does not say that he was acting as agent; and a further certificate on 31st August, 1900, on the plaintiff's affidavit. Halpin, as before mentioned, on 2nd December, 1897, assigned to Haller a half-interest in the Native Silver Fraction; and Haller on 19th July, 1900, purported to assign to Manley the same half-interest for an alleged consideration of $5,000.00. The evidence discloses that only $2,000.00 was paid, and the other $3,000.00 was to be paid when the plaintiff sold the property; and it was further clear that the plaintiff at the time he made purchase knew that the defendants were working on the claim, and applying for a certificate of improvements. The plaintiff never examined the stakes of either the Arlington Fraction or Native Silver Fraction.

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It is contended that however incorrect the written description was, and however incorrect the posting on the claim was, yet the defendants would not be misled as the sketch plan on the back of the record clearly indicated what the ground was, which was intended to be taken up by the Native Silver record. Therefore the compass bearings did not in fact mislead the defendants when the record was looked at; but the language used in the Act is "were they calculated to mislead," not whether "they did mislead." That they were calculated to mislead can hardly be disputed.

The language used in the proviso to this section 16 is very general, and is a protection to a *bona fide* locator, although he has failed to comply with some of the foregoing provisions of the statute, if he has found mineral in place, and that the non-

observance of the formalities required by the statute was not of a character calculated to mislead other persons desiring to locate claims in the vicinity. If mineral in place has been discovered then the law will protect as far as it can a man acting *bona fide*. The discovery of mineral in place is the basis of the right of a miner to stake out Crown lands. If Halpin was a *bona fide* locator, and had discovered mineral in place, this proviso might be invoked to protect him; but the facts shew that he was a mere catspaw of Cooper, and that no mineral in place was discovered, and his name was used to enable Cooper to evade the stringent provisions of the Act.

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Cooper says he discovered float, and that satisfied him it was mineral in place. Now by section 2 of the Mineral Act, R. S. B. C. 1897, Cap. 135, rock in place is defined to mean and include mineral, not necessarily in a vein or lode, but in the same place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary or broken rock or float which, by decomposition or erosion of the rocks, is found in wash, loose earth, gravel or sand. This definition clearly excludes the discovery of float spoken of as mineral in place. Float as it is technically called is very frequently discovered in the water courses and loose gravel of the mining districts. It is an indication of a deposit of mineral somewhere in the neighbourhood; but it is in order to guard against the location of Crown lands on insufficient data that the Legislature insists that mineral must be actually discovered *in situ* before a free miner has a right of entry, and before he can obtain that which is equivalent to a lease for a year of Crown lands.

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The evidence shews that the defendants did considerable work in washing off the surface from two to five feet in depth for some 300 feet before the lode was discovered, and before they could locate and record the claim; and there is no evidence that either Cooper or Halpin discovered anything but float. Therefore Halpin is not within the protection of the proviso above referred to.

The locator of a mineral claim when applying for record under section 16, has to file an affidavit that legal notices have been put up and that mineral has been found in place on the claim

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proposed to be recorded; and in fractional claims a sketch plan shall be drawn by the applicant on the back of the affidavit shewing as near as possible the position of the adjoining mineral claims, and the shape and size expressed in feet of the fraction to be recorded.

Cooper made a declaration but omitted the description in feet, and drew a sketch plan with the cardinal points all wrong, as I have stated before. The fact is the Arlington No. 2 having discovered a good lode, the parties thought it probable that it would run through the vacant ground on the north and therefore Cooper staked the ground.

The above are the facts which are in evidence. The learned trial Judge gave judgment for the plaintiff, thus establishing him in his claim, and on this appeal, notwithstanding the error in the compass bearing, and the non-discovery of mineral in place, the plaintiff contends that the fact of the record of work having been issued to the plaintiff is sufficient to cure all defects up to the date of the issuing thereof. The difficulty of applying this section as covering not only irregularities in carrying out the provisions of the Act, but also direct breaches of its enactments as well as evasions of its stipulations, is great.

If two or more claimants to a mineral claim each work on the claim and obtain certificates of work, they would each have a perfect title if the construction contended for is correct.

Judgment of DRAKE, J.

Sections 29, 30 and 32 all deal with the restrictions against a miner taking up more claims than one on the same lode, or allowing it to be done in the name of any other person. Can a certificate of work done on a claim held in defiance of these stipulations make a good title against a subsequent locator?

The use of the term "irregularities" in the section indicates the class of matters intended to be cured by the certificate of work. It was not intended to make the title absolute against the world except at the suit of the Attorney-General for fraud. If the Legislature had so intended they could easily have effected their object.

The case of *Callahan* v. *Coplen* (1899), 30 S. C. R. 555, has been greatly discussed, and the facts in that case were not greatly dissimilar to the present one. There the defendant had

located and recorded a claim with compass bearings nearly as incorrect as the present one, and the plaintiff had also taken up a claim, and both parties had obtained certificates of work. It was held that section 28 did not cure the defect. We next have the case of *Gelinas et al* v. *Clark*, 8 B. C. 42, decided by the Full Court on March 5th, 1901, wherein the Chief Justice decided that the fact of location and record of lands not at the time open to location, gave the person recording what was equivalent to a lease for a year, and therefore the plaintiffs could not record the same ground as against the defendants, who had obtained certificates of work. It is difficult to distinguish in what respect *Gelinas* v. *Clark* differs from *Callahan* v. *Coplen*. *Gelinas* v. *Clark* is supported on the ground that a lease from the Crown not attacked by the Crown cannot be successfully impeached by anyone else. If such is the true construction of the Act, no recorded claim if once a certificate of work is obtained can successfully be impeached however much the stipulations of the Mining Acts have been disregarded.

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The point is of vital importance to the mining industry; and although it is said that the effect of *Gelinas* v. *Clark* will stop claim jumping, it will also have the effect of enabling anyone to bolster up a mining claim by certificates of work, and thus induce others to invest their money in worthless chances. The stipulation which the Legislature thought necessary for the protection of the Crown lands, the miner and the public will be rendered nugatory.

In my opinion the appellant is entitled to succeed, and the judgment entered for the respondent should be reversed, and judgment entered for the defendant with costs here and below.

Judgment of IRVING, J.

IRVING, J.: The frame work of this case is very simple. On the 29th of November, 1897, the Native Silver claim was located by one Cooper for and in the name of one Halpin, who at once, 2nd December, 1897, conveyed one moiety to Cooper, and the other moiety to one Haller.

The plaintiff, 19th July, 1900, purchased Haller's half-interest, and on the 31st of August, 1900, obtained and recorded a certificate of work in respect of the said claim. Two certificates in

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respect of the said claim had been obtained by Haller prior to the sale to the plaintiff. These certificates were recorded on the 7th of October, 1898, and 15th November, 1899.

On the 25th of April, 1900, the defendant, knowing fully the position of affairs, decided to and did jump the claim, re-locating it as the Arlington No. 1 Fraction. The defendant began work at once, and obtained five certificates of work. The date of the earliest recorded being 10th August, 1900, and the other four were recorded in October, and applied for a Crown grant; whereupon the plaintiff, who obtained a third certificate, 8th August, 1900, brought the present adverse action.

By section 28, R. S. B. C. 1897, Cap. 135, it is provided as follows:

"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 on fraud."

Looking at the section, and the simple facts above set out, the first thing that strikes one is that both parties having obtained certificates of work are equally entitled to claim against the other the benefit of the section. That of course makes the section nonsensical.

Judgment of IRVING, J.

Then the first question is to determine which of the two is the person whose certificate is to prevail.

To answer that one must look at the facts and ask oneself, how did the dispute arise? There can only be one answer. The dispute arose, or was brought into existence, by the defendant planting his stakes in the land occupied by the plaintiff. The plaintiff then it is whose title is to be deemed perfect if section 28 covers the irregularities which the defendant alleges made the Native Silver an illegal claim.

The irregularities complained of are: (1.) That the plaintiff in locating and recording the Native Silver described his location line between No. 1 and No. 2 as running in an easterly direction, whereas in truth and in fact it was very nearly due north. I do not think it can be denied that this is a very

serious omission to comply with the statute, which requires the locator to state the approximate compass bearing.

(2.) The second point is that one or more of the free miners licenses under which the plaintiff derived his title was issued by a person without proper authority.

(3.) That the locator of the Native Silver did not in fact find mineral in place, and

(4.) That the Native Silver location was a location over an abandoned claim, by the same people, and was illegal under section 32.

Another ground was taken and discussed at the hearing of the appeal, but as it was not raised on the pleadings at the trial, or in the notice of appeal, I think we cannot deal with it. *Browne* v. *Dunn* (1894), 6 R. 67; *The Tasmania* (1890), 15 App. Cas. 223 at pp. 230, 236 and 238.

We understood at the hearing of the appeal the learned counsel acquiesced in the justice of Mr. *Duff's* objection to our dealing with the case on this ground, but whether I am correct or not on that point, the authorities justify the course I propose to take, *viz.*, to ignore this ground.

It was argued by Mr. *Davis* that the decision of this Full Court in *Callahan* v. *Coplen* had practically wiped out section 28, or if not that section had received its stroke in the decision of the Supreme Court of Canada.

Judgment of IRVING, J.

I venture to submit that the decision of the Supreme Court of Canada has been misread in that case. It is true the appellants (the Cube Lode) went to that Court relying on section 28; but Mr. Justice Gwynne points out that there was only one question to deal with—and that question was not the question raised by the appellant on section 28, but on the facts found by the learned trial Judge, that the Cube Lode was staked in such a way as to mislead the Cody and Joker people, and that in consequence of their being so misled they did locate the Cody and Joker Fractions. In short he proceeded on the ground that the Cube Lode locators, the appellants, were estopped by their own negligence or fault from taking advantage of section 28—a view of the case suggested by Mr. Justice WALKEM in the argument of *Callahan* v. *Coplen* before the Full Court. That I think is

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the plain reading of Mr. Justice Gwynne's reasons. If not, how can he say, as he does undoubtedly say, there is only one point?

Mr. Justice Gwynne, it is also said, has laid down that section 28 does not apply in a contest between two rival claimants; that if it has any application it is in a dispute between the Crown and a subject.

I think that cannot be his view, as the section contains a proviso by which there is reserved to the Attorney-General a right to contest the effect of the certificate in a suit for fraud. And the section would have this extraordinary result, that whereas against the Crown, the allodial owner, the locator's title would be perfect, yet as against a licensee of the Crown, one who has done nothing except place his stakes in the ground already occupied by another man, the prior locator would not be able to avail himself of the curative powers of section 28.

What Mr. Justice Gwynne said about section 28 was, with reference to the circumstances of the particular case, the sole question in which was who had the superior right to a piece of land, the plaintiff, who had so misdescribed it in his record as to mislead, and whose record did not include it, or the defendants, who, being thus misled had located and correctly recorded the claim.

Read in this way Mr. Justice Gwynne's judgment is not a decision on the conflicting construction put by the members of this Court on section 28.

Judgment of IRVING, J.

As to the points raised: (1.) As to the approximate compass bearing, the trial Judge, as he gave judgment for the plaintiff, must have been satisfied that it did not in fact mislead. This point can not be in doubt, as it was only at the trial that the defendant raised the question. Having regard to the plan annexed to the location affidavit, and the description of the ground as a "re-location of Arlington Fractional claim lying between the Arlington and Burlington," from which, and not from the posts—the defendant got his information, I think it was not calculated to mislead; at any rate section 28 would cure that irregularity.

(2.) The contention as to free miners' certificate being irregularly issued is set at rest by section 53.

(3.) The positive evidence of the finding mineral in place is sufficient. (See Cooper's affidavit and his statement that he was satisfied that it was mineral in place, and Haller's evidence.) There was no cross-examination of Cooper or Haller as to these.

And the fourth would be answered by section 28, which would excuse the failure to comply with the requirements of section 32. I think the appeal should be dismissed.

MARTIN, J.: It is necessary to decide first the question whether or not we are bound by the decision of this Full Court in *Gelinas* v. *Clark* (1901), 8 B. C. 42. After a consideration of the cases, *inter alia*, of *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, at pp. 111-2; *Casson* v. *Churchley* (1884), 53 L. J., Q. B. 335-6; *Pledge* v. *Carr* (1895), 1 Ch. 51; *Lavy* v. *London County Council* (1895), 2 Q. B. 577 at p. 581; *The London Street Tramways Company, Limited* v. *London County Council* (1898), A. C. 374; *North* v. *Walthamstow Urban Council* (1898), 67 L. J., Q. B. 972-4, and *Jordan* v. *McMillan* (1901), 7 B. C. 27, I am of opinion that we are, the Court as then constituted comprising a majority of the Bench, and the point decided having been for the first time passed upon by the Court.

Such being my view it is not necessary that I should add to my discussion of the case of *Callahan* v. *Coplen* in *Gelinas* v. *Clark*, other than to say that the argument of the appellant's counsel fortifies me in the conclusion I therein arrived at, but of course I bow to the opinion of the majority of the Court.

Judgment of MARTIN, J.

To clear up a possible misunderstanding of my remark in *Gelinas* v. *Clark*, that "from the fact that the judgment is affirmed they (the reasons of the Court below) must be considered as more or less ratified," I wish to draw attention to the remarks of the Master of the Rolls in the case of *Hack* v. *London Provident Building Society*, *supra*, at p. 112, cited by Mr. *Duff*:

"As regards the judgment of the Court of Appeal in that case, I must say this, that the decision of the Court of Appeal was affirmed, but not the judgment, and that is a very important distinction. When the House of Lords affirm a decision on

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different grounds from those of the Court below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Court of Appeal intact, shews the contrary, and that you are no longer bound by it. The mere affirmance of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it."

In attempting to apply these expressions to *Callahan* v. *Copleń* a difficulty arises from the fact that the Supreme Court upheld this Full Court on the question of the error in the compass bearing, and the result of that error—7 B. C. at page 426—thus partially giving effect to the reasons. This is something more than the "mere affirmance" referred to by the Master of the Rolls, and in view of the somewhat contradictory expressions in the judgment of the Supreme Court regarding section 28, I confess I am at a loss to know how to satisfactorily apply the said rule of construction to that case. However, seeing that, in my opinion, we are bound by *Gelinas* v. *Clark*, it is not really necessary to try to do so.

Judgment of MARTIN, J.

In the case at bar the situation simply is that on the 29th of November, 1897, the Native Silver Fractional mineral claim was located, and later recorded, and on October 7th, 1898, and November 15th, 1899, two certificates of work had been recorded. Long after this, on the 25th of April, 1900, the opposing claim the Arlington No. 1 Fractional was located, and later recorded, and on August 1st of that year its owners recorded a certificate of work. The action was begun on the 8th of August following. Now, as I understand it, the broad result of *Gelinas* v. *Clark* is that when there is a claim definitely located and recorded, and a certificate of work duly recorded, then by virtue of the joint operation of sections 28, 34 and 24, the holder of the claim has got what is equivalent to a lease from the Crown and the lands so leased are not open to location by other free miners because they have been segregated from the waste lands of the Crown.

But, it will be said, the junior locator has, by operation of the same sections, also got what is equivalent to a lease from the Crown: Now, *Victor* v. *Butler* (1900), 8 B. C. 100, decides that

in such cases the prior lease of the senior locator shall prevail.

It is possible, doubtless, to fritter away the decision in *Gelinas* v. *Clark* by subtle distinctions and refinements, but, speaking as a member of the Court which heard the case, the foregoing is my understanding of the substance and effect of the judgment. So much confusion has resulted from the decisions of this Court and the Supreme Court on section 28 that it is desirable we should, if possible, come to a decision which shall be certain and definite.

In view of the foregoing opinion that in principle this case is not distinguishable from *Gelinas* v. *Clark*, the other points raised are consequently not open to argument.

The appeal should be dismissed with costs.

*Appeal dismissed.*

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## REX v. GEISER.

WALKEM, J.
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*Criminal law—Summary conviction—Case stated—Recognizance imperative—Cash deposit not good—Criminal Code, Sec. 900, Sub-Sec. 4, and Crown Rules 59 and 60.*

The recognizance required by section 900, sub-section 4 of the Criminal Code, is a condition precedent to the jurisdiction of the Court to hear the appeal and no substitute therefor is permissible.

APPEAL by way of case stated under section 900 of the Criminal Code. The appeal was called at Rossland on 14th October, 1901, before WALKEM, J., when

*MacNeill, K.C.*, and *W. S. Deacon*, for the prosecution, objected that the Court had no jurisdiction as no recognizance had been entered into. Argument.

*Daly, K.C., contra.*

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15th October, 1901.

WALKEM, J.: This appeal comes up before me, in the form of a case stated by the Police Magistrate of Rossland.

The charge against Geiser is that, in contravention of section 1 of an Act to Restrict the Importation and Employment of Aliens (60-61 Vict., Cap. 11), he did, on the 21st day of August last, "assist and encourage the importation or immigration into Canada of Neal Stevenson, an alien, under contract made previous to the importation or immigration of said Neal Stevenson, to perform labour in Canada, contrary to the form of the statute in such case made and provided."

Mr. *MacNeill* objects to the appeal being heard on the ground that the requirements of sub-section 4 of section 900 of the Code, and of Crown Rules 59 and 60, have not been complied with. The Crown Rules, I may state, are copies of the English Rules. The combined effect of the section and rules is that every case stated shall be applied for within four days from the date of the order complained of, and that at the time of making the application, and before the delivery of the case, the appellant shall "in every instance" enter into a recognizance to the extent of $100.00 conditioned to prosecute his appeal without delay and submit to the judgment of the Court.

Judgment.

The unusual words, "in every instance," would appear to have been purposely used by the Legislature to emphasize its intention that no other security than a recognizance should be offered or accepted. In the present instance, the application for the case stated was properly made; but instead of a recognizance being entered into by the appellant, he deposited a marked cheque for $100.00 with the Magistrate. As this was, obviously, not a compliance with the requirement of the statute, I must dismiss the appeal with costs, as the observance of that requirement was a condition precedent to the right to appeal.

This is in accordance with the unanimous opinion expressed by the Court of Appeal in *Lockhart* v. *The Mayor, Aldermen, and Citizens of St. Albans* (1888), 21 Q.B.D. 188 (C.A.), in reference to a similar enactment and similar rules. This opinion, I am bound to follow: see *Trimble* v. *Hill* (1879), 5 App. Cas. 344.

## REX. v. BEAMISH.

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REX v. BEAMISH

*Criminal law—Summary conviction—Appeal to County Court—Habeas corpus proceedings after.*

The decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by *habeas corpus*.

APPLICATION for a writ of *habeas corpus* argued at Rossland on 12th October, 1901, before WALKEM, J. The facts appear sufficiently in the judgment.

*Gillan*, for the application.

*Daly, K.C., contra.*

12th October, 1901.

WALKEM, J.: In this case, the prisoner was convicted by the Police Magistrate of Rossland on the 19th day of August last, and sentenced to two months' imprisonment with hard labour, inasmuch as he "wrongfully and without lawful authority, with a view to compel Joseph Horn, the informant, to abstain from proceeding peacefully through the streets of the City of Rossland aforesaid, did persistently follow the said Joseph Horn about from place to place, and with one or more other persons did follow the said Joseph Horn in a disorderly manner on Washington Street and Columbia Avenue, in said City, contrary to the provisions of the Statute in such case made and provided."

Judgment.

By section 523 of the Criminal Code, which is the section under which the complaint was lodged against the prisoner, "Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two Justices of the Peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

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(*c.*) Persistently follows such other person about from place to place; or

(*e.*) With one or more other persons follows such other person, in a disorderly manner in or through any street or road."

The prisoner's counsel lately applied to me for a writ of *habeas corpus* for the purpose of having the proceedings in the case reviewed. On inspection of the conviction I granted the rule *nisi*, which is now up for argument—Mr. *Daly* appearing as counsel for the Crown.

I have now been informed for the first time that immediately after the conviction the prisoner's counsel gave notice of appeal to the County Court of Kootenay, and that the case was re-tried by His Honour Judge LEAMY, and the sentence of the Police Magistrate confirmed.

Under these circumstances it appears to me that I have no jurisdiction to deal with the case or express any opinion upon it, for by section 881 of the Code—"When an appeal against any summary conviction or decision has been lodged in due form . . . . . the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or decision."

Notwithstanding the ungrammatical structure of this section, it is clear that the Legislature intended that absolute effect should be given to the appellate Judge's decision, both on questions of law and fact, in respect to the Magistrate's conviction or decision, or, in other words, that the decision of the appellate Judge should be regarded as final and conclusive.

Judgment.

Moreover, the final judgment in the present case being that of a Judge of the County Court, it is the judgment of a "Court of Record" (County Courts Act, R.S.B.C. 1897, Cap. 52, Sec. 4), and also, in view of the language of section 881, which I have just been considering, of a Court of competent jurisdiction; consequently, the validity of the judgment cannot be impeached by *habeas corpus* proceedings. There are numerous authorities to this effect—the well known case of *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, being one of them.

Apart from this, the defendant had the right, immediately after his conviction, to elect any one of three remedies which were

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open to him; that is to say, either to proceed, as he is now doing, by way of *habeas corpus;* or to procure a case stated and have it heard (see section 900 of the Code); or to appeal under other provisions of the Code to the County Court of Kootenay Having elected to take this last course he is bound by the result of it.

*Regina* v. *Arscott* (1885), 9 Ont. 541, has been cited by the prisoner's counsel as shewing that notwithstanding the fact of an appeal from a Magistrate having been heard and determined, the whole proceedings in the case could be reviewed; but that case is clearly inapplicable here, as it was a decision given in 1885, and, hence, about seven years before section 881 became law.

Judgment.

I need hardly say that had it not been for the intervention of the appeal to the County Court I would have had jurisdiction to entertain the application now made; but, as it is, the rule must be discharged with costs.

*Rule discharged.*

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## CANADIAN DEVELOPMENT CO. v. LE BLANC *ET AL.*

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C. D. Co. v. LE BLANC

*Yukon law—Appeal to Supreme Court of British Columbia—62 & 63 Vict., Cap. 11, Sec. 7.*

*Collision—Damages—How assessed—Non-observance of Canadian sailing rules.*

*Practice—Costs—Preliminary Act—Order XIX., r. 28 of the English Rules.*

Plaintiffs' claim for $408.00 was dismissed, and defendants on their counter-claim got judgment for $735.00. Plaintiffs appealed.

*Held*, by the Full Court, that the appeal must be limited to the judgment on the counter-claim as the claim was not for an appealable amount.

Plaintiffs in a collision case having failed to file a Preliminary Act—

*Held*, by DUGAS, J., and affirmed by the Full Court, that no evidence could be given in support of the plaintiffs' claim.

The ship Canadian navigated by an American pilot was making a landing against a current of about six miles an hour. The ship Merwin, also

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navigated by an American pilot was coming down stream. Both vessels before collision gave blasts which were interpreted by each ship according to American regulations.

*Held*, by DUGAS, J., that under the circumstances the Canadian was alone to blame.

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*Held*, in appeal, by WALKEM and DRAKE, JJ., that both vessels were to blame, and that the appeal should be allowed without costs.

By IRVING, J., that both vessels were to blame, and that it be referred back to assess the damages to the Canadian, and then the damages should be apportioned according to the Admiralty rule.

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By MARTIN, J., that the appeal should be dismissed.

Observations as to the necessity for complying with the Canadian navigation rules in Canadian waters.

APPEAL from the judgment of DUGAS, J., in the Territorial Court of the Yukon Territory. The plaintiffs sued for $408.00 damages sustained by their steamer, the Canadian, as the result of a collision with the defendants' steamer, the Merwin, in Thirty-Mile River on 21st August, 1899. The defendants counter-claimed for damages. The Canadian (in order to comply with the requirements of the law that every Canadian vessel shall carry a Master having a British or Canadian certificate) at the time of the accident was theoretically in charge of Captain Moore who held a Canadian certificate, but practically and so far as navigation was concerned she was in charge of Captain Raabe who held no British or Canadian certificate.

Statement.

The Master of the Merwin was Captain Leach who held a Canadian certificate, but at the time of the accident she was being navigated by Pilot John Green who held no certificate. The plaintiffs did not file a Preliminary Act as required by Order XIX., r. 28 of the English Rules which the learned Judge held to be in force in the absence of a local rule, and their claim was dismissed. The remaining facts appear in the judgments.

The trial took place at Dawson on 21st and 22nd February, 1900, before DUGAS, J.

*F. J. McDougall*, for plaintiffs.
*McCaul, Q.C.*, for defendants.

17th April, 1900.

Judgment of DUGAS, J.

DUGAS, J.: Both parties claim damages done to their respective boats—one, the Canadian, belonging to the plaintiffs, and the

other, the Merwin, belonging to the defendants—as the result of a collision which took place between the two boats on the 21st day of August, 1899, on the Thirty-Mile River, below Lake Labarge in this Territory. The plaintiffs, not having filed Primary Acts, were not permitted to go to proof and the whole evidence was adduced upon the counter-claim by defendants.

The proof establishes that at about six o'clock in the morning the Canadian was at a certain point in the river, near the shore, on the left side of the stream, and about to make a landing, when the Merwin coming down stream, saw her from a distance estimated at about five hundred yards. The pilot immediately signalled by one short blast, stopping in the meantime the engine, which, according to Article 19 of the Regulations established by section 2, of Cap. 79, R.S.C. 1886, of the Act respecting the Navigation of Canadian waters, would mean "I am directing my course to starboard," to which the Canadian immediately answered by one short blast also, which meant "Follow your course; you have the right of way." This is accepted as the ordinary rules generally followed, by all the witnesses of both plaintiffs and defendants.

The current of that river is generally very swift, it being at that point estimated to be from four to six miles an hour. The Merwin having received the signal from the Canadian that the right of way was given to her, continued drifting and followed her course until at a distance of about three hundred yards from the Canadian, which at that time, began to back out into the channel in order to avoid striking a bar which was in front of her. The Merwin seeing the danger to which this backing out exposed both boats, gave the danger signal of three blasts, to which there was no answer, but on account of the swift current, although she reversed her engine and tried to back up, it became impossible to prevent the collision by which both ships were damaged.



The only question, therefore is: Whether the fault lies on both ships or only upon one of them? There seems to be no difficulty as to the facts, which can be reduced to this: That, being at a certain distance from the Canadian, the Merwin followed the rule in asking for the right of way, which meant

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whether she could follow safely her course to starboard. The Canadian answered "Yes," but immediately after, the latter boat having to back out from the shore and across the channel in such a way as to interfere with the right of way given, the Merwin, on account of the swiftness of the river, having a certain speed although only drifting, and the channel being comparatively narrow at that place, could not either swing around or back up in time to avoid the accident. Still, it has been pretended on the part of the plaintiffs that the Merwin should have swung around or have sufficient power to back up stream. This I believe cannot hold, notwithstanding the fact that a boat or a ship cannot be expected to be sufficiently powerful to meet any special accidents of navigation. The Merwin is one of those boats which, under the laws and regulations, is well qualified to navigate in inland waters, and I may add that it seems that even if she had been a more powerful boat, she could not have swung around or backed up in time, under the circumstances, to avoid the collision.

The fault I attribute to the Canadian alone, for, when, in answering in the way she did, and giving the right of way, it was for her to see, at the time that she so answered, whether she was doing so rightly or wrongly.

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But there is more than that in the case, for Article 2 of the same section says: "That nothing in these rules shall exonerate any ship, or owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precautions required by the ordinary practice of seamen, or by the special circumstances of the case."

According to the admissions, even of the witnesses of the Canadian, when backing there should be a proper look-out in the rear of the vessel. Here I find that the only man—who, it is pretended, was a proper look-out in this serious danger—was at the time preparing the ropes to land her, and happened to be there only for that purpose. I believe that this was not sufficient, more particularly after she had decided not to follow the signal given.

Taking all the circumstances into consideration, I come to the

conclusion that everything which could be done by the Merwin was done, and that the whole fault lies on the Canadian, which, besides, does not seem to have been very thoroughly equipped.

Taking this view of the case, I am relieved from adjudging upon the point as to whether the plaintiffs not having filed Primary Acts, would be prevented from entering into any evidence upon their defence on the counter-claim, which, however, was accepted under objection, and permits me to add that, even if the plaintiffs had been allowed to produce their evidence on their statement of claim it would not have changed their position as upon the counter-claim all the facts invoked by both the plaintiffs and the defendants were proven.

Judgment will be entered against the plaintiffs for the amount of damages which will be established by W. H. Snell, who is directed to ascertain the same, with costs covering both plaintiffs' action and defendants' counter-claim.

On the reference the Referee assessed the damages at $735.00.

The plaintiffs appealed to the Full Court of the Supreme Court of British Columbia from the judgment dismissing their claim and also from the judgment on the counter-claim, and the appeal was argued at Victoria on 18th January, 1901, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

When the appeal was called

Argument.

*Cassidy, Q.C.*, for the defendants, took the objection that the Court had no jurisdiction to hear the appeal from the judgment dismissing the plaintiffs' claim which was for only $408.00 (according to the statement of claim)—see 62 & 63 Vict., Cap. 11, Sec. 7.

*Per curiam:* The appeal will be only as to the counter-claim.

*Bodwell, Q.C.* (*Duff, Q.C.*, with him), for appellants: The trouble arose through the Merwin not being under control. She had no right to drift. The rule is that the overtaking vessel must keep out of the way of the overtaken.

*Cassidy*, for respondents: It is a question of disputed facts all the way through and there should be no light interference with the finding and judgment in the Court below: see

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*Bland* v. *Ross* (1860), 14 Moore, P. C. 210 at p. 235; *S. S. Santandarino* v. *Vanvert* (1893), 23 S.C.R. 145, both of which shew that the Court will not interfere unless the decision appealed against is clearly wrong. He cited also *The Agra* (1867), 4 Moore, P.C., N.S. 435.

*Bodwell*, in reply cited *The Saragossa* (1892), 68 L.T.N.S. 400; *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217; *Wakelin* v. *The London and South Western Railway Co.* (1886), 12 App. Cas. 41 and *Coghlan* v. *Cumberland* (1898), 1 Ch. 704.

*Cur. adv. vult.*

6th May, 1901.

WALKEM, J.: I have had the advantage of reading the judgment about to be delivered by my brother DRAKE, and I concur in his opinion that the appeal should be allowed, but without costs.

Judgment of WALKEM, J.

I might add that I think it is of the first importance that the Dominion sailing rules laid down for steamers and other vessels, especially with regard to signals, should be strictly enforced by the Court at Dawson, and that the importation, if I may use the term, of foreign rules should not be permitted.

DRAKE, J.: The evidence in this case is not so full as it might be on some of the points which have an important bearing on the case. The facts which are proved, however, shew that the S.S. Canadian was making a landing on the Lebarge River when she found herself in danger of getting on to a bar. She therefore backed out, just holding her way against the current which runs from five to six miles an hour. The effect of her manoeuvre was that her stern was thrown into the current, and more or less into the channel. She was keeping her nose ashore in order to get round the end of the bar, her bow being 100 feet from the shore. The Merwin was coming down the river, and when within some eight hundred yards she blew one whistle, which under Article 28 was an intimation she was going to starboard. The Canadian answered her whistle, which appears to be the custom in these waters, but which is not necessary under the rules, in fact it might lead to serious trouble, for one whistle is an intimation

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that the vessel is going to starboard, and if one whistle was to be taken merely as an acknowledgment of the other vessel's whistle if she wanted to intimate her course she would mislead the following vessel. The rules of navigation for preventing collisions published by Order in Council, 1897, should be strictly followed. In the present case the answering whistle has had no bearing on the result. The learned Judge who tried this case considered that by answering the Merwin she intimated to the Merwin "to follow your course you have the right of way." I find no justification for this meaning being attached to the answering call. The rules indicate what meaning is to be attached to one, two or three blasts, and it would lead to confusion if other meanings were interpolated than those which the sailing rules lay down.

The Merwin, after her whistle, stopped her engines, and drifted down with the current until she came within about 300 yards of the Canadian. Then finding the Canadian's stern out in the stream, she blew three blasts which meant, "I am going full speed astern," but apparently she had no time or power to overcome the current, and struck the Canadian's wheel, doing considerable damage, and driving both vessels on to the bar.

If instead of drifting down as she did, she had kept way on the boat, she might have avoided the Canadian. The channel was some four or five hundred feet wide, and the length of the Canadian, if she was at right angles to the shore, would still have left from one hundred to two hundred feet of channel for the Merwin to pass. The Captain of the Merwin says it was impossible to avoid the collision in the position the boats were at the time. Article 24 says an overtaking vessel shall keep out of the way of the overtaken vessel, and if necessary shall slacken speed, stop or reverse. Here practically the Canadian was stationary, or so nearly so that her backing her wheel only checked her in the current, but gave her no progress astern. Notwithstanding the special rules every vessel must do what it can to avoid a collision. The Canadian could only have avoided the collision if she had run into the bar; but she was not bound to sacrifice herself for the purpose of enabling the overtaking vessel to pass, particularly if the overtaking vessel was under control, as she

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might reasonably conceive she was, and there was room to pass. There is no evidence as to what was done on the Merwin by use of the wheel to avoid the collision, and no evidence as to there being sufficient way on her to enable her to steer.

The learned Judge who tried the case appears to have imported into the rules two new rules: one, that by answering the Merwin's whistle the Canadian meant to indicate to the following vessel that she was to follow her course as she had the right of way; and the other, that three blasts was a danger signal, and imported something other than the meaning given by the rules which is that the vessel is going astern. No evidence was given of any special rule relating to the navigation of the Lebarge River under Article 30, so the only rules governing are the above. The only steps taken by the Merwin when she saw the Canadian's stern drifting out from the shore was to back astern, but she was too late to do any good, and too late to overcome the force of the current. The defence set up is default of the Merwin as overtaking vessel in not keeping clear of the Canadian, and in the alternative inevitable accident as defined by various collision cases where its meaning is extended further than inevitable accident arising from the act of God, or some act which no one could foresee. But I think there is another alternative, and that is that both boats were to blame. I think the Canadian should have intimated her movement astern by three blasts when she saw the Merwin drifting on to her It is contended that the want of a look-out on the Canadian contributed to the accident. I do not think it did. There was no time for the Canadian to get way on her, and direct her course down stream. If the Merwin was drifting down a current at six miles an hour it would only take her one minute and ten seconds to cover the 300 yards; an insufficient period of time to take any active steps to avoid a collision. If she had been under control it is possible that a free use of the wheel might have enabled her to sheer clear, but as I pointed out there is no evidence on this head. The only thing she did was to go full speed astern, and it is not clear that she in fact had managed to get any stern way on her.

Judgment of DRAKE, J.

The defendants contend that there was a want of sufficient look-out on the Canadian. I do not see how a man at the stern

could under the circumstances have been of any use. The Merwin had the right of way, and it was reasonable to suppose that she knew her course, and would avoid the overtaken vessel. The time was too short after the 300 yards limit was reached for a look-out, if there had been one, to take any steps to avoid it. But in the view I take of the whole evidence I think the blame of the accident does not rest on the Canadian; and that the appeal should be allowed. Following *The Gannett* (1899), P. 230, there should be no costs of appeal or in the Court below.

IRVING, J.: This action, as originally launched, was brought by the Canadian against the Merwin. The Merwin counter-claimed against the Canadian, and this appeal is taken by the Canadian Development Co. from the decision given on the counter-claim.

The original action, *Canadian* v. *Merwin*, was dismissed because of the failure of the plaintiffs to file a Preliminary Act as required by r. 224 of the English Rules of Court. As the amount claimed in that action is only $408.00 there is no appeal from that decision.

For convenience, the plaintiffs in the counter-claim, the respondents, can be referred to as the Merwin, and the appellants as the Canadian.

The Merwin's case as deposed to by the two witnesses called on her behalf is as follows:

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The Merwin coming down the Yukon early in the morning, at about ten miles an hour, saw the Canadian 700 or 800 yards ahead of her, lying in against the left (or westerly) bank of the river, head down-stream according to one witness, head up-stream according to the other.

The Merwin slowed up and gave one blast. The Canadian replied with one blast The Merwin came on—just drifting down with the current, which is about five or six miles an hour, till she reached a point about 200 yards according to one witness, or 300 or 400 yards according to another; when the Canadian, without whistling, backed out into mid-stream and taking the biggest part of the channel, she had over half the river, placed herself in front of the Merwin, so that the Merwin could not get around her

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stern nor back away from her in time to avoid the collision.

The evidence was given in a most unsatisfactory way, but from the exhibits shewing the course of the channel, and the statement of the master of the Merwin "that he was following the channel" it would appear that the Merwin instead of directing her course to starboard really went to port, and kept edging towards the left bank of the river.

When the Merwin was within 350 yards, or 300 yards of the Canadian, the Canadian began to back in order to avoid the gravel bank that appeared in front of her. When the Merwin was about 200 yards from the Canadian she began to back.

I think the Merwin was in fault in not keeping to the starboard side of the channel (Art. 25), and having accepted the risk of travelling on the wrong side, in not reversing her engines in sufficient time (having regard to the power of her engines), to keep clear of the Canadian when it was first apparent to her that the Canadian was about to back out.

The channel was apparently the full width of the river, 400 to 500 feet, except opposite the sand bar, which, so far as the Merwin was concerned, made no difference in the selection of the course she ought to have pursued prior to the collision.

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The case is a difficult one to deal with in the absence of any survey, but it seems that the river was unobstructed, except by the gravel bar which ran out from the left bank. The collision took place near that point. By Articles 24, 25 and 28, she should have taken the east side of the river. By Article 28, after giving one blast she was bound to take the east side of the river. Instead she took the left. The blast of the Canadian ought to have made her aware that the Canadian was not tied up; and if they on the Merwin thought, as they say they did when they first saw the Canadian, that she was tied up to the bank, they must have, or ought to have seen their mistake long before they reached the 300 yards limit. I think the Merwin is in fault.

I agree with the learned trial Judge that the Canadian is also to blame in that she had insufficient look-out, and that she did not give three blasts before backing into the stream. One man in the wheel-house is not in my opinion a sufficient look-out.

His attention must necessarily be occupied with the shoals and the handling of the wheel.

The accident seems to me to have been brought about by the pilots neglecting to observe the rules laid down for their guidance. In connection with these rules I must call attention to the fact that rules must govern and must be followed strictly, and the pilots on the Yukon are not at liberty to adopt American or other rules for navigation, however good they may be.

At the trial of the counter-claim the defendants' evidence was received under reserve. The first question this Court must determine is are we to decide this appeal on the evidence of the plaintiffs as the learned trial Judge was asked to do, or are we to deal with the evidence given on both sides?

The objection to the admission of the Canadian's evidence was founded on the idea that because the defendant had neglected to file a Preliminary Act under r. 224 of the English Rules, he was to be regarded as having put in no defence.

The authorities shew that the Court will not allow any amendment to be made to the Preliminary Act, except in very rare cases; that if there is any mistake in the Act it stands; but the mistake can be corrected in the pleadings. This I think shews that the failure to file a Preliminary Act is not an absolute bar to giving evidence. The value of the evidence of the side neglecting to file the Act is diminished—even to the vanishing point—but I cannot agree to the proposal that this case is to be decided behind his back.



I cite on this point *The Frankland* (1872), L.R. 3 A. & E. 511; *The Miranda* (1881), 7 P.D. 185 and *The Godiva* (1886), 11 P.D. 20.

By section 7, Cap. 79, Revised Statutes of Canada, the Admiralty Rule as to the division of damages is to prevail over the Common Law Rule. By the Admiralty Rule the damages are thrown into hotch pot, and both parties contribute to the liquidation of the total amount.

The damages to the Canadian have not been assessed; those to the Merwin have been assessed at $735.00; we have the fact in this case that the Canadian's action has been dismissed, and the claim of her owners against the owners of the Merwin has been

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disallowed. This state of affairs could never exist if the two actions had been consolidated, and we cannot carry out the Admiralty Rule unless we ascertain the damages sustained by the Canadian.

It may be objected that the original action having been dismissed nothing can be done in the way of ascertaining what those damages amount to, but it has always been the practice of the Admiralty Court to do its utmost to place the parties on an equality—compare what was done in the case of *The Seringapatam* (1848), 3 W. Rob. 38.

I think the judgment we ought to give is that the judgment now under appeal be set aside; that it be referred to the Yukon Court to ascertain the amount of damages sustained by the Canadian, and that judgment be entered for the owners of the Merwin against the owners of the Canadian for the difference between that sum and the one-half of the damages sustained by the two boats.

Judgment of IRVING, J.

As to costs, the rule is, where both parties are found in fault by the Court of Appeal to give no costs to either party, there, or below, *e.g.*, *The Sandhill* (1894), A.C. 647; *The Gannet* (1899), P. 230.

MARTIN, J.: This appeal, as we have already held on January 18th last, proceeds only on the counter-claim of the Merwin, those paragraphs of the notice of appeal relating to the claim of the Canadian for damages having been struck out of the appeal book on page 87. Consequently, no questions arising out of any action taken by the Court in regard to Preliminary Acts were argued by counsel, and therefore should not, in my opinion, be considered by this Court.

Judgment of MARTIN, J.

Then as to the questions still open. It was argued for the appellants (defendants by counter-claim) that the judgment is erroneously based on the ground that the Canadian was guilty of two "statutory faults," (1.) that she should have given the Merwin the right of way after answering her signal to pass, and (2.) that the Canadian should have had a look-out astern.

I have carefully re-read the evidence and the learned Judge's reasons, and am unable to accept that view. Quite apart from

any question of statutory obligations there was ample evidence which justifies the appellants being found guilty of negligence. Speaking first as to the signals, I agree with the expressions that fell from some of my learned brothers in regard to the necessity of those navigating Canadian waters complying with our regulations, and where one steamer relies on the Canadian signals and another does not, on the latter will fall the responsibility. But in this case so far as signals are concerned neither party relied on the Canadian regulations but, on the contrary, both governed their conduct by a local code of signals unrecognized by the regulations, yet, nevertheless, in every way operative so far as the parties and questions of negligence are concerned. The learned trial Judge so finds, and on the evidence he could arrive at no other conclusion for it is, in fact, admitted that the signals actually used had only the one meaning, which was applied by both parties.

Then it was strongly urged against the Merwin that the cause of the accident was the fact that she was "drifting" down the stream, and so was helpless. It is true that she was "drifting," but not, in the primary sense of the word, like a log, but under control. The evidence shews that on first seeing the Canadian, the Merwin blew one blast of her whistle, "slowed down" and then stopped her engine and, after getting the answering blast, dropped down with the swift current, but being all the time "under control." In so going down the stream, I am unable to find that she did not substantially comply with Article 25 as to keeping to the proper side of the fairway; in my opinion she did, not only so far as was "safe and practicable," under the circumstances, but also so far as could be reasonably required of her under the peculiar conditions which have to be considered, the principal of which is that the Canadian was not proceeding on her course, but was alongside the bank making a landing, on account of a fog-bank ahead of her.



Furthermore, in answer to the suggestion that the Merwin was not properly equipped, there is a finding, which there is no evidence to disturb, that she was "well qualified to navigate in inland waters."

Speaking generally, it may be that the learned Judge appealed

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from has used some expressions in his judgment which might be excepted to, but as a whole I am of the opinion that he has rightly found, and this is eminently a case where such findings should not be lightly disturbed because, as the Lord Chancellor recently said in a collision case, "the point as to having seen the witnesses and having had an opportunity of judging whether they were speaking the truth or not is generally a very powerful one."—*The Gannet* (1900), A.C. 239. And see the recent judgment of the Supreme Court of Canada on the undesirability of interfering with the findings of a trial Judge—*Village of Granby* v. *Menard* (1900), 31 S.C.R. 14.

The appeal should be dismissed with costs.

*Appeal allowed—No costs of appeal or of counter-claim in Court below.*

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## B. C. STOCK EXCHANGE, LIMITED v. IRVING.

*Stock exchange—Broker and principal—Payment of differences—Illegality—Criminal Code, Sec. 201.*

Defendant instructed the plaintiffs to sell shares in The C. T. Co. for him, who asked for cover and defendant paid $600.00; no time was fixed for delivery; plaintiffs asked defendant for more as shares were rising, and finally called for $2,400.00, which defendant refused to pay. Plaintiffs then, as they alleged, purchased the shares to satisfy their own liability and sued for amount paid.

*Held*, by DRAKE, J., dismissing the action, that as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal.

Statement.

ACTION for $637.50 tried before DRAKE, J., at Victoria on 21st October, 1901.

*Bradburn*, for plaintiffs.
*W. J. Taylor, K.C.*, for defendant.

1st November, 1901. DRAKE, J.

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DRAKE, J.: This action is brought by the plaintiffs to recover $637.00 money alleged to have been paid by the plaintiffs at the defendant's request to Downing, Hopkins & Co., Seattle Brokers, in respect of the purchase of 300 Continental Tobacco shares at 62⅝. The plaintiffs are a Company incorporated in this Province. The defendant instructed them to sell 300 shares of the Continental Tobacco Company. The plaintiffs asked for cover, and the defendants paid them $600.00, that is $2.00 a share. No time was fixed for the delivery of the shares or closing the transaction. The plaintiffs called upon the defendant from time to time for more money as the shares were steadily rising, and on or about the 29th day of May they called for $2,400.00, which the defendant refused to pay. They thereupon alleged that they purchased 300 shares in the market at 62⅝ a share in order to satisfy the defendant's liability. The defendant when he sold the shares sold 100 at 52, and 200 at 51⅝. The plaintiffs never asked the defendant for the scrip which he sold, and they purchased without notifying him of their intention so to do, and without asking him to deliver the scrip.

The mode of business as alleged by the plaintiffs was that on receipt of an order from clients they instructed their agents in Seattle, Messrs. Downing, Hopkins & Co., to buy or sell as the case might be, and that the prices of the New York market were the governing prices for all transactions.

Judgment.

A good deal of evidence was given about the commission which they alleged they charged for transacting business, in order to substantiate the fact that they were not principals in the business transacted.

They have made no claim for any commission and have not sued for it, but merely for money alleged to be paid on the purchase of 300 Continental Tobacco Company's shares at $62.87 per share.

From the evidence of Mr. John Nicholles for the plaintiffs it appears that the rule is that if the margin is exhausted the trade is closed. "We have," he says, "to close the trade on the exhausted margin to protect ourselves from loss"—unless the trader re-margins—this is continually repeated, and it is difficult to see

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what claim he can have for further funds when the margin is exhausted. And he further says, "we never have any scrip delivered to us to sell. We settle the differences according to the fluctuation of the market." And again, "we would have closed the transaction on his, *i. e.*, the defendant's account at any time by his paying us the difference, or a receipt by him of the difference according to the rise or fall of the market without handling the shares at all." This evidence clearly indicates the nature of the business transacted, and that it was dealing with differences only.

The plaintiffs produce a sold note which is as follows :—

B. C. STOCK EXCHANGE, LIMITED.

Correspondents Downing, Hopkins & Co.,

Victoria, B. C., May 6, 1901.

Mr. Irving,

Dear Sir,

We have this day sold for yr. acct. & risk 200

Con. Tobacco 51⅝

Exhausts at $54⅜

Margin $ Stop loss 56⅜

J. N.

All sales are made in accordance with market prices of the property at the time of the order on the New York Stock Exchange & quotations thereof authorized by said Exchange.

Yrs. resply.,

B. C. Stock Exchange, Ltd.,

pr. J. N.

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No evidence was given to shew what was the market price at New York on the day they alleged they bought 300 shares, *viz.*, 25th May.

The plaintiffs claim that they actually sold the 300 shares as instructed by the defendant, how, when or to whom is not disclosed. If they in fact sold, the purchaser would be entitled to demand delivery of the stock, but here the time is left open and no day fixed for a settlement, and from the continual demand for cover made by the plaintiffs it is evident that they treated the sale not as an actual one, but as one for which the defendant might be responsible to pay if the shares rose in the market, until

the margin was exhausted, and that closed the deal. The contract says "Stop loss at 56⅜," but instead of doing so they continued until the shares rose to 62⅝. This case as far as the facts are concerned is on all fours with *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685, Lord Justice Lindley in his judgment says "the plaintiff was employed to buy and sell on the Stock Exchange, and everything he did was perfectly legal unless it was rendered illegal by reason of the object they had in view. If gaming and wagering were illegal I should be of opinion that the illegality of the transactions in which the plaintiff and defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a Court of law, any indemnity from the defendant in respect of the liabilities he had incurred. Gaming and wagering contracts under the English law cannot be enforced, but they are not illegal. *Fitch* v. *Jones* (1855), 5 El. & Bl. 238."

This is the point in this case, are gaming and wagering contracts under the Dominion Law illegal? Section 201 of the Criminal Code says "Everyone is guilty of an indictable offence who with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company.....makes any contract oral or written, purporting to be for the sale or purchase of any such shares of stock....in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery." And that is followed by a protecting clause for the broker, that if the broker received the delivery of the thing sold there is no offence, although he retains or pledges the same as security for the advance of the purchase money. This Act is aimed at the exact contract which was made in this case. The law has made gaming and wagering contracts illegal, and the evidence of the plaintiffs discloses that no stock was ever delivered or intended to be delivered, and the intent was to make a profit from the fluctuations of the stock market. The Privy Council in *Forget* v. *Ostigny* (1895), A. C. 318 at p. 325, point out that the decisions of the English Courts are not authorities upon the construction of the Canadian Code, but throw light on what constitutes a

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gaming contract, and cite Lord Justice Cotton's view of what a gaming contract is. He says the essence of gaming and wagering is that one party is to gain and the other to lose upon a particular event which at the time of the contract is of an uncertain nature, that is to say, if the event turns out in one way A. will lose, if it turns out the other way he will win.

That is the fact here. As far as the defendant knew he was dealing with these plaintiffs. He put up a margin to cover them from loss if the stock rose. If the stock had fallen they would have paid him the difference. But the plaintiffs say they had no interest in the deal beyond their commission; but they have never asked for commission or charged commission, and no reference is made to it in their sold note. But even if they had I think that the transaction is so tainted with illegality that they cannot recover. This Court is not to be made use of for carrying out unlawful bargains; and as both parties are in the wrong, I give judgment for the defendant without costs.

Judgment.

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CRAIG, J.

1901.

Jan. 7.

## WENSKY v. CANADIAN DEVELOPMENT CO.

*Passenger's baggage or luggage—What is—R.S. Canada, 1886, Cap. 82, Sec. 3. Pleading—Point not pleaded or taken in Court below—Practice.*

FULL COURT At Victoria.

1901.

Oct. 16.

WENSKY v. C. D. CO.

Defendant Company sold plaintiff a ticket for Dawson from Bennett and containing the proviso that baggage liability was limited to wearing apparel only and that each ticket was allowed 150 lbs. of baggage free and not exceeding $100.00 in valuation. Plaintiff paid $10.00 excess baggage. Part of the baggage, including lady's apparel, men's suits and wolf robes, to the value of $655.00 was lost. Plaintiff sued for full amount, and defendants pleaded that their liability under the contract was limited to $100.00.

*Held*, by CRAIG, J., and by the Full Court (IRVING, J., dissenting), that defendants were liable for more than $100.00, but under the Carriers' Act for not more than $500.00.

*Held*, also, on appeal, that the contention that defendants were not liable for certain articles, not the wearing apparel of the plaintiff himself, was not now open to defendants as that point was not raised in the pleadings or taken at the trial.

Remarks as to what is included in the term "wearing apparel."

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APPEAL from judgment of CRAIG, J., in the Territorial Court of the Yukon Territory.

The plaintiff, a passenger on the defendant Company's line of boats from Bennett to Dawson bought a ticket with this proviso:

"Baggage liability limited to wearing apparel only. Each ticket is allowed 150 lbs. of baggage free, and not exceeding $100.00 in valuation, and half tickets in like proportion. All exceeding this rate and valuation will be charged for. This Company shall not be held accountable for merchandise, notes, bonds, documents, specie, bullion, jewelry, or similar valuables nor stores to be landed under designation of baggage, unless bills of lading are regularly signed, and freight charges paid thereon, and under no circumstances shall this Company be held responsible in case of loss of baggage, for over $100.00, unless extra charge has been paid on excess of valuation," and paid $10.00 for excess baggage and received three checks. The baggage consisted of a trunk containing a sealskin jacket, a lady's parquet (parkey), a lady's dress, three men's suits; a bag containing two wolf robes, two parquet suits; and a bundle of Norwegian skis. The trunk and the bag with their contents were lost. The plaintiff sued for $665.00 being the value of the articles lost and of the amount paid for excess baggage.

Statement.

The defendants pleaded that the baggage was not lost and that it was stipulated and agreed to by plaintiff that should his baggage be lost the defendants would not be liable to damages in excess of $100.00.

The trial took place at Dawson on 19th November, 1900, before CRAIG, J.

*A. Noel*, for plaintiff.
*Stacpoole*, for defendants.

7th January, 1901.

CRAIG, J.: The plaintiff, a passenger upon the defendant Company's line of boats from Bennett to Dawson, bought the

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usual transportation ticket and paid $10.00 for excess baggage. His loss was sworn to at the sum of $655.00. The goods were last seen at White Horse, and although the plaintiff endeavoured to have them put on board the boat the Company undertook to see that they were properly delivered. The goods have not since arrived, and now over a year has elapsed since the delivery of the baggage to the defendant Company for carriage. The defendants urge in the first place that they are not liable, and if at all liable, are not liable beyond an amount set out in their conditions which form part of the ticket, which conditions are accepted by the owner of the goods as witnessed by his signature, and those conditions limit the liability of the Company to $100.00. While I do not say that the Company or any company, may not limit its liability as common carriers by a special contract, yet in the view which I take of this case it will not be necessary for me to decide that point. The contract which they set up and which they claim limits their liability I think is only meant to cover the liability which they assumed in carrying the regular baggage of the passenger, that is, the 150 pounds. While I do not determine the question of whether even in that case they could limit their liability to a bare $100.00, yet in a case where the consignor of the goods or the passenger pays excess baggage or excess rates, this ticket, in my opinion, will not cover such excess and does not limit liability even supposing the contract were sufficient to do so. No receipt was given for the excess and no conditions or contract were signed in regard to that. The Company are therefore liable and upon the evidence I find that they have been guilty of gross negligence. In fact, the plaintiff might, if he had so framed his action, have sued for refusal to carry goods, as there is not a particle of evidence that this luggage or baggage ever was carried a foot of the way or even put aboard the Company's steamers. The Dominion Act regulating carriers by water provides that the liability of carriage by water shall be limited in cases such as these, to $500.00, unless the value and kind of goods are set out and the Company receive notice of them. In this case there was no evidence of any such notice having been given to the Company or the terms of the Carriers' Act complied with. I there-

Judgment of CRAIG, J.

fore, think that the Company rightly contend that their liability should be limited to $500.00. There will be judgment accordingly, with costs.

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Defendants appealed and the appeal was argued on 10th June, 1901, before the Full Court consisting of DRAKE, IRVING and MARTIN, JJ.

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*Duff, K.C.* (*J. H. Lawson, Jr.*, with him), for appellants: Under the terms of the ticket plaintiff's baggage was limited to wearing apparel only—such as was for plaintiff's personal use. He cited *Macrow* v. *The Great Western Railway Company* (1871), L.R. 6 Q.B. 612 at p. 622: *Hamilton* v. *Anglo-French S. S. Company* (1876), 11 N.S. 352: *Bruty* v. *The Grand Trunk Railway Company of Canada* (1871), 32 U.C.Q.B. 66, as to principle to be followed when articles received as personal baggage turn out to be not personal baggage; and *Dunlap* v. *International Steamboat Company* (1867), 98 Mass. 371. The effect of the judgment appealed against is that a person might carry merchandise if he paid excess baggage.

Argument.

*Davis, K.C.*, for respondent: The point now taken was not raised on pleadings or at the trial. The questions on plaintiff's cross-examination were as to wearing apparel, but not as to whose wearing apparel; he was never asked as to how he happened to be carrying lady's clothes—he must have been travelling with his wife. This shews the point was not taken. He cited *Becher* v. *The Great Eastern Railway Company* (1870), 13 C.L.T. 217; L.R. 5 Q.B. 241.

*Cur. adv. vult.*

16th October, 1901.

DRAKE, J.: In this appeal the defendants gave the plaintiff a ticket and took charge of his luggage, giving him cheques in exchange. The baggage was lost. The ticket contains the following stipulation: [Setting out proviso as in statement.]

Judgment of DRAKE, J.

The defence raised was on two grounds only, first, that the defendants never had the goods delivered to them for carriage; secondly, that their liability under the contract of carriage was limited to $100.00.

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The value of the goods alleged by the plaintiff is $655.00. The articles consisted of wearing apparel and included two fur rugs. The learned trial Judge held that the plaintiff having been charged $10.00 excess was entitled to recover $500.00, being the limit recoverable under the Carriers' Act, Cap. 82 of the Revised Statutes of Canada.

The defendants did not raise by their pleadings that the articles were not wearing apparel of the passenger himself, and although the evidence disclosed that some of the articles were female apparel, no amendment was asked, and we do not consider this point now open to the appellants. See *The New Zealand and Australian Land Company* v. *Watson* (1881), 50 L.J., Q.B. 433 and *Ex parte Firth* (1881), 51 L.J., Ch. 473.

With regard to the fur rugs which the defendants contended did not come under the term "wearing apparel," we have to consider the climate and the circumstances under which the journey was made. Fur robes are a necessity in the Yukon, and fall within the rule laid down in *Macrow* v. *The Great Western Railway Company* (1871), L.R. 6 Q.B. 612, that whatever the traveller takes with him for his personal use and convenience, according to the habits and wants of his class either with reference to his immediate necessities or the ultimate purpose of his journey, fall within the terms wearing apparel.

Judgment of DRAKE, J.

The articles were checked and delivered to the defendants, but only one package was delivered at Dawson. The result is that the defendants are responsible for the value unless the amount the plaintiff is entitled to recover is limited either by special contract or by statute.

The special contract limits the amount to $100.00, unless extra has been paid on excess of valuation. An extra charge of $10.00 was made and paid, but no receipt or memorandum was given to the plaintiff to shew whether this sum was for extra weight or valuation, and no evidence was given by the defendants on the subject. Under these circumstances we do not differ from the conclusion arrived at by the learned Judge and dismiss the appeal with costs.

Judgment of IRVING, J.

IRVING, J.: This is an appeal from Mr. Justice CRAIG, who gave judgment in favour of the plaintiff for $500.00 and costs. The

action was brought for the value of the contents of certain parcels which were checked as baggage by the defendants for the plaintiff, who was travelling on one of their steamers on a ticket which provided as follows: [Setting out proviso as in statement.]

The plaintiff presented his baggage, and it was thereupon weighed, the sum of $10.00 was demanded, and nothing was said by the plaintiff, or by the agent of the Company checking the baggage, as to the value of the contents.

Having regard to the contract entered into between the plaintiff and the defendants, I think it was the plaintiff's duty, if he desired to hold the Company liable for more than $100.00, upon presenting his baggage to be checked to state what the value of the contents was. The inference that I draw is that the $10.00 was paid for excess of weight, for from the contract it is plain that there are two distinct things, namely; excess of weight and valuation. By the contract 150 pounds is the limit of weight. One hundred dollars in valuation. The defendants set up this contract in their statement of defence, and the plaintiff denied that he entered into any such contract.

Judgment of IRVING, J.

The contract was proved at the hearing, and it was not then suggested by the plaintiff that the $10.00 paid by him was paid for excess in valuation. The plaintiff took the risk of not paying on the excess of valuation, and he is now estopped from saying that the goods were of greater value than $100.00. I refer to *Magnin* v. *Dinsmore* (1875), 20 Am. Rep. 442; *Alling* v. *Boston & Albany Railroad Company* (1879), 126 Mass. 121 and *Robertson* v. *Grand Trunk Railway Company of Canada* (1895), 24 S.C.R. 611 at p. 620.

I think the appeal should be allowed, and the judgment reduced to $100.00.

MARTIN, J.: I agree that the question as to certain articles not being the wearing apparel of the plaintiff is not now open to the defendant Company because that question was "left aside" at the trial, as their Lordships of the Privy Council express it in *Corporation of the City of Victoria* v. *Patterson* (1899), A.C. 615.

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And I also agree that the articles herein are covered by the term "wearing apparel," which is a variable and elastic expression receiving a different construction under different circumstances, *e.g.*, as regards a summer voyage to Honolulu and a winter journey to the Yukon. That hooded and fur-lined outer garment, for instance, known throughout the Yukon and Alaska by its Russian name, "parka," and mentioned in the evidence, is recommended to travellers by the leading authority on the Yukon (W. H. Dall, Alaska and its Resources, 1870, pp. 21. 22, 82-3) as a shield from the wind, but it would not be required by a tourist in Vancouver Island in July, though it might save his life on the trail to Dawson in December. Nor, to answer a suggestion, does the fact that, say, an extra shirt happens to be in a trunk, checked and put in the hold of a steamer, render that article any the less one of "apparel" than its fellow which happens to be taken by the same owner in his hand-bag to his cabin. The checking of the trunk does not alter the nature of its contents.

Then as to the limitation of the liability set up by the eighth condition of the ticket. The language used is ambiguous and unfortunately the evidence also is far from clear. the facts not being sufficiently brought out in regard to the payment for "excessive baggage" (an indefinite expression) and so leaving the reason for the excess payment of $10.00 uncertain. It was the duty of the defendant, claiming an exemption, to clearly establish it, and I consequently, particularly in view of the fact that there is no obligation imposed upon the plaintiff by the contract to declare the value of the baggage, do not feel justified in interfering with the result arrived at by the learned trial Judge, and prefer to leave for a future and more opportune time the consideration of such a question when the facts will doubtless be before us in such a way that our judgment may be of utility as a precedent.

Judgment of MARTIN, J.

*Appeal dismissed.*

## WILLIAMS *ET AL* v. FAULKNER AND KROENERT.
## RAYMOND *ET AL* v. FAULKNER AND KROENERT.

CRAIG, J.

1900.

Sept. 7.

FULL COURT At Victoria.

1901.

July 24.

WILLIAMS v. FAULKNER

*Yukon law—Order of reference—Jurisdiction of Court to make—N.-W. T. Orders XXIII., rr. 333 & 336, and XXXIII., r. 401—Co. Or. N.-W. T. 1898, Cap. 21.*

The power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of section 3* of the Judicature Ordinance, and therefore the Yukon Court has no power under this section to make an order of reference.

THE plaintiffs and defendants were adjoining placer mining claim owners, and plaintiffs sued defendants in the Territorial Court of the Yukon Territory for damages for wrongfully drifting and tunnelling through their claims and taking away pay-dirt containing gold and gold dust. The cases were argued together and for the purposes of this report they will be considered as one.

On plaintiffs' application DUGAS, J., made an order appointing Duncan A. McRae receiver, and Joseph McGillivray to make an inspection, the operative part of the order in regard to the latter being as follows:

"I do order that Joseph McGillivray, Esquire, be and he is hereby appointed and directed to inspect the dump and workings in question in this action for the purpose of ascertaining (1.) if the said workings encroached on the mining claim of the plaintiffs, the Baker Fraction, and if so to what extent; (2.) if any pay-dirt has been taken from the said mining claim, and if so to what amount; (3.) the amount of pay-dirt in the dump in question; and (4.) generally the condition and manner of the said workings, and that the said Joseph McGillivray, Esquire, report the result of such inspection to the Court, or a Judge, on or be-

Statement.

*The jurisdiction of the Supreme Court of the North-West Territories shall be exercised so far as regards procedure and practice in the manner provided by this Ordinance and the rules of Court, and where no special provision is contained in this Ordinance or the said rules it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898.

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fore the 1st day of July, 1900, or such further time as the Court or a Judge may appoint, with power to the said Joseph McGillivray, Esquire, to take evidence as to the matters hereby referred to him for inspection and apply to the Court or a Judge at any time for directions as to such inspection."

The report of McGillivray was as follows:

"I, Joseph McGillivray, beg to inform the Court that in accordance with the order made by the Honourable Mr. Justice DUGAS, in the Territorial Court of the Yukon Territory bearing date June 1st, 1900, I have for the purposes of the above action personally examined the mine and surroundings both on surface and underground, also have heard evidence produced by both parties and would submit to the Court the result of my investigations and findings.

"I find in answer to question:

(1.) "If the said workings encroached on the mining claim of the plaintiff, the Baker Fraction, and if so to what extent?"

That the defendants have encroached on the mining claim of the plaintiffs, the Baker Fraction, to the extent of forty-four yards on bed-rock.

(2.) "If any pay-dirt has been taken from the said mining claim, and if so, to what amount?"

That pay-gravel has been taken from said claim by defendants to the amount of $7,700.00, a portion of which has been rocked out in the mine and a portion put in the dump.

Statement.

(3.) "The amount of pay-dirt in the dump in question?"

I estimate there are about 2,463 yards, and value at $83,279.00.

(4.) "Generally the condition and manner of the said workings?"

That the drifts and tunnels are not made in a miner-like manner, in order to be maintained for permanent use. They should not have been made wider than five feet and should have been made straight on the sides, arched at the top. Whereas these drifts and tunnels in instances have been made as much as twelve feet in width flat and gouged in underneath."

On motion for judgment before CRAIG, J., McGillivray was examined as to how he arrived at his conclusions and the learned Judge approved and confirmed the report and entered up judg-

ment in pursuance thereof against the defendants for $7,700.00.

The defendants appealed to the Full Court of the Supreme Court of British Columbia and the appeal came on for argument at Victoria on 5th June, 1901, before WALKEM, DRAKE and IRVING, JJ.

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*Hunter, K.C.*, and *Duff, K.C.*, for appellants: We move to admit affidavits of Kroenert and Clarken to shew facts which do not appear in the appeal books. The case was commenced before DUGAS, J., who appointed McGillivray to inspect the workings—who would not let us give evidence but made a report on the opinion of others; then CRAIG, J., on motion for judgment simply confirmed the report and gave judgment against us. No issues were ever defined. The affidavit of Kroenert was to the effect that McGillivray would not allow counsel before him, refused to hear witnesses tendered by defendants, told defendants that they need not be concerned about the evidence as he was not holding a trial, but that they would be allowed to appear afterwards in Court and produce their witnesses. They referred to *In re Chennell* (1878), 8 Ch. D. 492 at p. 505, in which Jessel, M.R., said that it was convenient that the Court should know something about the facts of a case before dealing with the question of admitting further evidence. The affidavits to be adduced now are as to what took place at the trial, and so do not come under the general rule about putting in additional evidence on appeal. They cited *In re Copiapo Mining Company, Limited* (1894), 10 T.L.R. 180.

Argument.

*Davis, K.C.*, and *Cassidy, K.C.*, for respondents: Fresh evidence will only be admitted on same ground as that on which a new trial will be granted. This Court has no power to grant a new trial: see section 7, of 62 & 63 Vict., Cap. 11, which is as to appeal only. An appeal and a motion for a new trial are two different things. The only question now is whether the Judge came to a right conclusion on the report, and therefore this evidence should not be admitted as it could not have been used before the Judge. The defendants might have applied for an order to examine witnesses on commission and had it been refused there would have been no appeal as the order would have

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been interlocutory and they can't now be in a better position. They cited *Cummins* v. *Herron* (1877), 4 Ch. D. 787; *Walker* v. *Brunkell* (1882), 22 Ch. D. 722; *Richard* v. *Talbot* (1890), 38 W.R. 478; *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236; *Baroness Wenlock* v. *The River Dee Company* (1887), 19 Q.B.D. 158; *Weed* v. *Ward* (1889), 40 Ch. D. 555.

*Duff*, in reply, said the order appointing McGillivray was not an order of reference and if it was it was *ultra vires*, and McGillivray had exceeded the power given him under the order.

The Court ruled that the affidavits were admissible and that an adjournment should be granted respondents in order that they might answer the affidavits. Counsel for appellants then said that rather than have an adjournment they would go on with the material in the appeal books.

The Court then called on

*Davis* and *Cassidy*, for respondents: The power to make an order of reference is a question of practice and procedure. The order is beyond an inspection order: see Wharton, pp. 579, 594; Stroud, 605; *In re Oliver and Scott's Arbitration* (1889), 43 Ch. D. 310; *Larkin* v. *Lloyd* (1891), 64 L.T.N.S. 507; North-West Territories Order XXIII. r. 243.

Argument.

*Hunter*, in reply: There was no jurisdiction to make an order of reference and if it is only an inspection order McGillivray went beyond the scope of his appointment. He cited *The London and Lancashire Fire Insurance Company* v. *The British America Insurance Company* (1885), 52 L.T.N.S. 385; *Ward* v. *Pilley* (1880), 5 Q.B.D. 427; *Hurlbatt* v. *Barnett & Co.* (1893), 1 Q.B. 77; *Clow* v. *Harper* (1878), 3 Ex. D. 198. DUGAS, J., in making such an order, if it was an order of reference, deprived us of our right to a trial by jury, and right to a jury does not arise until the issues are defined and the time comes to set the action down for trial—see rule 170. He referred to *The Darlington Wagon Company, Limited* v. *Harding and the Trouville Pier and Steamboat Company, Limited* (1891), 1 Q.B. 248; *Longman* v. *East* (1877), 3 C.P.D. 142; *The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 723; *Hoch* v. *Boor* (1880), 49 L.J., Q.B. 666.

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DRAKE, J.: The main question argued on these appeals was whether the sections in relation to reference and appointment of referees were matters of jurisdiction, or matters of procedure and practice only. The Yukon Territory Act, Cap. 6 of 1898, introduced into the Yukon the laws of the North-West Territories.

The laws of England relating to civil and criminal matters as the same existed on 15th July, 1870, were by section 11 of Cap. 50 of the Revised Statutes of Canada made applicable to the North-West Territories.

The Common Law Procedure Act, 1852, Sec. 92, gave power to the Judge in cases where amount of damages was substantially a matter of calculation to direct that the amount for which judgment was to be signed should be found by one of the masters of the Court, and the attendance of witnesses and production of documents might be compelled by subpœna. This was the law as it existed prior to the Supreme Court of Judicature Act, 1873. By that Act, section 56 *et seq.*, power is given to the Court or Judge to refer to an official or special referee and the report of such referee might be adopted wholly or in part, and might, if adopted, be enforced as a judgment of the Court. By section 57 the Court or Judge by consent, or without consent, in any matter requiring prolonged examination of documents, or accounts, or scientific or local investigation which could not conveniently be made before a jury, might order any question or issue of fact to be tried before an official referee, to be appointed as therein mentioned, or before a special referee to be agreed upon between the parties; and all trials before referees should be conducted in such manner as should be prescribed by Rules of Court; and by section 58 the report of any referee on any such trial should be equivalent to the verdict of a jury. The official referees are made permanent officers of the Court by section 83.

Judgment of DRAKE, J.

These sections establish a new jurisdiction, and give to the referees judicial powers, and do not fall within the terms "practice" or "procedure" which, under section 3 of the Judicature Ordinance, being Cap. 21 of the Consolidated Ordinances of 1898 of the North-West Territories, are made applicable to the legal procedure in the Territories.

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It is to be remarked that in support of this view the Rules of Court make no reference to referees. Under the English Order XXXVI., r. 29a. and the following rules, their powers are defined and mode of procedure laid down.

The order made by Mr. Justice DUGAS, is in my opinion an order for inspection only, although he has included in it an order to take evidence, which, with great respect for the learned Judge, I think has not been provided for in the rules. Order XXIII., provides for taking accounts and directing inquiries; and by r. 236 the accounts are to be verified by affidavit unless the Judge shall otherwise direct. Order XXXIII., r. 401, deals with inspection, and it is under this rule that the order of Mr. Justice DUGAS has been made. Mr. McGillivray, the person appointed, exceeded even the powers given him by the order. He was to inspect and report upon the encroachment made upon the plaintiff's claim. This he did, but he went further and reported that the defendants had made the encroachment. He was not asked to report as to the persons by whom the encroachment had been made, and in so doing he in fact decided the point at issue. The defendants have contended throughout that part of the encroachments were made under a license from the Crown before the plaintiffs had any rights to the land in question, and partly owing to the boundary lines not being properly ascertained; and in fact the other alleged encroachments were made within the limits of their own land. These in fact are the main issues which have to be decided at the trial, and on which no trial has been had. Under these circumstances there should be a new trial, the costs of the first trial to abide the event. The defendants are entitled to the costs of the appeal.

Judgment of DRAKE, J.

The appellants moved to admit certain affidavits relating to the facts which did not appear in the appeal book; but when it was shewn that the admission of such further evidence would delay the appeal, the appellants decided to go on without them. We therefore are of the opinion that the costs of this motion should be the plaintiffs' costs in the cause and set off against the costs of the appeal.

*Appeals allowed with costs and new trial ordered in both cases.*

## SHALLCROSS, MACAULAY & CO. v. ALASKA STEAMSHIP CO.

FULL COURT At Victoria.

1901.

March 19.

*Practice—Service out of jurisdiction—Contracts.*

SHALLCROSS v. ALASKA S.S. Co.

A Seattle Steamship Company contracted with a Victoria firm to carry coal from Seattle to Alaska, and was paid the amount of the contract price. When the coal arrived at Dyea the Company demanded and collected from the firm's agent an additional sum for taking the coal in lighters from Skagway to Dyea. The Company's agent promised to repay this amount in Victoria.

*Held*, setting aside an *ex juris* writ, that the claim really arose out of the contract and therefore the Court had no jurisdiction.

APPEAL from judgment of MARTIN, J., refusing to set aside an order of DRAKE, J., allowing service of writ of summons out of the jurisdiction. The plaintiffs were a Victoria firm and the defendant Company was a foreign corporation with its head office in Seattle. The affidavit of J. J. Shallcross, a member of plaintiffs' firm, stated that in December, 1897, he made a contract with defendant Company that it should carry per barque Colorado, 101 tons of coal from Seattle to Dyea in Alaska for $7.50 per ton; that shortly after the coal was shipped from Seattle, defendant Company demanded from plaintiffs $750.50, which was paid; that when the coal arrived at Dyea in lighters the defendants claimed from plaintiffs' agent to receive the coal, $757.50 for carrying it in the Colorado from Seattle to Skagway, an American port, about five miles from Dyea, and the additional sum of $303.00 for carrying the same in lighters from Skagway to Dyea, and held the coal against payment, whereupon plaintiffs' agent paid both amounts, but subsequently the defendant Company re-paid the $757.50. The affidavit of P. G. Shallcross, also a member of plaintiffs' firm, stated that he had a conversation in Dyea with C. E. Peabody, manager of the defendant Company in reference to the plaintiffs' claim for a return of $303.00, when Peabody admitted that the claim was correct and promised that defendant Company would refund it to plaintiffs

Statement.

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at Victoria. On 6th June, 1900, the plaintiffs sued for $303.00.

On these two affidavits, DRAKE, J., made an order on 5th June, 1900, giving plaintiffs leave to issue a writ for service out of the jurisdiction against the defendant Company.

The Company moved to set aside the order, and on 12th July, 1900, MARTIN, J., dismissed the motion, holding that the case was distinguishable from *Comber* v. *Leyland* (1898), A.C. 524, and that he did not feel justified in interfering with the order of DRAKE, J.

The Company appealed and the appeal came on for argument at Victoria on 18th March, 1901, before MCCOLL, C.J., DRAKE and IRVING, JJ.

Argument.

*Cleland* (*L. C. Smith*, with him), for appellants: The affidavits do not shew where the contract was made; it could have been performed outside the jurisdiction and hence there was no jurisdiction to make the order of 5th June: see *Oppenheimer et al* v. *Sperling et al* (1899), 7 B.C. 96 and *Comber* v. *Leyland* (1898), A.C. 524. The plaintiffs have tried to bolster up their case by making it one for money had and received for their use, but there is only the one cause of action on the one entire contract. No action could be brought on Peabody's alleged promise to re-pay; it was *nudum pactum*. He cited Pollock on Contracts, 6th Ed., 579; Addison on Contracts, 27; Chitty on Contracts, 13th Ed., 39 and *Hopkins* v. *Logan* (1839), 5 M. & W. 241.

*Cassidy*, *K.C.*, for respondents, contended that *Comber* v. *Leyland* was distinguishable. The debtor must seek his creditor: see *Robey & Co.* v. *The Snaefell Mining Company, Limited* (1887), 20 Q.B.D. 152; *The Eider* (1893), P. 119 and *Rein* v. *Stein* (1892), 1 Q.B. 758.

*Cur. adv. vult.*

On 19th March, the Court delivered judgment allowing the appeal with costs and stated that written reasons would be given.

Subsequently on 22nd March, the following judgment was given by

Judgment of MCCOLL, C.J.

MCCOLL, C.J.: Counsel for the respondents relied on the rule that a debtor must seek his creditor as shewing a breach within

the jurisdiction of the implied promise to re-pay the amount paid to them under protest. The foreign law was assumed by counsel on both sides to be the same as our own in this respect. I am of opinion that the rule does not apply. Substantially the claim arises out of the agreement. If the money had been paid to a third party for what was done, and was treated as outside the agreement, this would be clear, and it can I think make no difference that the Company did the work and took the money: *Comber* v. *Leyland* (1898), A.C. 524.

With reference to the alleged promise made by Peabody, the Company's manager, it does not appear that he was authorized to make any promise on behalf of the Company, and even if he was, there being no consideration for the promise, it is not enforceable. The appeal should be allowed with costs.

Judgment of McColl, C.J.

DRAKE, J.: The plaintiffs obtained an order for service of a writ on the defendant Corporation carrying on business out of the jurisdiction. The contract was to carry coals from Seattle to Dyea for a specified sum, both places being in the United States. On arrival of the coals at Dyea the defendants' agents demanded and obtained a further sum for lighterage, and it is this sum which the plaintiffs now seek to recover.

The original contract was not to be performed within the jurisdiction, but Mr. *Cassidy*, on behalf of the plaintiffs, urges that this sum was not part of the contract, but was money had and received by the defendants for the plaintiffs' use, and is therefore an ordinary debt which the defendants are bound to pay to the plaintiffs at their place of business, relying on a rule of law that a debtor is bound to seek his creditor out in order to pay him, and therefore the payment has to be made within the jurisdiction, which would give this Court cognizance of the cause of action. The rule he relies on is one which takes effect only when both parties are within the jurisdiction, and does not apply to a debtor resident abroad. To hold otherwise would enable parties to ignore Order XI. A foreigner abroad is not bound by our rule of law, and no such contract as that set up can be implied, much less relied on in order to bring a contract within the jurisdiction.

Judgment of DRAKE, J.

FULL COURT At Victoria.

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But there is another objection which goes to the root of the matter. The order here made is for service of a writ on a foreign corporation: there is no jurisdiction in this Court to make such an order, all that the Court can do is to order notice of a writ to be served. The appeal must be allowed and the writ set aside with costs.

*Appeal allowed.*

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MARTIN, J.

1901.

June 24.

MACKENZIE v. CUNNINGHAM

## MACKENZIE v. CUNNINGHAM AND WIFE.

*Husband and wife—Libel committed by wife—Liability of husband—Verdict for $10.00—Costs—R.S.B.C. 1897, Cap. 56, Sec. 95 and Cap. 52, Sec. 23—Rule 751.*

In an action against husband and wife for damages for a libel published by the latter, the jury returned a verdict for $10.00.

*Held*, by MARTIN, J., that the husband was liable and that the costs should follow the event.

Statement.

LIBEL action tried at Vancouver on 12th, 13th, 15th and 16th July, 1901, before MARTIN, J., and a special jury. The plaintiff sued the husband and wife for damages for a libel published by the wife. The jury returned a verdict in plaintiff's favour for $10.00.

On June 24th, 1901, the motions for judgment and for non-suit came on for hearing.

Argument.

*Davis, K.C.*, and *A. D. Taylor*, for the plaintiff: The plaintiff is of course entitled to judgment for the verdict. As to costs these should follow the event: see r. 751, there being no good cause for any other order. Section 95 of the Supreme Court Act does not apply, for under section 23 of the County Courts Act the action being for libel had necessarily to be brought in the Supreme Court and there is no question therefore of a certificate under section 95. The law is really the same as in Eng-

V. Edwards v Bovlton (1925) A.C. 1. 27 E+E Dig. 05, 214 26 1951.

land. See English Rule 987 and *Saywood* v. *Cross* (1884), 14 Q.B.D. 53. They cited also *O'Connor* v. *The Star Newspaper Company, Limited* (1893), 68 L.T.N.S. 146; *Moore* v. *Gill* (1888), 4 T. L. R. 738; *Myers* v. *The Financial News* (1888), 5 T. L.R. 42; *Wood* v. *Cox* (1889), 5 T. L. R. 272; *Forster* v. *Farquhar* (1893), 1 Q.B. 564; *Argent* v. *Donigan* (1892), 8 T. L.R. 432 and Odgers, pp. 400 to 406. The point has already been decided by two Judges of this Court in the unreported cases of *Hayden* v. *Beasley* and *Brydone-Jack* v. *The World*. In the former the verdict was for $1.00, in the latter $5.00, and in both cases costs were allowed.

As to the liability of the husband the case of *Seroka* v. *Kattenburg* (1886), 17 Q.B.D. 177, is directly in point. In this case it was held that notwithstanding the "Married Woman's Property Act" the husband can be sued with the wife for wrongs committed by the wife during marriage, the Act being for the relief of wives and not of husbands. This case has been approved in the case of *Earle* v. *Kingscote* (1900), 2 Ch. 585.

Argument.

*Wilson, K.C.*, and *R. L. Reid*, for the defendants: Costs should not be given the verdict being for less than $50.00. As to the defendant Cunningham, he is not liable for the wrong committed by his wife and in any case if liable for the amount of the verdict he is not liable for the costs.

MARTIN, J.: As to the question of costs I have no hesitation in deciding that they should follow the event, and in doing this I am following the two cases cited in which other Judges of this Court have already decided the same point.

As to the liability of the husband, the case of *Seroka* v. *Kattenburg* must be followed. No distinction can be drawn between the liability for damages and for costs. Let judgment be entered against both defendants.

Judgment.

HARRISON, CO. J.

1901.

March 29.

THE KING v. CAMPBELL

## THE KING v. CAMPBELL.

*Crown, prerogative of—R.S.B.C. 1897, Cap. 52, Sec. 64.*

It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open, either because of the defendant not residing in or of the cause of action not arising in the District.

ACTION brought in the County Court of Westminster against defendant, who resided in the County Court District of Yale, for damages for the conversion of timber growing on Dominion lands in Yale District.

Statement.

At the trial in New Westminster before HARRISON, Co. J., and acting Co. J., of the County of Westminster,

*Corbould, K.C.*, for defendant, objected to the jurisdiction of the Court contending that this case did not come within section 64 of the County Courts Act, inasmuch as the defendant was not resident in Westminster District, and the cause of action had not arisen either wholly or partly in that District.

Argument.

*Howay*, for plaintiff, contended that His Majesty The King by His prerogative could take proceedings in any Court, even though as between subject and subject such Court would not be open, and quoted Bacon's Abridgment, Tit. prerogative; Comyns' Digest, Debt (G 12); *The Attorney-General* v. *Lord Churchill* (1841), 8 M. & W. 171 and *Attorney-General* v. *Walker* (1877), 25 Gr. 233.

HARRISON, Co. J., held that the Crown could bring the action in any County, citing in addition to the cases *supra*, *Dixon* v. *Farrer, Secretary of the Board of Trade* (1886), 17 Q. B.D. 662; *Regina* v. *Grant et al* (1896), 17 P.R. 165; *Farwell* v. *The Queen* (1894), 22 S.C.R. 553 and *Attorney-General to the Prince of Wales* v. *Crossman* (1866), L.R. 1 Ex. 381.

Judgment.

The plaintiff eventually got judgment for $15.45 and costs.

## RICHARDS v. BANK OF B. N. A.

FULL COURT
At Vancouver.

1901.

Nov. 20.

RICHARDS
v.
BANK OF
B. N. A.

*Banker's lien—Overdrawn accounts—Partner's separate account—Costs—"Good cause."*

Decision of MARTIN, J., reported *ante* at p. 143 affirmed on main question and reversed on question of costs by the Full Court, which held that the plaintiff should be allowed his costs of the action, but only on the County Court scale as the action should have been brought in that Court.

APPEAL from the judgment of MARTIN, J., reported *ante* at p. 143. The appeal was argued at Vancouver on 15th November, 1901, before WALKEM, DRAKE and IRVING, JJ. Statement.

*Bowser, K.C.* (*Godfrey*, with him), for appellant, stated the facts and contended that the Bank had a lien. He cited *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787: *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, and *T. and H. Greenwood Teale* v. *William Williams Brown & Co.* (1894), 11 T.L.R. 56.

As to Bank's right of set-off see *French* v. *Andrade* (1796), 6 Term Rep. 582; Lindley on Partnership, 6th Ed., 301, 304; *Bent* v. *Puller* (1794), 5 Term Rep. 494; Byles on Bills, 15th Ed., 426; *Owen* v. *Wilkinson* (1858), 5 C.B.N.S. 626 and *Snead* v. *Williams* (1863), 9 L.T.N.S. 115.

*Pottenger* (*Kappele*, with him), for respondents: Bankers have no lien on the deposit of a partner on his separate account for a balance due to the Bank from the firm: see Lindley on Partnership, 6th Ed., 303, 676; Grant on Banking, 5th Ed., 252; Maclaren on Banks and Banking, 115, 116; *Watts* v. *Christie* (1849), 11 Beav. 546, especially the Master of the Rolls at pp. 551 and 555; *Wolstenholm* v. *The Sheffield Union Banking Co., L'd.* (1886), 54 L.T.N.S. 747, especially Lord Esher, M.R., and Lindley, L.J., at p. 748; *Ex parte M'Kenna* (1861), 30 L.J., Bk. 20. We should get substantial damages, Maclaren, 208; Byles on Bills, 15th Ed., 19; *Rolin* v. *Steward* (1854), 14 C.B. 595; Argument.

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*Marzetti* v. *Williams* (1830), 1 B. & Ad. 415. As to costs in Court below see R.S.B.C. 1897, Cap. 56, Sec. 88, as repealed 1899, Cap. 20, Sec. 20, and re-enacted 1901, Cap. 14, Sec. 11. There was no "good cause" for depriving plaintiff of his costs in the Court below, and as to meaning of "good cause" see *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 32; *Bostock* v. *Ramsey Urban Council* (1900), 1 Q.B. 360 and *Forster* v. *Farquhar* (1893), 1 Q.B. 564. Our trials before Judge alone are governed as to costs exactly the same as trials by jury under English practice.

*Bowser*, in reply, cited *Baillie* v. *Edwards* (1848), 2 H.L. Cas. 74.

20th November, 1901.

WALKEM, J.: Prior to the 21st of July, 1900, the plaintiff was one of two members of a firm of Richards & Riley that carried on business as hotel keepers, in Vancouver. In connection with the business, the firm opened an account with the Bank of British North America, which was headed as follows:

| | |
|---|---|
| "Richards, Ernest Wood,<br>Riley, Molly,<br>both to sign. | Partners, RICHARDS & RILEY,<br>Strand Hotel, City." |

On the above date, the partnership was dissolved and the assets and effects sold to one Johnston who undertook, as part of the bargain, to pay such debts as were then due by the firm. The plaintiff, by way of precaution, then asked the ledger-keeper in the Bank how the firm's account stood, and was told that there was a balance to its credit of $215.85; and he, thereupon, applied it, as far as it went, in payment of the firm's indebtedness, and opened a private account in the Bank, with a deposit to his credit of a considerable sum.

Judgment of WALKEM, J.

About a month later, and when the firm's account was supposed to have been closed, it was found to be wrong and, after correction, to have been overdrawn by $197.97; and, without consulting the plaintiff, this overdraft was charged to his private account.

In consequence of this, he brought the present action for the recovery of the amount; and having obtained a judgment in his favour the Bank has brought this appeal.

The contention of counsel for the Bank is that Richards & Riley made themselves individually liable on the cheques by attaching their individual names to them. If this had been the only circumstance to be considered, the contention might have had some force; but the heading of the account in the Bank's ledger is "Partners, Richards & Riley," with the address of the firm "Strand Hotel" added: and the insertion of the full names of the two partners in the same heading, with the words "both to sign" beneath them, was intended, as it seems to me, as a direction to the Bank to pay no cheques of the firm that were not signed, as indicated. The whole heading is referred to by the Manager of the Bank, in his evidence, as being peculiar and unusual; and as he has declined to give an opinion as to its effect, it will be useful to see how the Bank dealt with the account. In the first place, the pass-book is headed "Bank of British North America, In account with Richards & Riley."

On its face, this means "In account with Richards & Riley" as a firm; and had the words jointly and severally been added here as well as in the heading of the ledger account, the position now taken by the Bank would, probably, have been unassailable. In the next place, the Bank placed $13.15 to the credit of the account in the ledger on the 23rd of July, in accordance with a deposit slip worded "Place to the credit of Richards & Riley"—manifestly as a firm—"$13.15:" and it is only reasonable to infer that all the deposit slips were in this form, as no evidence was given to the contrary. In view of all these circumstances, I must conclude that the account of Richards & Riley was dealt with by the Bank as a partnership account.

Judgment of WALKEM, J.

We now come to the legal point in the case. In *Watts* v. *Christie* (1849), 11 Beav. 546, it was held by Lord Langdale, M.R., at p. 555, that a banker has no lien on a deposit of cash or securities made in connection with a partner's private account for any balance due by his firm. Hence, in the present instance, the Bank had no legal right to charge the plaintiff's private account with his firm's overdraft.

A number of cases were cited by counsel for the Bank as being qualifications of this decision; but in none of them has the principle laid down by it even been questioned.

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B. N. A.

I have referred to the facts of this case somewhat fully as considerable stress was laid upon them by counsel for the Bank, and also for the purpose of shewing that Richards, the plaintiff, had suffered from the mistake made by the ledger-keeper, inasmuch as he had paid out $197.97—the amount now in dispute—in discharge of debts which Johnston had undertaken to pay. In other words, Richards has been $197.97 out of pocket: and it was not unreasonable for him to think, as he did, that he, alone, should not be called upon to pay his late firm's overdraft to that amount. I make these observations because I think that Richards should have been allowed his costs in the Court below, instead of being deprived of them, as was the case.

The appeal must be dismissed with costs, and the plaintiff be allowed his costs of the action, but only on the County Court scale, as the proceedings should have been brought in that Court.

DRAKE, J.: Richards and Riley had an account with the Bank of British North America opened on July 3rd, 1900. These persons were partners in the Strand Hotel and the account was so opened. The partners were both to sign checks in their individual names and not in the partnership name. Owing to an error in the Bank account the partners were allowed to overdraw $197.97, this error was not discovered until the end of the following month.

Judgment of DRAKE, J.

Richards opened an account with the Bank in his own name on the 24th of July, 1900, before the partnership account was closed, and when the overdraft in the partnership account was not made good, the Bank on the 28th day of August, 1900, transferred the sum of $197.97 from Richards' private account claiming they had a right to do so under the circumstances.

The law of lien does not give a Banker a lien on the funds or securities of a partnership for a debt due by a member of partnership, and *vice versa*, the Banker cannot claim a lien on the funds of an individual member for the debt of the partnership. The case of *Watts* v. *Christie* (1849), 11 Beav. 546 is a clear authority for this proposition.

The appellants' contention is, that when they are sued they have a right to set off the debt due by the partnership against

the claim of one of the partners. In order to give the right of set-off, the debt must be due between the same parties and in the same right. And the Judicature Act has not made any alteration in this principle although it has extended the right of set-off to equitable claims—the claim in question is not one of such claims.

In my opinion the appeal must be dismissed. Under section 88 of the Supreme Court Act, Cap. 56, the costs are to follow the event unless for good cause. There is no good cause here to prevent the ordinary course being followed. The plaintiff is merely enforcing a legal right—he was not the cause of the error, and although he may be responsible in another action, he is not therefore to be deprived of his legal right, therefore the plaintiff is entitled to the costs of this appeal and to the costs of the Court below, but as I think the action should have been tried in the County Court, the costs must be taxed on that scale.

IRVING, J.: I agree that this appeal should be dismissed. Mr. *Bowser's* argument is this, that as the Bank by taking the proper steps against the plaintiff and Mrs. Riley for the amount overdrawn by them, would be at liberty to issue execution against either of them, until the Bank's judgment was fully satisfied, why should the Bank not set off the amount overdrawn against the plaintiff's claim? The answer is that there was not at common law, nor, speaking generally, in equity, a right of set-off except against cross demands which are connected with each other.

Judgment of IRVING, J.

The right of set-off (by 2 Geo. II., Cap. 22, Sec. 13), applies where there are mutual debts between the plaintiff and the defendant. These debts are not mutual debts within the statute.

The Judicature Act has not altered the law of set-off except that it enables a person claiming the set-off to get a judgment for the amount due him (if any), over and above the amount claimed by the plaintiff.

The dicta in *Garnett* v. *M'Kewan* (1872), L.R. 8 Ex. 10 cited with approval in *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 333, shews that bankers are not at liberty to deduct from A's personal account, to pay A's partnership or A's trust account.

*Appeal dismissed.*

MARTIN, J.

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CENTRE STAR v. B. C. SOUTHERN

# CENTRE STAR MINING CO. *ET AL* v. B. C. SOUTHERN RAILWAY CO. *ET AL.*

*Water Clauses Consolidation Act—Water record—Joint application for—Whether good—Purposes for which water required—Duty of Gold Commissioner.*

Water records under Part II., of the Water Clauses Consolidation Act, may be held jointly.

Mine owners in their notice of application to the Gold Commissioner for water records included in their notice among the purposes for which the water was required, a purpose not authorized by section 10 of the Act, *i.e.*, "domestic and fire purposes." At the hearing before the Gold Commissioner applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application.

On appeal, MARTIN, J., held that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers and he referred the matter back for re-hearing, and his decision was affirmed by the Full Court.

*Quaere*, whether a supply of water for fire purposes would be necessary as being directly connected with the working of a mine or incidental thereto.

Statement.

APPEAL from a decision of John Kirkup, Gold Commissioner, refusing appellants' application for water records.

The appeal was argued at Rossland before MARTIN, J., on 28th May, 1901. For the purposes of this report the facts are sufficiently stated in the judgment.

*Galt*, for the appellants.

*Davis, K.C.* (*W. S. Deacon*, with him), for respondents.

*Abbott*, for the City of Rossland, the holder of a prior record.

1st June, 1901.

Judgment of MARTIN, J.

MARTIN, J.: It is objected, first, that under Part II., of the Water Clauses Consolidation Act an application cannot be made by two companies jointly.

Section 8 provides that "every owner of land may secure the right to divert unrecorded water" and section 10 contains a cor-

responding provision in favour of "every owner of a mine." By section 10, sub-section 13 of the Interpretation Act "words importing the singular number . . . . . only shall include more persons . . . . . of the same kind than one," and by sub-section 14 the word "person" includes any body corporate.

It is admitted that in the case of two co-owners of one mine there would be no objection to a joint water record, but it is contended that where two owners own two different mines it cannot be granted, and counsel gave several illustrations of difficulties which might arise in the practical working out of the Act in the latter case. While I fully appreciate the probability of difficulties being encountered, yet a remedy therefor will, I think, in most cases be found in sections 18 (3), 20 and 28, and even if not the element of difficulty would not of itself justify the Gold Commissioner in refusing to entertain such an application.

Seeing that the statute does not prohibit the acquisition of such an interest there is nothing at common law which is opposed to water records being held jointly like any other form of property; the objection is therefore overruled.

It is further objected that the notice given under said Part II., was invalidated because it included among the "purposes" for which the water was required a purpose not authorized by section 10, *i.e.*, "domestic and fire purposes."

Applications by owners of land for water records for "agricultural, domestic, . . . . mechanical or industrial purposes" must be made under section 8 to the Commissioner of Lands and Works or his assistant or representative in the district.



Owners of mines may secure similar records under section 10 "for any mining purpose or other purposes incidental thereto, or for milling, concentrating or other purposes in connection with the working of (their) mines," and such application must be made to the Gold Commissioner. The statute certainly contemplates distinct applications to two distinct officials of limited jurisdiction. But does the fact that an applicant, in applying to the proper official, includes in his application not only a request for water which that official may grant, but also a request which he may not grant, thereby invalidate the whole application and render it impossible for the official to deal with it at all? The

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contention to be effectual must go to this length that because an applicant asks for more than he is entitled to he is thereby debarred from obtaining that which he is entitled to. For the applicant it is on the other hand contended that the unauthorized request should be treated as mere surplusage and that the Gold Commissioner should deal with the matter so far as his authority permits him and grant a record for what water he may think the circumstances justify. At the hearing the applicants expressed their readiness to abandon their claim for "water for domestic and fire purposes" and requested the Gold Commissioner to deal with it as a claim for mining purposes only, but he refused that request and dismissed the application. Of course neither under section 13 nor 18 can the Gold Commissioner do more than grant a record for that amount of water which in his discretion shall be "reasonably necessary for the purposes specified in the application," but what is complained of here is that the applicant was not permitted to shew what was reasonably necessary. In view of the fact that section 16 provides that "on any dispute arising prior to record priority of notice of application shall constitute priority of right," it is not in my opinion, contemplated that obstacles should be placed in the path of one who, conforming to essentials, is endeavouring, *bona fide*, to obtain the, in many instances, all important benefits of the Act. In the case of such an applicant the spirit of the statute will be best preserved by placing upon it a liberal and reasonable construction, and I am unable to agree with the argument that public or private interests are likely to suffer by allowing an applicant to abandon any part of the claim included in his notice.

Judgment of MARTIN, J.

In the present case, apart from the admitted "mining purposes," it might on investigation appear that under the particular circumstances a supply of water for fire purposes would be necessary as being directly connected "with the working of a mine" or "incidental thereto;" that would be a matter for the Gold Commissioner to determine on the facts of each case—it might be proper to grant it for such purposes to one applicant and not to another.

My decision herein is not that it was necessary that there

should have been any amendment of the notice but that the Gold Commissioner was not justified in refusing to exercise the powers he had because the applicant asked him to exercise those he had not. When the applicant declared his readiness to abandon what the Gold Commissioner regarded as the unauthorized claims in his notice of application they should have been considered as mere surplusage and the hearing proceeded with on the remaining claim which the Gold Commissioner has jurisdiction over.

It follows that the adjudication of the Gold Commissioner is reversed and the matter referred back to him for re-hearing and re-adjudication.

The appellants are entitled to the costs of this appeal to be paid by the British Columbia Southern Railway Company.

From this judgment the Railway Company appealed to the Full Court and the appeal was argued at Vancouver on 7th November, 1901, before McColl, C.J., Walkem, Drake and Irving, JJ.

*Davis, K.C.*, and *MacNeill, K.C.*, for the appeal.
*Galt, contra.*

On 20th November, the judgment of the Court dismissing the appeal was delivered by

Judgment of DRAKE, J.

Drake, J.: This cause depends entirely on the construction to be placed on the Water Clauses Consolidation Act, Cap. 190, R.S.B.C. 1897. The Centre Star Company and the War Eagle Company joined in an application for water to be taken from north, south and middle forks of Murphy Creek; the water was purposed to be used for operating machinery for domestic and fire purposes, and for general purposes of mining and milling ore, and generating power, and to be used on or in the vicinity of the War Eagle and Centre Star mines situate on Red Mountain. The British Columbia Southern Railway Company made an application for water, subsequent in date to that of the mining Companies, and opposed their application on the grounds that the Act did not contemplate a joint application by two independent companies having no connection one with the other, and not

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even adjoining each other, and further that the application for water for domestic purposes could not be made under the sections of the Act relating to applications for water for mining purposes; they also objected on the grounds that the locality where the water was to be used was too indefinite and not in accordance with the Act.

The learned Judge who heard the appeal from the refusal of Mr. Kirkup to grant the rights asked for, referred the matter back to Mr. Kirkup.

Section 11 of the Water Clauses Consolidation Act directs where the notices of intention to apply for a record shall be posted up, and what the notice shall contain.

It is not disputed that the necessary notices were duly given, but it is argued that the notice is void and the application also void because of the objections already stated.

The only absolute pre-requisite for the record of water is, that notice shall be given as required by the statute containing the particulars mentioned.

An applicant may ask for more than the law will allow him, he may specify things in his notice which are not mentioned in the Act, these things will not render his application void. Section 13 shews that the Commissioner is acting as a judicial officer—in dealing with water applications he has to consider the unrecorded water open for diversion—the amount available—pending applications, and generally all the surrounding circumstances; he has to exercise his discretion on all these matters before he allows the record.

Judgment of DRAKE, J.

If more persons join in an application than the law contemplates, or if some of the uses for which the water is to be put are not in his opinion correct, he has power to make the record, omitting those matters which are in his opinion incorrect, just as much as he has power to limit the amount of water to be used, or define the particular place or the mining property on which it is to be used. In my opinion in this case the petitioners ought to be called upon to elect for whom they will apply. The intention of the Act it appears, from a general view of its provisions, is that any mine owner or number of mine owners interested in one claim may apply, or owners of a group of mines under control of

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one company or partnership, may join in an application, but not several owners of separate and distinct mines with no proprietary connections; if such a course was allowed, very great difficulty might arise. Without enumerating such difficulties, it is sufficient to say that in my view such a proceeding was not in contemplation of the framers of the Act, which was to enable the waters of the Province to be separated for the use of all miners and not to be absorbed for scattered miners under one application. Therefore, the appeal should be dismissed, allowing the applicants to elect for which mine or group of mines under one management they desire the water, and the place where the water is to be used to be defined. The appeal will therefore be dismissed with costs.

*Appeal dismissed.*

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FULL COURT
At Vancouver.
1901.
March 7.

FAWCETT
v.
C. P. R.

## FAWCETT v. CANADIAN PACIFIC RAILWAY COMPANY.

*Appeal, from interlocutory order—Action decided pending appeal.*

Where, pending an appeal from an interlocutory order the action itself has been decided, the Full Court will not hear the appeal.

THIS was an appeal from an interlocutory order and pending the appeal the action had been tried and decided.

The appeal was called on at Vancouver on 7th March, 1901, before McCOLL, C.J., DRAKE and MARTIN, JJ.

*Davis, K.C.*, for appellant, wanted the case to go on to decide the question of costs.

*Wilson, K.C.*, for respondent, objected.

*Per curiam:* The appeal should be struck out of the list—no order as to costs.

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Note:—The same course was followed in *Chisholm* v. *Le Roi* at Victoria on 19th March, 1901 (Full Bench), and in *McCune* v. *Botsford* at Vancouver on 19th November, 1901 (WALKEM, DRAKE and IRVING, JJ.)

FULL COURT
At Victoria.

1901.

March 22.

TATE
v.
HENNESSEY

## TATE *ET AL* v. HENNESSEY *ET AL.*

*Practice—Service out of jurisdiction—Affidavit leading to order for—What it should shew—Grounds of information and belief.*

An affidavit leading to an order for an *ex juris* writ containing allegations of facts which must necessarily have been founded on information and belief only, must state the source of information.

APPEAL by plaintiffs from an order of WALKEM, J., dated 27th September, 1900, setting aside an order made 30th April, 1900, by SPINKS, Co. J., granting plaintiffs leave to issue a writ for service out of the jurisdiction. The action was for a declaration that defendants held a five-eighths interest in certain mineral claims in British Columbia in trust for plaintiffs, for an injunction restraining defendants from alienating or otherwise disposing of said interest and for a *lis pendens*.

Statement.

WALKEM, J., set aside the order on the grounds that the affidavit of Tate in support of the order did not state the grounds of his information and belief, and he did not state or shew that he had a good cause of action on the merits. Paragraph 1 of the affidavit was as follows: "I am one of the above-named plaintiffs and have personal knowledge of the matters herein deposed to."

Other facts were positively sworn to in the affidavit which must necessarily have been founded on the information and belief only of the deponent, but the grounds of such information and belief were not stated.

The appeal came on for argument at Victoria on 21st January, 1901, before MCCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.

Argument.

*MacNeill, Q.C.*, for appellant: As to good cause of action see *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62. Tate swears to personal knowledge of the matters deposed to and his statement must be taken as good until shaken by cross-examination or by affidavits to the contrary. He cited Sugden, 267; *Turner* v. *Harvey* (1821), Jacob, 169; *Jones* v. *Keene* (1841), 2 M. & Rob.

348; *Walters* v. *Morgan* (1861), 3 De G. F. & J. 718; *Haygarth* v. *Wearing* (1871), L.R. 12 Eq. 320; and as to positive allegations Holmested & Langton, 687.

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*Duff, Q.C.*, for respondents: Several statements in the affidavit are not in deponents knowledge and he didn't give the source of his knowledge. This is a case in which there is a conveyance and a Crown grant has been issued; see *Pope* v. *Cole* (1898), 29 S.C.R. 294-5 as to what representations are sufficient to set aside a complete sale of land—a vendee cannot get relief unless an action for deceit could be maintained. As to necessity of deponent stating source of knowledge see *In re Anthony Birrell Pearce & Co.* (1899), 2 Ch. at p. 52; *Bonnard* v. *Perryman* (1891), 2 Ch. 269; *Bidder* v. *Bridges* (1884), 26 Ch. D. 1 at p. 10 and *In re J. L. Young Manufacturing Company* (1900), 2 Ch. 753.

Argument.

He contended that a Local Judge has no jurisdiction to make an order for an *ex juris* writ and referred to his argument in 7 B.C. at p. 263.

*MacNeill*, in reply, cited Bainbridge on Mines, 258 as to contract not actually executed.

On 22nd March, the Court delivered judgment dismissing the appeal with costs, and the following judgments were filed by

IRVING, J.: On the 30th of April, 1900, his Honour Judge SPINKS, made an order for service on the defendants out of the jurisdiction: the order was made under r. 1,075. On the 27th of September, 1900, Mr. Justice WALKEM made an order setting aside Judge SPINKS' order, and the proceedings taken thereunder.

Many grounds were taken before Mr. Justice WALKEM. It was said first of all that the Local Judge had no jurisdiction under r. 1,075 as the rule, it was argued, is limited to actions "brought," and this order was made in the matter of a proposed action. However good this objection would have been if we were dealing with the matter now for the first time it is not necessary to say, but a decision has been given by my brother MARTIN in a case of *Tate et al* v. *Hennessey et al* (1900), 7 B.C. 262, in which he held that objection was bad, and that decision has been followed again and again. Speaking for myself, I think it is better to have a

Judgment of IRVING, J.

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bad practice rather than an uncertain practice, and as this point has been settled for some time I think it would be a mistake to re-open it. I do not wish to be understood as saying that the decision in 7 B.C. 262 is wrong.

Another objection taken was that the affidavit is defective in that the deponent did not swear to the belief that he had a good cause of action; and, further, that the deponent did not state the grounds of his information and belief. This objection as to not stating the grounds of information and belief is well taken: *Bidder* v. *Bridges* (1884), 26 Ch. D. 1 at p. 10: *Bonnard* v. *Perryman* (1891), 2 Ch. 269 at p. 287; *In re Anthony Birrell Pearce & Co.* (1899), 2 Ch. at p. 52 and *In re J. L. Young Manufacturing Company* (1900), 2 Ch. 753.

Judgment of IRVING, J.

I am unable to say that the affidavit discloses a cause of action. In these circumstances I think the order of Mr. Justice WALKEM was properly made.

MARTIN, J.: Objection is taken to the affidavit in question in that it does not comply with r. 403 requiring the grounds of belief to be stated, when belief is admissible. Though the deponent uses positive language, yet it is evident that many of the essential points he swears to must necessarily be founded on his information and belief only, and the grounds thereof are not stated. A recent case in the Court of Appeal—*In re J. L. Young Manufacturing Company* (1900), 2 Ch. 753—has finally decided that such affidavits are inadmissible; as the Lord Chief Justice puts it, "they are worthless and ought not to be received." Similar decisions have been given in Ontario: *Bank of Toronto* v. *Keilty* (1896), 17 P.R. 250; *Jones* v. *Mason* (1899), 18 P.R. 443. Following these authorities, I think the order of the learned Judge should, in my opinion, be affirmed, and the appeal dismissed with costs.

Judgment of MARTIN, J.

*Appeal dismissed.*

## GRANT v. DUPONT.

FULL COURT
At Vancouver.
1901.
July 8.

GRANT
*v.*
DUPONT

*Architect—Whether liable for loss caused by mistakes in estimates.*

Decision of IRVING, J., reported *ante* at p. 7, affirmed.

APPEAL by defendant from the judgment of IRVING, J., reported *ante* at p. 7.

The appeal was argued at Vancouver on 4th July, 1901, before McCOLL, C.J., WALKEM and MARTIN, JJ.

*Wilson, K.C.*, for appellant.
*Godfrey*, for respondent.

On 8th July, the Court gave judgment affirming the judgment appealed from and dismissed the appeal with costs.

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## LAWR v. PARKER.

FULL COURT
At Vancouver.
1901.
Nov. 7.

LAWR
*v.*
PARKER

*Mining law—Assessment work—Mineral Act, Secs. 24, 28 and 53.*

Decision of WALKEM, J., reported in 7 B.C. at p. 418, affirmed.

APPEAL from the judgment of WALKEM, J., reported in 7 B.C. 418.

The appeal was argued at Vancouver on 29th June, 1901, before McCOLL, C.J., IRVING and MARTIN, JJ.

*Davis, K.C.*, for appellant: The question is, does section 28 cure the defect of the work not being done on the claim at all? He referred to B.C. Statute 1898, Cap. 33, Sec. 5. Argument.

*S. S. Taylor, K.C.*, for respondent.

*Cur. adv. vult.*

FULL COURT At Vancouver. 1901. Nov. 7.

On 7th November, 1901, the Court gave judgment dismissing the appeal and the following judgments were handed down by

LAWR v. PARKER

IRVING, J.: I am of the opinion that it was not open to the plaintiff to challenge in this action the correctness of the method by which the defendant obtained his certificate of work; I am inclined to think that error in this matter should be taken advantage of within a reasonable time by application to the Attorney-General.

Judgment of IRVING, J.

Having disposed of the question of work being performed outside of the claim, the case comes to this: The plaintiff had a properly located claim, duly recorded and had obtained and recorded a certificate of work, the defendant or his predecessor in title comes on the ground and jumps it. The conclusion of the learned Judge appealed from was right. The appeal should be dismissed with costs.

Judgment of MARTIN, J.

MARTIN, J.: So far as the effect of section 28 is concerned this case cannot be distinguished in principle from *Gelinas et al* v. *Clark* (1901), 8 B.C. 42. Our attention was drawn to section 5, Cap. 33 of the Mineral Act Amendment Act, 1898, but I share the opinion expressed during the argument that its effect is merely to provide for an extension of the time within which the certificate can be obtained, and once it is obtained either within the original or the extended period, section 28 operates as best it may on either of such periods.

It being admitted that if the respondent succeeds on this point he can on the other under section 53 it remains only to dismiss the appeal with costs.

*Appeal dismissed.*

## CLEARY *ET AL* v. BOSCOWITZ.

McColl, C.J.

1901.

June 21.

FULL COURT At Vancouver.

Nov. 13.

CLEARY v. BOSCOWITZ

*Mining law—Certificate of work—Impeachment of—Evidence—Mineral Act, Sec. 28 and Amendment Act of 1898, Sec. 11.*

A certificate of work cannot be impeached in any proceeding to which the Attorney-General is not a party.

Plaintiffs, in making their case, admitted that defendant held certificates of work;

*Held*, that in itself was affirmative evidence of defendant's title within the meaning of section 11 of the Mineral Act Amendment Act of 1898.

APPEAL from judgment of McColl, C.J., delivered 21st June, 1901, dismissing the plaintiffs' action for a declaration of right to the Royal, Royal Extension and Regina mineral claims and that the Empress, Victoria and Queen mineral claims held by the defendant in respect of the same ground were invalid locations and the defendant should be restrained from obtaining a certificate of improvements therefor. The defendant relied on the fact that he held certificates of work in respect of the Empress, Victoria and Queen mineral claims. The plaintiffs were not permitted to impeach such certificates of work by shewing that the full or any amount of work required by the statute as a pre-requisite to such certificates of work being issued, had not been performed, or on any other ground, his Lordship holding that evidence impeaching a certificate of work could not be received in any proceedings to which the Attorney-General was not a party.

Statement.

The plaintiffs appealed and the appeal was argued at Vancouver on 13th November, 1901, before Walkem, Drake, Irving and Martin, JJ.

*S. S. Taylor, K.C.*, for appellants: This case differs from *Lawr* v. *Parker*, *ante*, p. 223, because there there was the intention to do the work.

Argument.

*Davis, K.C.*, for respondent, was not called on.

*Per curiam:* The intention makes no difference. If a certificate of work is to be set aside the Attorney-General must be a party and until set aside all things are presumed in favour of its

McColl. C.J.
1901.
June 21.

holder. This case is governed by *Gelinas* v. *Clark*, *ante*, p. 42: *Manley* v. *Collom*, *ante* p. 153 and *Lawr* v. *Parker*, *ante*, p. 223, and the appeal must be dismissed with costs.

Subsequently the following judgments were handed down by

FULL COURT
At Vancouver.
Nov. 13.

CLEARY
v.
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DRAKE, J.: This action was dismissed with costs at the hearing, and the chief ground relied on was that the learned Chief Justice had held that the plaintiffs were not allowed to attack the defendant's title on the ground that the certificate of work obtained by the defendant was improperly issued by the mining recorder, and that the same had been wrongfully and fraudulently obtained. Section 28 of the Mining Act says that it shall be assumed that up to the date of the last certificate of work the title to the claim was perfect except upon a suit by the Attorney-General based upon fraud. One of the objects of this section is to prevent claimants from questioning the correctness or validity of the certificates of work issued by the proper officer. If, as alleged here, the defendant was guilty of fraud in obtaining this certificate, the Attorney-General is to bring the suit. There is no regulation in the Act how the party claiming that a fraud has been committed can put the Attorney-General in motion—whether as a relator, or by information, or merely as a Crown officer—when satisfied that a fraud has been committed. If the Attorney-General declines to move there is no power in the Act to compel him. We think the Chief Justice was correct in the view he took on this section.

Judgment of DRAKE, J.

The plaintiffs, however, further contended that the Chief Justice was wrong in dismissing the action without requiring the defendant to give affirmative evidence of title to the ground in controversy. I think that when it is shewn that the action is wrongly conceived, as this is, and the certificates of work by the defendant have been produced, that the time has not arrived to call upon the defendant to prove any further title. The plaintiffs have to shew a *prima facie* title: having done so, the defendant is then called upon to shew his title. The plaintiff not having done this, his action has failed at an initial step, and I think was rightly dismissed.

Judgment of IRVING, J.

IRVING, J.: This case is provided for by section 28. By that

section the certificate of work establishes the title of the holder thereof, except in the case of fraud. An action to set aside the certificate should be brought by the Attorney-General.

As to the other objection that the learned Chief Justice neglected to examine the defendant's title, I fail to see how that objection can be substantiated, as the plaintiff in making his case, admitted that the defendant held certificates of work, that in itself is affirmative evidence of the defendant's title and no further examination was necessary.

Martin, J.: This case cannot be distinguished from *Lawr* v. *Parker* in which the Court delivered judgment on the seventh instant. There, no work at all was done on the claims, by mistake, as alleged. Here also no work was done, by deliberate intention, as alleged. But the result is the same because the question of fraud cannot be raised unless the Attorney-General is a party to the suit. In view of the recent decision of this Court in *Gelinas et al* v. *Clark* (1901), 8 B.C. 42; *Manley* v. *Collom* and *Lawr* v. *Parker*, the learned trial Judge was right in holding that the certificates of work, if regular in themselves, were conclusive evidence that the work had been done.

At the same time I think it in the interest of the mining public that the question of the proper construction of section 28 should be submitted to a higher Court.

So far as regards section 11, my views thereon have already been expressed in *Schomberg* v. *Holden* (1899), 6 B.C. 419; *Dunlop* v. *Haney et al* (1899), 7 B.C. 2 and 4; *Gelinas* v. *Clark*, *supra*. But in any event ample affirmative evidence of the defendant's title has been given because the plaintiffs in their reply admit that the defendant has obtained and recorded certificates of work. In view of the decision of this Court above cited, what better affirmative evidence of title can there be? Even if it were necessary (and having regard to the certificate of work, I doubt it) for the defendant to formally prove that he was a free miner, that objection is not open because, as the plaintiffs' counsel stated at the trial "the only question I raise is as to the sufficiency of the work on which the certificates were obtained." The appeal should be dismissed with costs.

Judgment of Martin, J.

*Appeal dismissed.*

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## DRYSDALE v. UNION STEAMSHIP CO.

*Ship—Bill of lading, exceptions in, applicable to matters occurring during the voyage—Breach of obligation to provide reasonably fit ship—Clause limiting liability of ship-owners, scope of.*

The plaintiff shipped six cases of dry goods on board the defendants' ship for carriage from Vancouver to Skagway and thence to Dawson under a bill of lading which provided that all claims, for damage to or loss of any of the merchandise, must be presented within one month. The grating on the outside of the hull of the ship and at the mouth of the pipe in which the sea-cock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the after-hold and damaged the plaintiff's goods. Plaintiff did not present his claim within a month, but subsequently sued for damages.

*Held*, by the Full Court (reversing IRVING, J.), MCCOLL, C.J., dissenting, that the stipulation in the bill of lading to the effect that no claim for loss should be valid unless presented to the Company within a month, did not apply to damage occasioned by the defendants not providing a seaworthy ship.

APPEAL from judgment of IRVING, J., delivered 24th April, 1901. The plaintiff on 5th June, 1899, shipped on defendants' steamer The Cutch six cases of dry goods to be carried from Vancouver to Skagway. The bill of lading contained the following conditions:

"The within goods are shipped and received subject to the following conditions:

"If the consignee is not on hand to receive the goods, package by package as discharged, then the master may deliver them to the wharfinger or other party or person believed by said master to be responsible, and who will take charge of said goods and pay the freight on the same, or deposit them on the bank of the river, or other usual place for delivering the goods. The responsibility of said master shall cease immediately on the delivery of said goods from the ship's tackles.

Statement.

"The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamer or steamers; to lighter from steamer to steamer or from steamer to shore; to deliver to other steamers, companies, persons or forwarding agents any of the within goods destined for ports or places at which the vessel on which they are carried does not call. The master and owners shall not be held responsible for any damage or loss resulting from fire at

sea, in the river or in port; accident to or from machinery, boilers or steam, or any other accident or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever.

"It is expressly understood that the master and owners shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss or damage arising from insecurity of package, or damage to cargo by vermin, burning or explosion of articles or freight or otherwise or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or from unavoidable detention or delay, nor for the loss of specie, bullion, bank notes, government notes, bonds or consols, jewellery, or any property of special value, unless shipped under proper title or name and extra freight paid thereon.

"Live stock, trees, shrubbery, and all kinds of perishable property at owner's risk. Oils and all other liquids at owner's risk of leakage, unless caused by improper stowage.

"It is hereby understood that wool in bales, dry hides, butter and egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if NOT so marked it is agreed that the delivery of the full number of packages as within mentioned without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

"It is agreed that in settlement of any claim for loss or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

"It is agreed that the person or party delivering any goods to the said steamer for shipment is authorized to sign the shipping receipt for the shipper.

"On delivery of the goods within enumerated as provided herein, this receipt shall stand cancelled, whether surrendered or not.

"In consideration of the goods being carried by the Company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded by Statute or otherwise, to hold the Company responsible in any manner for the keeping, or safe, or prompt carriage of the goods, and waives and abandons all advantage and benefit accorded by the Statute 37 Vict., C. 25 to the shipper, and himself accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the Company absolved and discharged from delays, damages, or losses from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the Company's officers, servants, or workmen, but which shall have occurred without the actual fault or privity of the Company. Statement.

"It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise must be presented to the master or owners thereof within one month from date hereof; and that after one month from date hereof no action, suit or proceeding in any court of justice shall be brought against the said steamer or

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the owners thereof for any damage to or loss of said merchandise; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof for any such damage or loss."

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The goods were damaged and plaintiff commenced an action but not within a month. The following is the judgment of

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IRVING, J. [who after setting out the facts proceeded:] The goods were damaged on the voyage by salt water; and I think there can be no reasonable doubt but that the salt water reached the goods by reason of the packing under the plate which covered the man-hole in the top of the ballast-tank blowing out. Having regard to the condition above set out it seems to me unnecessary to decide the point whether this leakage was unseaworthiness (which the defendants are supposed to warrant) or negligence against which they have provided by other conditions in their bill of lading.

It was argued (1.) that the plaintiffs were outside the bill of lading altogether; (2.) that the words of exemption were not sufficiently clear and explicit; and (3.) that the bill of lading being in derogation of the provisions of Cap. 82 of the Revised Statutes of Canada could not be invoked, that is to say, that it was contrary to public policy.

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With regard to the third point, I think the answer is to be found in the maxim of *cuilibet licet renuntiare juri pro se introducto* and the case of *The Glengoil Steamship Co.* v. *Pilkington* (1897), 28 S.C.R. 146; and as to the first and second grounds I can only refer to the language of the condition, that it was expressly agreed that all claims for damages which would include as well those arising from a breach of the fundamental warranty of seaworthiness as those specifically mentioned in the exceptions, should be presented within one month and suit brought thereon within that period. Stringent as this condition is, it must prevail because the parties so agreed. Judgment for defendants with costs.

The plaintiff appealed and the appeal came on for argument at Vancouver on 8th June, 1901, before MCCOLL, C.J., WALKEM and MARTIN, JJ.

*Sir C. H. Tupper, K.C.*, and *Gilmour*, for appellant: The trial Judge erred in overlooking the principle of construction applicable to the implied warranty of seaworthiness, that nothing but express and unambiguous terms exempt the ship-owner from the full effect of such warranty, and in applying a condition in the bill of lading which referred to the events and circumstances happening after sailing to the condition of the ship before she sailed, and especially to the warranty of seaworthiness which was not referred to in the bill of lading. They cited *Tattersall* v. *National Steamship Co.* (1884), 12 Q.B.D. 297; *Crooks & Co.* v. *Allan* (1879), 5 Q.B.D. 40; *Sewell* v. *Burdick* (1884), 10 App. Cas. 74 at p. 105; *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; *Lyon* v. *Mells* (1804), 5 East, 438; *Phillips* v. *Clark* (1857), 26 L.J., C.P., 168; *Czech* v. *General Steam Navigation Co.* (1867), L.R. 3 C.P. 14 at p. 20; *Leuw* v. *Dudgeon* (1867), 17 L.T.N.S. 146; *The Glengoil Steamship Co.* v. *Pilkington* (1897), 28 S.C.R. 146; *Waikato (Owners of Cargo on SS.)* v. *New Zealand Shipping Co.* (1898), 1 Q.B. 647; (1899), 1 Q.B. 56; Carver's Carriage by Sea, 2nd Ed., 77; Scrutton's Bills of Lading (1893), 72, 171, 185; *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 382; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 600; *Watson* v. *Clark* (1813), 1 Dow, 336; *Douglas* v. *Scougall* (1816), 4 Dow, 269; *The Glenfruin* (1885), 10 P.D. 108; *The Cargo ex Luertes* (1887), 12 P.D. 187; *Gilroy, Sons, & Co.* v. *Price & Co.* (1893), A.C. 56; *Maori King* v. *Hughes* (1895), 65 L.J., Q.B. 168; *Queensland National Bank* v. *Peninsula and Oriental Steam Navigation Co.* (1898), 1 Q.B. 567 and *The Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 56 L.J., Q.B. 630.

Argument.

*Davis, K.C.*, for respondent: The condition is not one limiting liability, but only one limiting the result of it when the liability comes into effect—it only deals with what shall regulate that liability when it arises.

[The Chief Justice: Where there is more than one meaning the question of reasonableness must enter into the construction of every contract.]

He cited *Moore* v. *Harris* (1876), 1 App. Cas. 318. The plaintiff cannot be in a better position than he would be if there were

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an express provision in the bill of lading that the Company would be liable for unseaworthiness—if there were such a clause his action would be barred by the time limit.

*Sir C. H. Tupper*, in reply.

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*Cur. adv. vult.*

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7th November, 1901.

McCOLL, C.J.: I think the appeal should be dismissed.

WALKEM, J.: On the 5th of June, 1899, the plaintiff shipped several packages of goods, under a bill of lading of that date, on board the defendant Company's steamer Cutch for carriage from Vancouver to Skagway, and thence, by the usual available means, to Dawson, there to be delivered to one Fraser, his agent. On their delivery, the packages were found to be badly damaged by salt water. The plaintiff has, therefore, brought this action to recover his consequent loss, as it was due, as he alleges, to the unseaworthiness of the steamer.

In addition to the ordinary exemptions as to liability for loss that are inserted in bills of lading in favour of ship-owners, the bill of lading in this case contains a special stipulation to the effect that the Company is not to be liable for any loss unless the claim for it is presented within a month from the date of that document. As a matter of fact, the present claim was not presented within that period.

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On behalf of the Company, unseaworthiness is denied and the above stipulation pleaded as a bar to the action. Two issues are thus raised—one of fact, and one of law. But unseaworthiness being at the very root of the plaintiff's case, it follows that if, in our opinion, it has not been proved, the legal question need not be considered; and, *e converso*, if our opinion should be to the contrary.

The case was tried without a jury; and the Court found as a fact "that the goods were damaged on the voyage by salt water," and "that there could be no reasonable doubt but that the salt water reached the goods by reason of the packing under the plate which covered the man-hole in the top of the ballast-tank blowing out." I agree with this finding as far as it goes;

but as it is not a direct finding of unseaworthiness, I must deal with that question and the evidence relating to it.

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With respect to unseaworthiness, the following extract from Lord Blackburn's judgment in *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72, at p. 86, serves, amongst other purposes, to indicate the real issue of fact involved in this case, and, consequently, the evidence applicable to it: It is "quite clear," his Lordship observes, "that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which would prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in . . . . contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." Consequently, the only issue of fact is—Was the Cutch fit, on the 5th of June, 1899, for the purpose for which the plaintiff then engaged room in her? Hence, much, if not all, of the evidence given at the trial as to antecedent fitness, or efforts to ensure fitness, for instance, in 1898, is irrelevant.

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The captain states that the steamer left Vancouver for Skagway on the 5th of June, and had fine weather throughout the voyage. This at once disposes of the suggestion made by another witness that a rough sea, or unusual wash, might have forced the sea-cock, or the tank of the vessel, to leak. After a run of seventeen or eighteen hours, she reached Alert Bay and discharged some cargo, which, it is said, was in good condition. Before leaving the bay, the water ballast-tank was re-filled, by direction of the captain, with salt water from the sea-cock, after which the sea-cock was, apparently, but, as it turned out, not completely, closed, as he states, and as appears by the following entry in the log, on the 6th of June:—"Cargo damaged in afterhold by salt water. Opened Egg Island 11.04. Upon examining into the same, the chief engineer told us that while pumping into the ballast-tank, some sea-weed got into the valve of the sea-cock causing it to leak after it was apparently shut off, and the con-

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sequence of which was the ballast-tank overflowed and a large quantity of sea water got into the hold. The pumps were started going, immediately, to clear the hold;" and, as further evidence shews, were kept going until the steamer reached Skagway. When the quantity of water was sufficiently reduced to permit of its being done, the leakage in the sea-cock was stopped; but as to when this happened there is no evidence. From the fact that it was found necessary to keep the pumps going throughout the voyage, it is reasonable to infer that it happened when the steamer was well on her way, or near Skagway. The tank, I might state, could not be reached at any time during the voyage for the purpose of being pumped out as it lay in the bottom of the after-hold of the ship, and beneath its floor, on which all the cargo was stowed.

A correct conception of what is meant by the sea-cock, and of its position and purpose, is necessary to properly appreciate the charge of unseaworthiness. According to the evidence, there is a permanent hole in the hull of the steamer, about four feet below its water-line, large enough to admit of an inflow of salt water sufficient to fill the tank, if needed. This hole is covered on the outside of the hull by an iron grating of half-inch mesh, and is connected inside by a pipe, or tube, with the tank which is near by. In this pipe, the sea-cock, or, as it is termed by some of the witnesses, a "valve," is placed for the purpose, when necessary, of either letting the salt water into the tank, or shutting it off. An every-day example of the principle of its construction is that of the ordinary water tap.

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Now, it is beyond question, in view of the hull inspector's statement that the express purpose of the grating was "to keep any dirt out—sea-weed, or anything else," that, as sea-weed entered the pipe and clogged the sea-cock, thereby causing it to leak, the grating was radically defective inasmuch as its half-inch mesh was, obviously, too large for its purpose. Hence, the inspector's opinion to the contrary, when certifying, in 1898, that the ship was, in effect, seaworthy is of no value on this point. The leak was a serious one, for, according to the captain's evidence and the log, it resulted in the overflowing of the tank and the mischievous and, naturally, incursive flow of "a large quan-

tity of water into the hold." The correctness of the statements of some of the witnesses to the effect that even if the sea-cock had leaked no damage could have been done if the tank were full, or partially so, must be admitted, as, at best, the water in the tank would naturally have neutralized, in proportion to its quantity, the pressure of the in-coming leak. But this evidence was given on the assumption that the tank itself was sound, which was not the case. I, therefore, consider that the defective character of the grating is, in itself, clear evidence of unseaworthiness.

I shall now deal with the condition of the tank as the damage to the goods is mainly attributed to its having been materially defective from the outset. From the evidence it appears that it is on the bottom of the ship in the after-hold. It conforms to the shape of the ship, and is fourteen feet wide forward, and thence tapers aft for about sixteen feet to a point. It is three feet deep, and of twenty-five or thirty tons capacity. It is made of steel, and is flat on the top. In the top there is an oval man-hole twelve by sixteen inches, sufficiently large to admit of a man passing through it. The cover of the man-hole is a flat plate of the same oval shape, but two inches wider in circumference. Without going into further details, the plate is fastened down by stud-bolts, that is to say, by bolts four and a half or five inches long, with screw threads at each end. These bolts, which are eight or ten in number, pass through the holes in the plate and corresponding holes in the top of the tank, and are secured inside the tank by being "headed," and above the covering plate by ordinary nuts. Between the plate and the top of the tank, an endless oval piece of rubber, about two inches broad and three-sixteenths of an inch thick, is placed. This is called a rubber joint. Before the rubber is placed in its position, holes are punched in it to correspond with the holes in the plate and top of the tank. It is then slipped down on the stud-bolts before the plate is placed over it: and the plate is then tightened to the requisite degree by the upper nuts on the bolts. When the tank was examined in Skagway it was found that a portion of this rubber had been "blown out;" in other words, the rubber was not sufficiently strong to resist the upward pressure of

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the sea water in the tank. There is evidence to the effect that the best quality of rubber available was selected when the vessel was "re-modelled" in June, 1898; but there is also evidence, for instance, of Mr. Hardie, a witness called for the defence, to the effect that the quality, or durability, of such rubber can only be ascertained by using it, and that what may appear to be a good article as sent out by the manufacturer may turn out to be otherwise. This is common sense. Either he, or another witness, states that rubber is liable to become hard and brittle after more or less use, and that in such case it becomes useless. There is a diversity of opinion as to the durability of rubber, some witnesses stating that it ought to last at least two years, while others take a different view of it, but this is neither here nor there in view of the actual fact that the rubber in question was forced away from the stud-holes under a pressure of salt water which, it is almost needless to say, it was expected to more than withstand. A witness, who was employed about two years and a half in the engine room of the Empress of India, a steamship of about 6,000 tons, states that while so employed he never knew of any trouble having occurred with respect to the tanks, which were from 70 to 100 tons capacity, as the man-holes and sea-cocks were well looked after. It would appear that the rubber in question was never examined from the time it was placed in position, in June, 1898, until it was blown out twelve months afterwards. It seems to be a rule that before a steamship leaves port her tank, if she has one, must be carefully examined. In this case, the examination was farcical, for the second mate states, with respect to his examination of the man-hole of the tank, that he lifted the hatch above it and took a "glance" at it, and this, to my mind, is all that he actually did. He says he "kicked" some of the nuts to see if they moved, and on further cross-examination is not sure how many he kicked, or whether he kicked any of them. A reference to his evidence will shew that from first to last it is, to say the least of it, most discreditable; for, although he was present at the examination of the tank at Skagway, his memory is a blank with respect to its condition; and it is also a blank in respect to any facts that could possibly militate against his employers' interests. At all events, the fact

remains that the rubber in question was blown out by an ordinary pressure of the sea water in the tank; hence, it matters not whether the fresh water tests which were applied to the tank before the steamer left Vancouver were satisfactory or not. This disposes of a lengthy discussion before us as to the effect of the difference between the static pressure of fresh and salt water with different heads or levels. The fact that the tank was inaccessible from the time the steamer started until she reached Skagway, owing to the stowage of the cargo above it, tends to shew that the cover of the man-hole could not have been tampered with at any time during the voyage, and, consequently, that it was defective when the steamer sailed. On this ground, as well as on the former ground with relation to the grating, I am of the opinion that the ship was unseaworthy. In other words, the defect in the grating, as well as in the rubber joint in the man-hole, contributed, so to speak, to the mischief complained of.

Now, the implied warranty of seaworthiness was, as Lord Blackburn points out in the case I have referred to, a warranty, for instance, in the case of the Dutch, that she was seaworthy, or, in other words, not a "rotten" ship when the plaintiff engaged room in her. This engagement was, obviously, a matter antecedent to the delivery and stowage of the plaintiff's goods on board, and also to the signing of the bill of lading, which, with its specific exemptions, constituted the contract between the parties. It follows that as there is no exemption, as might have been the case, as to unseaworthiness, the plaintiff's charge of unseaworthiness is in no way affected by the terms of the bill of lading, as the special stipulation at the end of it, to which I have referred, can only be read, as having relation to the previous matters contained in it. It seems to me that the decision in the case of *Tattersall* v. *National Steamship Co.* (1884), 12 Q.B.D. 297, puts an end to discussion on this point. In that case, there was a contract for the carriage of cattle from London to New York to the effect that the shippers should, amongst other things, be in no way responsible "for escape, disease or mortality, and that, under no circumstances, should they be liable for more than five pounds a head." Several of the

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animals contracted a foot and mouth disease owing to the uncleanly condition of the ship before she started, and died from the effects of it; and it was held that the provision in the bill of lading limiting the defendants' liability to £5 a head did not apply to the implied warranty of seaworthiness, as the warranty was outside of the bill of lading, and antecedent to it.

In view of this decision, let us suppose that the special stipulation in the last clause of the Cutch's bill of lading was worded in the more comprehensive language of the stipulation in the *Tattersall* case, that is to say, that "under no circumstances" should the defendant Company be liable; could the result have differed from the opinion expressed on the point in that case? There is, therefore, only one inference to be drawn from it, and that is, that the defendant Company, notwithstanding the special stipulation I have referred to, is legally liable for the damage that occurred.

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As the question of damages was not dealt with by the Court below, the case would, necessarily, have to be sent for a new trial; but, as counsel for both parties have agreed that, in the event of our finding that the steamship was unseaworthy, the amount of the damages should be $1,476.18, judgment is to be entered for that amount, and the costs of the action and of this appeal.

MARTIN, J.: It is established by the evidence that the sea water flooded the ship by coming into the ballast-tank through a leaky sea-cock in the bottom of the vessel, and, because of the man-hole of the tank not being properly secured (packed) escaping from the ballast-tank into the hold. The inflow of water was kept down by pumping and the sea-cock was finally properly closed, but in the meantime the water could not be prevented from flowing into the hold from the tank since it was impossible to get at the man-hole because of the cargo.

Judgment of MARTIN, J.

Now this was something not "easily curable by those on board," to quote the language of Lord Lindley in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (1901), A.C. 362 at p. 371, a case reported since the argument, and after considering the evidence in the manner directed by that case, I am satis-

fied as a matter of fact that the Cutch was unseaworthy when she sailed.

The question of law then arises—is the last exception in the bill of lading a bar to this action?

It is admitted that liability for unseaworthiness may be excepted in a bill of lading—an example of a partial exception will be found in *The Cargo ex Laertes* (1887), 12 P.D. 187.

It is contended by the appellant's counsel that this exception must be by express terms, and the respondent's counsel takes the ground that if that be the case the question of whether there has been such an exception becomes one of construction of the language used in the bill of lading, and contends that the exception here is wide enough to cover everything.

It will be noted that this exception is one as to time, and it is urged that not the liability itself but the result of it is what is excepted, and that after the loss has occurred and the liability has arisen from such loss, it does not matter how that liability arose—whether by negligence after sailing or unseaworthiness on or before sailing—that the two sources of liability are merged and no cause of action thereon can be enforced after the expiration of the time limit. It is admitted that there is an implied warranty of seaworthiness, but it is contended that the appellant cannot be in a better position than if there were an express exception of unseaworthiness, and it is submitted that if there were such an exception nevertheless the time limit is a bar, because the clause invoked deals only with what results from that liability which has arisen.



The contention is certainly ingenious and plausible, and our attention has been called to an expression used by Lord Justice Collins in *Queensland National Bank* v. *Peninsula and Oriental Steam Navigation Co.* (1898), 1 Q.B. 567 at p. 571, wherein he said that in that case there was no "magic" in the word "unseaworthiness." But nevertheless it is clear from the judgments in *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 4 R.C. 717; *The Cargo ex Laertes, supra*; *Gilroy, Sons, & Co.* v. *Price & Co.* (1893), A.C. 56; *Maori King* v. *Hughes* (1895), 65 L.J., Q.B. 168, and others, that in those cases at least there is something akin to "magic" in the sense that term is used by

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the Lord Justice, because, as Lord Justice Smith says in the *Maori King*, p. 172, different considerations apply to a contract to carry goods by sea from those which apply to one to carry by land. What we have to do as the last mentioned learned Judge also said in *Tattersall* v. *National Steamship Co.* (1884), 12 Q. B.D. 297 at p. 301, is to ascertain "the true meaning of a very special bill of lading;" and how can that true meaning be ascertained unless the question of seaworthiness was fairly presented to the minds of the consignor and owner?

If this were an ordinary contract it might very well be that because the penultimate clause takes away any right of action for loss or damage by the ship-owners' officers and servants occurring without said owners' actual fault, therefore the last clause must apply to liability of all other kinds, otherwise the clause itself would have nothing to take effect on. But that does not dispose of the matter because the further question arises—admitting the exceptions to what period of time do they relate? The respondent contends, to "all times," just as they were similarly contended in *Tattersall's* case to apply to all "circumstances." After a full consideration of this bill of lading, and of the cases cited, I have come to the conclusion that Lord Justice Smith supplies the answer in the *Maori King* at p. 172:

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"In my opinion, there is the implied warranty, which I have mentioned, and I think that the exceptions all apply after the ship sets sail. They are exceptions during the voyage, when, if any of the matters mentioned take place, the ship-owner is not to be liable. But if there is, as I think there is, an implied warranty that the machinery shall be fit for its purpose when the ship sets sail, then the exceptions do not apply, and are no answer to a claim by the owner of the goods founded on the original unfitness of the machinery"—in the present case—unseaworthiness.

Taking this view, the case of *Moore* v. *Harris* (1876), 1 App. Cas. 318, particularly relied on by the respondent, does not afford us much assistance, though it is otherwise a decision of much commercial value. In my opinion the appeal should be allowed with costs.

*Appeal allowed.*

## DALLIN v. WEAVER.

FULL COURT
At Vancouver.

1901.

July 8.

DALLIN
*v.*
WEAVER

*Costs—Appeal—Offer of settlement.*

Where a judgment is reduced on appeal and pending the disposition of the appeal respondent offers to accept in settlement an amount smaller than the original judgment but greater than the reduced judgment, the appellant will be allowed the costs of the appeal.

AT the trial of this action before IRVING, J., the plaintiff recovered judgment for damages for $797.00 and costs. The defendant appealed and after notice of appeal the plaintiff offered, in order to avoid costs of appeal, to accept in settlement $425.00 and the costs of the action, but the appellant refused to pay that sum. Statement.

The appeal came on for argument at Vancouver on 6th March, 1901, before MCCOLL, C.J., DRAKE and MARTIN, JJ., and on 8th July, judgment was given reducing the damages to $396.00 and allowing the appellant the costs of the appeal.

The following judgment was delivered by

MARTIN, J. [who after dealing with the main question proceeded:] Then as to costs. On December 20th last, after notice of appeal had been given, the plaintiff's (respondent's) solicitors offered, in order to effect a settlement and save further costs, to reduce the damages to $425.00, but the appellant refused to pay that sum. If the appellant had not succeeded before us in reducing the damages below the sum the respondent offered to accept, he would be in an unfavourable position as regards costs; but having succeeded in so doing I know of no good reason, in the absence of authority, why, being successful, he should not receive the customary legal fruits of success, costs. An inadequate tender cannot avoid the payment of costs.

Judgment of MARTIN, J.

*Davis, K.C.*, for defendant (appellant.)
*Wilson, K.C.*, for plaintiff (respondent.)

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# THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. LUDGATE AND THE ATTORNEY-GENERAL OF CANADA.

## DEADMAN'S ISLAND CASE.

*Military reserve—Deadman's Island—Recitals in private Acts—Whether binding on the Crown.*

The statement in The Vancouver Incorporation Acts which are private in their nature, that certain land was a "Government Military Reserve" is not conclusive on the Crown in right of the Province, and

*Held*, on the facts that it was not shewn that Deadman's Island was a military reserve called into existence by properly constituted authority and, therefore, that it belongs to the Province and not to the Dominion.

Remarks as to the powers of Governor Douglas and as to what constituted a "reserve."

ACTION for a declaration that the title to the land situate in Burrard Inlet, in British Columbia, and known as Deadman's Island, was in Her Majesty the Queen on behalf of the Province of British Columbia, for an injunction restraining defendant Ludgate from cutting trees and trespassing, for possession and for damages. The defendant Attorney-General claimed that the land was never owned in behalf of the Province, but that it formed part of land duly reserved for and on behalf of Her Majesty's Imperial Government. By an Indenture of Lease dated 14th February, 1899, the Government of the Dominion of Canada represented by the Minister of Militia and Defence leased the land to defendant Ludgate, who entered into possession and was proceeding to cut trees and make the necessary preparations for erecting on the Island a lumber mill.

Statement.

The action was tried on different days in December, 1900, and January and February, 1901, before MARTIN, J.

*Bodwell, K.C., Duff, K.C.*, and *J. H. Lawson, Jr.*, for plaintiff.
*Peters, K.C.*, and *Howay*, for defendant Attorney-General.
*Macdonell*, for defendant Ludgate.

7th September, 1901. MARTIN, J.

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MARTIN, J.: What the defendants seek to establish herein is that the land in question, Deadman's Island, formed part of a Military Reserve before this Province became a part of the Dominion, and it is contended that such reserve existed prior to the time of a survey made by Corporal Turner, R.E., in 1863, of what was then called Coal Peninsula, but is now known as Stanley Park. That park contains, according to the Parliamentary Return of January 14th, 1873, 950 acres, but according to a recent calculation of the chief clerk of the Department of Lands and Works, only 880 acres, or thereabouts. Deadman's Island contains about eight acres.

At the outset I have to deal with the contention of the defendants' counsel that the matter is conclusively determined in their clients' favour by the effect of certain Acts of the Legislature of this Province, or if not conclusively determined, that a *prima facie* case is thereby established.

The statutes relied upon are as follows:

(1.) An Act to Incorporate the City of Vancouver, Cap. 32 of 49 Vict., 1886. Section 2 in part defines the boundaries of the Corporation as "along the shore-line of lot number 185 in said New Westminster District and the Government Military Reserve to the First Narrows, etc." This Act is to be found under the heading and division "Private Acts."

Judgment.

(2.) The similar Amending Act of the following year, Cap. 37, Sec. 1, containing language to the same effect.

(3.) Cap. 32, section 2 of the Unconsolidated Acts, Vol. II., of 1883, also containing language to the same effect. The Consolidated Public and General Acts are contained in Vol. I., of 1888.

(4.) Cap. 54, section 2 of 64 Vict., 1900, being "An Act to Revise and Consolidate the Vancouver Incorporation Act." Herein occurs the same reference to the Government Military Reserve. This Act also, though included in the same volume with the public Acts, is placed within the division reserved for private Acts at and following p. 209, and is further distinguished from the public Acts by a separate table of contents and index.

Though it is true that by sub-section 48 of Interpretation Section 10, R.S.B.C. 1897, it is declared that "Every Act shall,

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unless by express provision it is declared to be a private Act, be deemed to be a public Act, and shall be judicially noticed by all Judges . . . . without being specially pleaded," yet with this must be read sub-section 52, which provides that "nothing in this section shall exclude the application to any Act of any rule of construction applicable thereto and not inconsistent with this section."

Said sub-section 48 is similar to section 9 of the Imperial Act, 52 & 53 Vict., Cap 63, which declares that "Every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of the Act, shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act."

Prior to this enactment similar provisions were customarily inserted in Acts of a local or private nature—Taylor on Evidence, 9th Ed., paragraph 1,532. An example of this will be found in the case of *Brett* v. *Beales* (1829), M. & M. 416, wherein the Act there in question contained a clause that it should "be deemed and taken to be a public Act and shall be judicially taken notice of by all Judges, Justices and others without being specially pleaded." But despite that language, quite as strong, if not stronger, because special, than that here relied upon, objection was taken by the Attorney-General to the reception of the statute as evidence of the fact that the Corporation of Cambridge was entitled to certain tolls as stated in the recital, and Lord Chief Justice Tenterden, after stating that the point was new and of great importance, consulted with his learned brothers and afterwards gave judgment sustaining the objection on the ground, first, that the said clause only applied to the forms of pleading and did not vary the general nature and operation of the Act; and second, that the bill itself was not public in its nature, and did not "affect all the King's subjects." This decision was followed by the Court of Exchequer *in banc* in the case of *The Duke of Beaufort* v. *Smith* (1849), 4 Ex. 450, at p. 470, wherein Mr. Baron Parke said, "The plaintiff's counsel has very properly given up insisting on the private Acts of Parliament. They are clearly inadmissible. A similar rule was laid down in the Cambridge Toll Case, *Brett* v. *Beales*."

Judgment.

The reason why recitals in private Acts, passed before a certain date, are received in evidence in peerage cases is that, as Lord Justice Brett says in *Polini* v. *Gray* (1879), 12 Ch. D. 411 at p. 432, affirmed (1880), 5 App. Cas. 623, it was the practice of the House not to allow any recital "unless proved to the satisfaction of the Judges." And see *The Shrewsbury Peerage Case* (1857), 7 H.L. Cas. 1. Taylor on Evidence says (1897), paragragh 1,660, "The evidence in support of private bills is, however, no longer submitted to the Judges for approval, and, therefore, recitals inserted in them since this change in the practice appear to be now inadmissible. And, as a general rule, a local or private statute, though it contains a clause requiring it to be judicially noticed, is not, as against strangers, any evidence of the facts recited; neither does it affect the public with a knowledge of its contents." See also Phipson (1898), 310.

Counsel for the Dominion relied particularly on the cases of *The King* v. *Greene* (1837), 6 A. & E. 548, and *The Labrador Company* v. *The Queen* (1892), 62 L.J., P.C. 33. Neither of these cases bears upon the exact point under consideration because they were both decided upon statutes which were public and general in every sense of the word, affecting "all the King's subjects." The first case, in fact, is cited by Taylor as an authority for the proposition that even the recitals in a public Act are not conclusive evidence, and the second decides that where there is "an absolute statement by the Legislature" in a public Act, "even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it. The Act of Parliament has declared that there was a seigneurie of Mingan. . . . . The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination."

Judgment.

The contention that the Government "must be assumed to take a part in all private bills" was long ago answered by the Attorney-General in *Brett* v. *Beales*, *supra*, wherein he stated, "in point of fact, if a bill of this kind is unopposed, and conforms with the rules of parliament, it passes as a matter of course, without inquiry." The many members of the legal profession of

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this Province who have been called upon to act as parliamentary agents, as I have, know that this quotation is specially applicable to the course of legislative procedure in a new country.

In the present case, in addition to what I have already noticed, the preamble of the Vancouver Incorporation Act of 1900, recites that the enactment is passed in answer to the prayer of the Corporation expressed in a petition presented by it, thus emphasizing its private nature, and in view of the authorities above cited, it is clear that this Court should not notice, or if bound to notice, should give no weight at all to the expression "Government Military Reserve." For the purposes of the enactment the word "Military" is superfluous, and I am satisfied that the attention of the Crown was in no way directed to it.

I hold, therefore, that a *prima facie* case has not, by the statutes, been established in favour of the defendants.

Proceeding then to a consideration of the proof of such a reserve having been made as a matter of fact, reference must primarily be had to the Land Proclamation of 14th February, 1859, wherein provision is first made for reserving lands. For a proper understanding of that Proclamation, and of the state of affairs when the reserve is alleged to have been made the exact powers of His Excellency the Governor of the Colony must be clearly defined and appreciated.

Judgment.

By the Royal Commission issued to him under the Great Seal on the 2nd of September, 1858, Mr. James Douglas was appointed "Our Governor and Commander-in-Chief in and over Our Colony of British Columbia and its Dependencies, and in and over all forts and garrisons erected and established or to be erected and established" therein, and after defining the boundaries of the Colony, it, to quote the language of the Lords of the Privy Council in a similar case, *Cooper* v. *Stuart* (1889), 58 L.J., P.C. 93, conferred upon the "Governor authority and jurisdiction which may be described as Royal, including full powers to make grants of lands, tenements and hereditaments. . . . . ." Referring to the extent of the Governor's authority the Right Honourable the Secretary of State for the Colonies says in his despatch of September 2nd, 1858 (Imp. Par. Ret., Feb. 18th, 1859, B.C. Papers Part I., p. 62): "These powers are indeed of very seri-

ous and unusual extent . . . ." At that time the Governor, by virtue of said commission and the Imperial Order in Council of September 2nd, 1858, empowering him to make laws and provide for the Administration of Justice in the said Colony, was at once the creative (legislative) and the executive power—he was, in short, the law.

The relation of Colonel Richard Clement Moody, Chief Commissioner of Lands and Works, to the Governor must likewise be understood.

In 1858, it had been decided by the Home Government to send out a body of Royal Engineers for service in the Colony. The object of this move is explained in a letter from the Secretary of State for the Colonies to the Under Secretary for War, dated 3rd August, 1858 (Imp. Par. Ret., Brit. Col. Papers Part II., p. 53):—

"I am to explain that the object for which this party of Royal Engineers is sent to British Columbia is not solely military, though circumstances may compel it to act in that capacity, but for practical and scientific purposes; that it will be required to execute surveys in those parts of the country which may be considered most eligible for settlement, to mark out allotments of land for public purposes, to suggest the site for the seat of Government and for a sea-port town, to point out where roads should be made, and to render such general aid to the Governor as may be within its competency."



In the instructions to Colonel Moody, dated August 23rd, 1858 (*Ib.* 55), who had been appointed to the command of the force, it is stated that "It is to be distinctly understood (1.) That the Governor is the supreme authority in the Colony. That you will concert with him, and take his orders as to the spots in the Colony to which your attention as to surveys, etc., should be immediately and principally directed. That you will advise and render him all the assistance in your power in the difficult situation in which it is probable he will be placed for some time."

And in the later and fuller instructions to Colonel Moody, "on the eve of his departure," the Colonial Secretary says, under date of November 1st, 1858 (*Ib.* p. 74):—

"Whilst I feel assured that the Governor will receive with all

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attention the counsel or suggestions which your military and scientific experience so well fit you to offer, I would be distinctly understood when I say that he is, not merely in a civil point of view, the first Magistrate in the State, but that I feel it to be essential for the public interests that all powers and responsibilities should centre in him exclusively."

Colonel Moody was also selected as the most fitting person to hold the dormant Commission of Lieutenant-Governor; this under the 11th clause of the Governor's Commission which authorized the government of the colony being administered by the Lieutenant-Governor "in the event of the death, incapacity, removal or absence of" the Governor from the Colony.—(Despatch of Colonial Secretary to Governor Douglas, September 24th, 1858, *Ib.* p. 67.) A Royal Warrant was transmitted to the Governor authorizing him to "pass Letters Patent under the Public Seal of British Columbia appointing Colonel Moody to be Chief Commissioner of Lands and Works" (*Ib.* p. 66) and he was so appointed.

Some misunderstanding at first existed in regard to this office of Lieutenant-Governor, but it was corrected by a despatch from the Colonial Secretary to the Governor, dated March 21st, 1859:

"I take this opportunity to notice an inaccuracy into which you have fallen in this despatch in designating Colonel Moody the Lieutenant-Governor: You will observe that it is of importance to bear this in mind as his functions in that capacity will commence only in the event of the death or absence of the Governor."

Judgment.

In view of the fact that the Governor of British Columbia was at the same time Governor of Vancouver Island, he had, as the Duke of Newcastle said in his despatch of September 5th, 1859 (Brit. Col. Papers Part III., pp. 95, 101) "necessarily a divided duty to perform" which occasioned that unavoidable absence from British Columbia contemplated by Clause XXXVI., of his instructions. (*Ib.* Pt. I., p. 8, and *Cf.* Pt. IV., p. 22.) It is clear from the above despatch of the 21st of March, 1859, that the Home Government did not, under the circumstances, consider that the absence of the Governor at Victoria was of such a nature as to call the dormant office of Lieutenant-Governor into exist-

ence, and there is nothing to lead me to suppose that there was any attempt on the part of Colonel Moody, while he remained in the Colony (till October or November, 1863) to exercise such functions. On the contrary, the correspondence between him and the Governor disclosed in exhibits 34, 35, 36, 39, 40, 49, &c., as well as despatches in the blue books, shew that the latter exercised supervision over important departmental acts of the former. These exclusive powers of the Governor continued to be exercised till the Imperial Order in Council of June 11th, 1863, which was passed to "constitute a Legislature for the said Colony consisting of the Governor or officer administering the government thereof and the Legislative Council hereinafter established." I understand that the first meeting of the Legislative Council took place at New Westminster on January 21st, 1864.

It is true that so far back as March 1st, 1859, the Governor had provisionally appointed Mr. Justice Begbie and Colonel Moody to be members of his council, but in replying to the Governor's announcement of that proceeding, the Colonial Secretary in his despatch of April 11th, 1859, makes the following observations:

"Regarding these appointments as a mere voluntary committee of advice I approve of your proceeding. Whenever you consider that the time has arrived for the formation of a regular executive council, and that it is expedient to make the necessary appointments, proper steps shall, on your recommendation, be taken for that purpose."

Judgment.

It consequently follows that at the time the reserve contended for was made, if at all, it could only have been made by one person—that is the Governor himself, the sole Executive. In pursuance then of such his powers, and for the reasons set out in the preamble, the Governor issued the Land Proclamation above noticed, asserting the title of the Crown to all the lands, mines and minerals in the Colony, and declaring that all the said lands were for sale under certain specified terms and conditions. In regard to reserves it contained the following clause:

(3.) It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown lands, and for such purposes, as the Executive shall deem advisable.

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This proclamation was the law relating to Crown lands, and had to be observed by all without exception. In a case in this Court relating to the disposal of Crown lands, Mr. Justice Gray held that "Without the express sanction of the Legislature a Government has no power of dispensing with conditions absolutely required by law." *Peck* v. *The Queen* (1884), 1 B. C., Pt. II., pp. 11 and 21.

In the present case it is admitted that an executive act cannot be proved. What then, is the evidence that a military reserve was made as alleged?

Reliance is placed, first, on the fact that in Corporal Turner's field notes of his survey, the land in question is so styled. In regard to this survey it should be noted that Captain Parson's instructions to Turner, annexed to the field notes, impose no duty whatever on Turner in regard to a military reserve, though Government and Naval reserves are mentioned, nor is the expression "Military Reserve" even made use of. Turner was a witness at the trial, and what he chose to write in 1863, under such circumstances at least, in regard to the existence of a military reserve is not admissible in evidence any more than his statement to the same effect would be if made in the witness box.

In the second place it is contended that the property in dispute was shewn as such a reserve in a certain series of official plans of New Westminster District, prepared under the direction of Colonel Moody, as Chief Commissioner of Lands and Works, and impressed with the seal of that department.

Judgment.

Corporal Howse, late R.E., states that there were "four or five" maps in the so-called official series, but he is not positive as to the exact number, and apparently inclines to five. Four maps are produced from the Provincial Department of Lands and Works, exactly answering to Howse's description, exhibits 20A., 20B., 20C., and 20E. It may be remarked that 20C. is not signed by Colonel Moody in any particular capacity, though 20A., B. and E. are signed as "Col. R. E. & C. C. L. & W." But Howse, however, who states that the plans were signed in his presence, does not allege that any one of them was signed in a representative capacity, but simply "signed by Colonel Moody." There is also a

fifth plan apparently of the same series, 20D., marked "incomplete" and signed by Colonel Moody as "Col. R. E. & C. C. L. & W." In addition to said four official plans, duly signed and sealed, it is alleged that there are, or were, two more, now missing, signed and sealed in like manner, one shewing the whole of what is now known as Stanley Park, and the other being an index plan on a smaller scale, setting out the various reserves.

These missing plans Howse states were in the Provincial Department of Lands and Works at the time he left in 1878. He is, of course, speaking from memory, and I am satisfied that his memory is not, in this respect, reliable. Take an important illustration: he stated at first that he believed the whole series of official plans shewed what is now known as Stanley Park and Deadman's Island, but he afterwards abandoned that position, and stated that only two of them shewed Stanley Park—that is, the Index plan and the other one above mentioned. Another illustration: he first stated that the area in question was designated, not only by the colour red, but by the words "Military Reserve" being written on it, except that on Deadman's Island there was simply the letter "R" indicating "reserve;" but afterwards, towards the close of his cross-examination, his memory palpably failed him on this point, and he no longer relied on the existence of the words, but on the colour as explained by the references on the index plan. This index plan, he stated on cross-examination, shewed the reserves as being marked in the same way as they are shewn in Launder's beautifully executed "Plan of Reserves" (Ex. 4), except that the index plan had in addition under the word "Reserves" an explanation of the colours used. Nor, it will be seen, is he any more to be relied on even as to the number of the maps. He begins by stating the number to be four or five, but if there are two missing ones, there must have been at least six or seven. This is a grave inconsistency when alleged missing plans are sought to be accounted for.

Judgment.

Richards is called ostensibly for the purpose of corroborating Howse, but as I understand the result of his indefinite and unsatisfactory statements, he does not venture to say that there were more than four of the official series, and thinks that of those

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four two related to the land in question. This is utterly inconsistent with Howse's recollection, and I need only say that in my opinion, Richards' evidence, though doubtless given with the best intentions, is, as a whole, unreliable, probably because of the lapse of time. So far as the preparation of the Return, the very subordinate position he then held in the Department would largely account for certain manifest inaccuracies in his statements. Some argument was also based on Richards' map of 1877, but no importance attaches to that document because it is admittedly made from Turner's survey.

This witness' statement that the alleged missing maps were in the Department when he left in 1886, and the above statement of Howse in regard to their being there in 1878, are, in my opinion, sufficiently answered by the evidence of the Deputy Commissioner of Lands & Works as to the "diligent and exhaustive search" made by him over twenty years ago for the express purpose of obtaining evidence in regard to the Naval and Military Reserves. (See his report of the 29th of October, 1880, B. C. Sessional Papers 1886, p. 429.) He is also confirmed by the evidence of the then Surveyor General, Mr. A. S. Farwell, who entered the Department of Lands and Works on the 13th of January, 1873, as Acting Surveyor-General and head of the Department under the Chief Commissioner. Strong corroborative testimony is contained in the index book of maps, plans, reserves, etc., which was prepared by Mr. Conway Scott, chief draughtsman, by instructions of Mr. Farwell, shortly after the latter took charge of the Department. It is a most important circumstance that on page 90 in the list of official maps relating to the Mainland, the alleged missing maps are not enumerated, though the index was prepared several years before Howse left, for the express purpose of ascertaining exactly what maps and plans there were, because, as the then Surveyor-General states, "It was absolutely necessary to make a list, we could not find anything." The evidence of a number of other officials is to a similar effect, and generally supports me in the view I have taken as to the non-existence of the missing plans. I think it is due to Mr. Fullagar, barrister-at-law, to express my appreciation of the exceptionally careful and thorough manner in which I am satis-

Judgment.

fied he conducted his researches, though they have failed to produce anything in support of the defendants' case. The conclusion I have come to is that in the long course of time, upwards of forty years, the witness Howse has unconsciously, and very naturally, mentally confused and intermingled the contents of the official series of plans with Launder's contemporary plan of reserves, which may very well be the "plan of a few reserves" mentioned in the letter of Colonel Moody, dated 24th August, 1861, to the B. C. Colonial Secretary, and acknowledged by the Colonial Secretary on September 3rd, 1861 (Ex. 12 and 36.)

It should not pass unnoticed that Howse was not recalled to explain why in this index, made while he was still in the department, the alleged missing maps are not scheduled with the rest of their series, though according to his statement they were with the others in the same compartment at the time. It is difficult to believe that under such circumstances the alleged missing maps could have been passed over, though other documents not similarly connected might well have been temporarily overlooked.

Then, thirdly, as to the Return of the 14th January, 1873, "of all public lands reserved," made in answer to the address of the Legislature of 19th December, 1872, that such Return should "state the area and object of each reserve."

According to one item in this Return a reserve then existed "South of the First Narrows, Burrard Inlet, (Purpose) Military, (Acreage) 950, (Remarks) Commanding entrance to Burrard Inlet. (When established) No data for date of reservation. (Source of Information) From Official Maps." The only action taken by the Legislature on the presentation of this Return by the Chief Commissioner of Lands and Works was to order it to be printed. During the conduct of the case a good deal of discussion arose as to the weight of evidence that should, under such circumstances, be attached to this bare Return. It seems to me that at the most no greater effect can be given to it than as setting forth the then view of the Department on the matter, leaving it open to be shewn that that view was incorrect. After hearing the evidence of Mr. Robert Beaven, by whose instructions to the then chief officer of that Department the Return was prepared, I am satisfied that the departmental attention was at that

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time directed primarily to the fact of ascertaining what reserves then existed, and not to the purpose for which they had been called into existence. There are some glaring inaccuracies in the Return, a notable one occurs in the item immediately preceding the one under consideration, whereby it is stated that a Military Reserve of 354 acres existed, according to official maps, north of the said First Narrows, but it is abundantly clear from the evidence that no such reserve ever existed there: even the witnesses for the defendants best qualified to judge repudiated the idea. For these reasons, in addition to my remarks on Richards' evidence, I am of the opinion that the Return is of practically no assistance in determining this matter.

So much discussion has arisen in regard to the meaning of the word "Reserve" as used in the original Land Proclamation of the 14th of February, 1859, that the point requires careful consideration. The Governor's object in making this Proclamation, his general explanation of the effect and scope thereof, and his intentions regarding reserves, will be found in his despatch, dated five days after the Proclamation, to the Colonial Secretary. (*Ib.* II., p. 64), which contains the following paragraphs relating to reserves:

"(3.) All known mineral lands, and lands reputed to contain minerals, will for the present be reserved.

"(4.) It is also our intention to make large reserves for roads, the erection of places of worship, schools, and public purposes, and also for towns and villages, in such a manner, however, as not seriously to interfere with or retard the progressive improvement and settlement of the country.

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"(11.) The land for special settlement is that bordering the frontier of the United States, and on this we propose to make a military reserve on behalf of the Royal Engineers, and if possible also to otherwise settle it with a population composed exclusively of English subjects."

In his reply, at p. 86 of the same blue book, dated May 7th, 1859, to this despatch, the Colonial Secretary, after acknowledging receipt of the Proclamation and despatch, says: "I have no objection to their general tenor." And see also his previous despatch of February 7th, 1859, at p. 79. On the 4th of

January, 1860, this original Proclamation was followed up by another wherein provision was made, pending survey, for the occupation and pre-emption and purchase of "unoccupied and unreserved and unsurveyed Crown lands." A number of other proclamations followed dealing with land which will be found recited in section 2 of No. 144 of the Revised Laws of B. C., 1871, but which do not call for consideration.

At the present time, and for many years past, the word "reserve" is and has been used in the sense of land being reserved by the Executive from sale or pre-emption under the Land Acts, and so held in that state pending the pleasure of the Executive as to its ultimate disposition. Such a construction of the word would, *e. g.*, be consistent with the notice of the Chief Commissioner of July 18th, 1874, setting out a long list of lands reserved for various purposes.

There is nothing in the evidence adduced which leads me to believe that there is any substantial difference in the meaning of the word as used by Governor Douglas in his proclamations and despatches and the word as now used. In his time, as now, land might be withdrawn from sale or pre-emption for a variety of reasons, and kept in a state of suspense, as it were, for an indefinite time, till the Executive should, at its pleasure, arrive at some conclusion regarding the disposition of the same. An illustration of a temporary reserve—"for the present"—is to be found in the public notice of January 24th, 1863 (Ex. 37.) As I understand a reserve of Crown land, it is something quite different from land, "set apart for General Public Purposes" as mentioned in the B. N. A. Act, third schedule, item 10,—"Armouries, Drill Sheds, Military Clothing and Munitions of War, and Lands set apart for General Public Purposes." To my mind, the latter expression, as therein used, implies finality, and an intention to appropriate for a specific public purpose: a permanent, definite segregation from the public domain. The word "reserve" as used in the old colony and present Province of British Columbia has neither of these meanings primarily attached to it.

Judgment.

Even supposing it had been shewn that the land in question had been designated on official maps as a military reserve, that

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would not, in view of the various meanings that might well be given to such a loose term, necessarily be conclusive of the issues herein. That language might with propriety be applied to a provisional reserve made by Colonel Moody, pending the pleasure of the Executive—the Governor; or to one made provisionally by the Executive pending the wishes of the War Office; or temporarily by the Governor in his capacity as Commander-in-Chief under the momentary apprehension of complications with foreign powers. Again, in any of such cases the whole area might only have been reserved pending the selection of a portion of it for, say, the site of a fort. Instances might be multiplied so far as the general understanding of the term is concerned. And the members of the corps under Colonel Moody's command would be apt to use the term in an even looser fashion—the fact that he had corresponded with the Inspector-General of Fortifications on the basis of the land being desirable for a military reserve would be ample justification, in their opinion, for treating the reserve as existing in that capacity, and this would easily explain a belief which is stated to have been entertained by his men.

At this length of time, and in the absence of definite evidence, it is a mere matter of speculation how the reserve originally was made, and why it was kept in its present state. A reserve may well have been made by one Governor for certain reasons and maintained by his successor for others quite different, a change of circumstances necessitating a change of policy. There is, however, one explanation of the original reservation of the land in question, which is at least as likely as any other; I mean, as "land reputed to contain minerals."

Judgment.

It appears from the despatches that concurrently with the survey of land in the vicinity in question by Colonel Moody's forces, Captain Richards, R. N., in command of H. M. Surveying ship "Plumper," was making an Admiralty survey of that neighbourhood, and naturally there would be, to a certain extent at least, a communication of information by one commanding officer to the other. An illustration of this is to be found in Exhibit 18, which is a tracing dated 4th July, 1859, and as appears from a memorandum therein signed by Captain

Richards, was for the use of Colonel Moody. It was moreover stated that the general shore line of certain of the Royal Engineers' maps was taken from said naval survey.

A portion of the alleged reserved area now in question is marked "Coal Beds" in that exhibit, and a point further up the inlet is similarly designated. The whole area in dispute was admittedly then known as Coal Peninsula (*e. g.*, it is so styled in Turner's survey), and the harbour as Coal Harbour, so called on all the contemporary maps and in the survey, when named at all. In Exhibit 33, of the 20th of January, 1860, Colonel Moody refers to this vicinity as the "Coal District."

Now it is important to note that the Home Government, doubtless in view of the existing Naval Station at Esquimalt, gave particular directions to Colonel Moody in regard to the discovery of coal. Paragraphs 16, 17 and 18 of his instructions are as follows:

"(16.) You will remember that gold is not the only mineral in which British Columbia is said to be rich. You will examine and report to Her Majesty's Government upon all its other mineral productions.

"(17.) You will ascertain the real value of the coal for all purposes of steam communication, both in British Columbia and Vancouver; not only its quality, but the easy working of its mines; whether the coal lies deep or near the surface; whether mining operations are likely to be impeded by much water, bearing in mind that in coal, as in all else, the product is to be estimated by the degree and cost of labour which the supply may necessitate.



"(18.) In this, as in all the mineral products of those Districts, I entreat you to form the most dispassionate and careful judgment, and rather to own ignorance or doubt than ever to allow yourself to be misled by reliance on untested statements . . . ."

If, as counsel for the defence suggests, I am, in dealing with this matter in a broad light, to consider probabilities, it does seem to me that, in view of the foregoing, the conclusion might almost be reached that Colonel Moody probably brought about the temporary reserve of this land as a prospective coal area;

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its very name and reputation at the time suggest such a course. Such a provisional reserve pending an examination on the supposed mineral deposits might well be considered by Colonel Moody's subordinates as a "military" one, and it would from their point of view, perhaps, not be incorrectly so described, though not regarded in that light by others, or properly so called.

It is a circumstance of weight that while there is no record of military reserves, yet in the case of naval reserves executive action was taken in the year following the establishment of the colony, *i. e.*, 1859. The correspondence on this point will be found in the Imperial B. C. Papers, *supra*, Part III., pp. 78 and 108, and in the Return of the Provincial Legislature, dated February 23rd, 1886. In the sister colony of Vancouver Island a reserve at Esquimalt had been made so early as February, 1854. There is no evidence that the design of establishing a Military Reserve along the frontier, on behalf of the Royal Engineers, was ever carried out. (Pt. I., p. 61; Pt. II., p. 65.)

So far as questions of fact are concerned, before judgment can be given in favour of the defendants, I must be satisfied that the reserve in question was a military one which had been called into existence by properly constituted authority. In the absence of direct evidence I am asked to draw such inferences from the facts as will supply the place of it. In view of what has already been said, it would be unprofitable here, if not impossible, to enter into all the minute points of conflicting evidence arising out of a trial lasting many days, or to attempt to state in detail the result of my investigation (which has, I may say, largely occupied my attention for nearly a month) of the testimony and the great mass of plans, documents and state papers before me as exhibits and otherwise. Suffice it to say, in addition to my previous remarks, that I find myself quite unable to draw the inferences which must be drawn before the defendants' contention can be established, and on the facts I am forced to find in favour of the plaintiff.

Judgment.

Before leaving this branch of the case it is desirable to make a remark on the documentary evidence. During the course of the trial a good deal was said about the incompleteness of the

old records, and while in some respects this is true, yet on the other hand we are fortunate indeed, in having, so far as the old Colony of British Columbia is concerned, the four Imperial Blue Books of 1859-62, which, in the admirable despatches of Governor Douglas, contain an account as interesting as it is exceptionally complete of the early administration of the affairs of that colony. And I trust it may not be out of place for me to say, after a repeated perusal of those despatches (which a proper understanding of this case necessitated), that they bring home to one how well it was for the proper establishment of the infant colony, under trying and peculiar circumstances, that there was placed at the head of its affairs so able an administrator as Governor Douglas.

There remain to be noticed the arguments on certain sections of the British North America Act.

First. Regarding the suggestion that the Dominion can claim the land in question by virtue of item 10 of the third schedule of the B. N. A. Act, *supra*, it is sufficient to refer to what I have already said on the meaning of the word "reserve" to shew that there is nothing in the evidence which would justify me in finding that the lands in question were "Set apart for general public purposes" within the true meaning of the schedule. I might add that, in speaking of the public works and property dealt with by this schedule, the Lords of the Privy Council said, in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46, at 56, that "as specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united ..... It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use."

Judgment.

Second. It is said that assuming a "valid reserve" before Confederation in favour of the Imperial Government then such reserve would not be subject to the provisions of the B. N. A. Act. Even if this were so, in the present case I am unable, on the facts, to make that assumption, because no such "valid reserve," whatever that expression may mean, in favour of the Imperial Government has been shewn to exist.

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Finally it is argued that this reserve should be regarded as being lands which, under section 109 of the B. N. A. Act were at the Union subject to some trust existing in respect thereof, or some "interest other than that of the Province in the same," and that there is here a trust in favour of the Imperial Government, or that such Government had some interest therein. In view of *St. Catherine's Milling and Lumber Company* v. *The Queen*, *supra*, and what has been hereinbefore said, I fail to see that said section 109 has in this relation any present application because no trust or interest has been shewn to exist. Even if there be such a trust or interest there is nothing in the section which states that the Province shall cease to be the owner, and here the nature of any suggested trust or interest is not shewn, consequently the defendant Ludgate's lease cannot be supported on that ground.

Judgment.

The result is that the defendants' case fails, and the title to Deadman's Island is hereby declared to be in His Majesty the King on behalf of the Province of British Columbia, and a perpetual injunction is granted restraining the defendant Ludgate from felling trees or otherwise trespassing upon said lands, to which the plaintiff is entitled to immediate possession.

## CHONG *ET AL* v. McMORRAN.

FULL COURT
At Vancouver.

1901.

Nov. 20.

CHONG
*v.*
McMORRAN

*Practice—Adding parties.*

A Chamber order allowed plaintiffs to amend the writ and statement of claim by adding as defendants "L. and C. carrying on business with defendant under the name of the P. P. Co. and the said P. P. Co."

*Held*, in appeal, that the order should be varied by striking out the words "and the said P. P. Co."

APPEAL by defendant from an order of WALKEM, J., dated 23rd May, 1901, adding parties as defendants, the operative part of the order being as follows:

"It is ordered that the above named plaintiffs be at liberty to amend the writ of summons and statement of claim herein by adding as defendants 'Amy I. Leonard, married woman, and John H. Carlisle carrying on business with the defendant R. A. McMorran in partnership under the name of the Provincial Packing Company and the said Provincial Packing Company' and by adding to the indorsement on the said writ the following words: 'In the alternative the plaintiffs' claim against the defendants R. A. McMorran, Amy I. Leonard, married woman, and John H. Carlisle carrying on business as The Provincial Packing Company and the said Provincial Packing Company the sum of $1,619.95 due under contract dated the 3rd day of May, 1900,' and to amend the statement of claim as they may be advised."

Statement.

The plaintiffs were a firm of Chinese contractors and the defendant was a salmon canner. The statement of claim alleged that on 3rd May, 1900, the plaintiffs entered into an agreement with the Provincial Canning Co., Ltd., to supply it with labour at its cannery during the season of 1900, and in pursuance thereof performed what was required of them, but the Company failed to peform its part with the result that the plaintiffs brought an action in the Supreme Court against the said Company and obtained judgment for $1,444.90 and costs taxed at $175.05, both of which sums the plaintiffs were unable to collect, a writ of *fi. fa.* having been returned *nulla bona;* that the negotiations lead-

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ing up to the agreement were conducted on behalf of the Company by the defendant who signed it as President and A. I. Leonard signed it as Secretary; that at the time of the negotiations and prior to the execution of the agreement the Company had ceased to do business, its property and assets had been seized, and on 10th May, 1900, were sold to defendant who on the following day formed a partnership with A. I. Leonard and J. H. Carlisle under the name of the Provincial Packing Company and assigned all the property of the old Company so acquired by him to the new firm which took possession and carried on the canning business for the season, and obtained the benefit of the plaintiffs' services and the pack put up by plaintiffs: that during the negotiations defendant falsely represented that the old Company was carrying on and intended to continue to carry on business and concealed the facts above set out and that the true state of facts and fraudulent concealment only became known to the plaintiffs after the closing of the canning season of 1900, and after they had instituted their said action to recover the amount due under the said agreement. The plaintiffs claimed damages. On plaintiffs' application the order amending was made as above set out and on the application the affidavit of a member of plaintiffs' solicitors' firm was read; it recited the action and referred to the pleadings as exhibits and clauses 5 and 6 were in full as follows:

Statement.

"That I verily believe that Amy I. Leonard, married woman, and J. H. Carlisle carrying on business with the defendant under the firm name and style of the Provincial Packing Company and the said Provincial Packing Company are necessary and material parties to this action in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in this action.

"That this application is made *bona fide* and not for the purpose of delay."

The defendant appealed and the appeal came on for argument at Vancouver on 14th November, 1901, before DRAKE, IRVING and MARTIN, JJ.

Argument. *Sir C. H. Tupper, K.C.*, for appellant: The affidavit is worth-

less as it does not shew the grounds of belief: see *In re Anthony Birrell Pearce & Co.* (1899), 68 L.J., Ch. 444; *In re J. L. Young Manufacturing Co.* (1900), 2 Ch. 753 and *Lumley* v. *Osborne* (1901), 1 K.B. 532.

Plaintiffs launched the action against defendant for fraud, but finding they could not succeed after discovery, added others as defendants. While there are large powers of amendment there are none so great as this where the form of action is completely changed. He cited *Raleigh* v. *Goschen* (1898), 1 Ch. 73; *Thompson* v. *London County Council* (1899), 1 Q.B. 840; *Quigley* v. *Waterloo Manufacturing Co.* (1901), 1 Ont. 606; *Frankenburg* v. *Great Horseless Carriage Co.* (1900), 1 Q.B. 504.

Argument.

*A. D. Taylor*, for respondents: We allege fraud against all the defendants. He cited *Bennetts & Co.* v. *McIlwraith & Co.* (1896), 2 Q.B. 464; *Leduc & Co.* v. *Ward* (1886), 54 L.T.N.S. 214; *Child* v. *Stenning* (1877), 5 Ch. D. 695; *Kent Coal Exploration Co.* v. *Martin* (1900), 16 T.L.R. 486 and *Howell* v. *West* (1879), W.N. 90.

*Sir C. H. Tupper*, replied.

20th November, 1901.

DRAKE, J.: This appeal is from an order in Chambers allowing the plaintiff to add other parties as defendants.

The plaintiffs' action alleges fraud against the defendant in entering into a contract with them on behalf of the Provincial Canning Company which was in a moribund state to the knowledge of the defendant. The plaintiffs allege that the other defendants proposed to be added were parties to the fraud. If the matter stood merely in this way, the amendment asked for could be made without any objection. As the matter was first presented to us, it appeared to me that the plaintiffs if they intended to charge the new defendants with fraud jointly with McMorran had not clearly indicated their intentions and the summons and order were open to this construction and at first view it appeared that the alternative claim, charging all the defendants with breach of contract was the only amendment intended to charge the new defendants.

Judgment of DRAKE, J.

*Sir C. H. Tupper's* argument and the cases he cited were directed to this view of the case, for it would in fact be joining

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two separate causes of action against different defendants—in other words a charge of fraud against McMorran and other defendants. Mr. *Taylor* disclaimed any such construction of the order he had obtained and stated that it was intended to charge all the parties with fraud and also for money due under contract. It further appears the Provincial Packing Company is merely the partnership name under which the defendants trade. If this is so, they should not be added as defendants unless the Provincial Packing Company is an Incorporated Company. It has no status and cannot commit a fraud, it is not a legal entity and can neither sue nor be sued. If on the other hand it is a Corporation, then the members thereof are not individually responsible for Corporate acts. I point this out in order to prevent a further application to Court on the matter.

Judgment of DRAKE, J.

*Sir Charles* also took exception to the affidavit as speaking from information and belief without giving the sources from which information and belief were derived. Affidavits must state the sources on which belief is founded, otherwise they will not be read, but here the pleadings, however, were before the Court and sufficiently indicated the facts on which the application was based.

I think the order appealed from should be varied by striking out the words "and the said Provincial Packing Company." Costs in the cause.

MARTIN, J.: I agree that the order giving the plaintiffs leave "to amend the statement of claim, as they may be advised" should merely be varied as suggested and not set aside. But though the respondent largely succeeds nevertheless he has, as one of my learned brothers said during the argument, "shifted his ground" and his position now is not precisely what it was in Chambers, the costs therefore will be in the cause. The amendment as originally proposed in the summons, did not, having regard to the statement of claim, bring the case within the scope of the *Kent Coal Exploration Co.* v. *Martin* (1900), 16 T.L.R. 486, which comes nearer to the plaintiffs' contention than any other authority cited.

Judgment of MARTIN, J.

In regard to the sufficiency of the affidavit, that question was

lately dealt with by this Court in *Tate et al* v. *Hennessey et al* (March 22nd, 1901, not yet reported*), but in order to avoid misconception I may say that in many cases at least it would in my opinion be a sufficient ground of belief for a solicitor to state that he was so instructed. But so far as the present case is concerned, that question does not really arise because the writ and statement of claim were properly referred to, and were sufficient to exercise a discretion upon without reference to the affidavit.

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* Since reported *ante* at p. 220.

## McKINNON v. THE PABST BREWING CO.

IRVING, J. 1900. Sept. 1. FULL COURT At Vancouver. 1901. July 8. McKINNON v. PABST

*Contract—Action for extras—Authority of agent—Setting aside findings of jury.*

The plaintiff, a Vancouver builder, contracted to erect a building in Vancouver for the defendants, a Milwaukee Company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. On the instructions of S., who intended to occupy the building for the purposes of a Bottling Company, of which he was a member, and bottle defendants' beer amongst other things, the plaintiff made alterations and additions, but no indorsement was made on the contract.

*Held*, by IRVING, J., dismissing plaintiff's action, and affirmed by the Full Court, that such indorsement was a condition precedent to plaintiff's right to recover.

APPEAL from the judgment of IRVING, J., dated 1st September, 1900, dismissing the plaintiff's action. The plaintiff is a contractor of Vancouver and the defendants are a Milwaukee Brewing Company. The plaintiff and defendants on 10th February, 1899, entered into an agreement whereby plaintiff agreed to erect a building for them in Vancouver, the contract price being $4,265.00. Paragraph 5 of the contract was in part as follows: Statement.

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"It is also mutually agreed that if the said parties of the first part (the defendants) shall at any time desire to make any changes or modifications in either the quantity or quality of the work the said second party (the plaintiff) shall accede to the same, and shall perform and execute the same without in any manner vitiating or abrogating this contract; but the value of all such changes must be agreed upon and indorsed on this contract before going into execution, and no extra will be allowed or entertained that does not comply strictly and literally with this article, any custom or understanding to the contrary notwithstanding. Should any dispute arise respecting the true value of the work added or omitted the same shall be referred to three arbitrators, etc."

And this clause was in the specification:

"In case of an addition the price therefor must be agreed upon and the price and agreement committed to writing before the alterations are commenced. Owner will not be responsible for any extra expense unless agreed beforehand as above."

A further contract (to be considered as part of the original contract) for an additional story to cost $1,450.00 was made. Both these contracts were completed and paid for. The Brewing Company erected the building for one Sauer who intended to occupy it for the purposes of the Vancouver Bottling Works of which he was a member, and bottle Pabst's beer amongst other things.

Statement.

Plaintiff sued for $369.05 for extras and defendants denied that the extras were ordered and pleaded that no indorsement had been made upon either of the agreements with reference to extras and that if any such agreement was made between the plaintiff and any person with respect to extras, they denied that such agreement was entered into on their behalf.

The action was tried at Vancouver on 2nd March, 1900, before IRVING, J., and a common jury, who found "that Sauer was the authorized agent for the extras for the Company, that he ordered the extras for the Company, and that the Company did hold out or permit Sauer to hold himself out as the Company's agent for the purpose of ordering extras."

On 20th June, 1900, the motion for judgment was argued and on 1st September, judgment was given as follows:

Judgment of IRVING, J.

IRVING, J.: At the close of the plaintiff's case, I was of the opinion that there was no evidence of Sauer's authority. I am still of that opinion. I think the plaintiff fails also on the other

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ground taken by Mr. *Wilson*, *viz.*, that as by the written contract it was agreed that the defendants should not be responsible for anything beyond the contract price unless previously agreed upon and the extras committed to writing, the plaintiff cannot recover for the extras now sued for. See *Russell* v. *The Viscount Sa Da Bandeira* (1862), 32 L.J., C.P. 68 at pp. 76 and 77 for reasons. Action will be dismissed with costs.

The plaintiff appealed and the appeal was argued at Vancouver on 5th March, 1901, before McCOLL, C.J., DRAKE and MARTIN, JJ.

*Macdonell*, for appellant: Sauer was around the works practically in charge for defendants who accepted the work—they stood by and let us do the work thus waiving the contract's provisions: see *Hill* v. *South Staffordshire Railway Co.* (1865), 11 Jur., N.S. 193.

Argument.

*Wilson*, *K.C.*, and *Bond*, for respondents.

The Court reserved decision as they desired to see the judgment of the Supreme Court of Canada in *Galbraith & Sons* v. *Hudson's Bay Co.* (7 B.C. 431, 515), a very similar case.

On 8th July, 1901, judgment was given dismissing the appeal, and the following judgments were handed down:

DRAKE, J.: This appeal is from the dismissal of the action. The action is brought to recover $369.65 for balance due on a contract for erection of a building for the defendant Company. The defendants relied on [setting out the paragraphs as in statement.]

The original contract was for $4,265.00 and a further contract was made for $1,450.00. Both these contracts have been completed and paid for, and the amount now sued for is for extras.

The defendants plead the contract. The case of *Russell* v. *The Viscount Sa Da Bandeira* (1862), 32 L.J., C.P. 68, is very analogous to the present. There the contract contained a clause that no charges should be demanded for extras, but any additions which might be made by order in writing of the defendants' agent should be paid for at a price to be previously agreed upon in writing. Various alterations and additions were made by direction of the defendants' agent, but no written order was given

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as required by the contract. It was then held that these extras could not be recovered under the terms of the contract; and in *Tharsis Sulphur and Copper Co.* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1,040, where the contract was that no alterations should be made without the written order from the employers' engineer, his certificate of payment included the extra weight of certain girders beyond the weight mentioned in the specifications, it was held that these certificates were not written orders, and the claim was excluded. In contracts such as that relied on in this action, it is very usual to insert clauses protecting the owner from any alterations or additions without certain formalities are complied with. This is no hardship on the contractor; he is not bound to comply with verbal instructions when his contract says they must be in writing, and the price agreed upon before the expense is incurred. Contractors frequently run the risk when they might have insisted on an order in writing and the price agreed upon. I feel bound to give effect to the terms of the contract which the parties have assented to, and I think the appeal should be dismissed with costs.

MARTIN, J.: I am of the opinion that this appeal should be dismissed with costs for the reasons given by the learned trial Judge.

*Appeal dismissed.*

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FULL COURT
At Vancouver.
1901.
Nov. 14.
McKELVEY
v.
LE ROI

## McKELVEY v. LE ROI MINING COMPANY, LIMITED.

*Full Court—Reference of motion for judgment to by trial Judge—Jurisdiction.*

The Full Court is an Appellate Court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge.

Statement.

ACTION for damages sustained by plaintiff while employed as a miner in the Le Roi mine at Rossland. The trial took place at Rossland on 18th and 19th February, 1901, before McCOLL, C.J., and a jury, who found the following verdict:

(1.) What was the immediate cause of injury? The approximate cause of the injury was occasioned by the non-continuance of the guide rails, which, in the opinion of the jury caused the safety clutches to fail in their action and, therefore, allowed the cage to fall.

(2.) If the plaintiff is entitled in law to succeed what amount of damage do you find? Three thousand dollars.

The Chief Justice did not see fit to enter any judgment on the findings of the jury, but left the parties to move the Full Court as they might be advised.

Both parties moved the Full Court for judgment and the motions were argued together at Vancouver on 5th and 6th November, 1901, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

*MacNeill, K.C.*, for plaintiff.

*Hamilton*, for defendant Company.

The arguments were confined to the question of the liability of the defendant Company.

On 14th November, the following judgments were delivered by

WALKEM, J.: The motion in this case first came before us at the sitting of the Full Court* in June last in Victoria. It was then adjourned to be heard in Vancouver. Before the adjournment, I remarked that it should not have been placed on the list of appeals, as it was not an appeal, but a motion for judgment, and, therefore, a motion that should have been disposed of at the trial. I also stated that this Court had already decided that such a motion could not be entertained; and, if I recollect aright, Mr. Justice IRVING took the same view, and said that the hearing of a similar motion in *Eves* v. *Genelle* (not reported†) had been previously refused by the Full Court, and the case sent back to the learned trial Judge for judgment. Counsel in the present case, consequently, knew that the question of jurisdiction would require attention; and although the question has not been discussed we have to consider it, and, for that matter, at once, for if we have no jurisdiction, any judgment that we might give on the merits would be a nullity.

Judgment of WALKEM, J.

* Bench: WALKEM, DRAKE and IRVING, JJ.
† March 16th, 1898; Bench: WALKEM, DRAKE and IRVING, JJ.

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Sitting as a Full Court, our jurisdiction is limited by section 72 of the Supreme Court Act "To the hearing of appeals" in cases that are specified; hence we have no authority to do what we are, virtually, asked to do, that is to say, to sit vicariously, as it were, for a Court of First Instance and deal with a matter that is exclusively within its jurisdiction.

In remitting the matter to this Court, the learned Chief Justice states that he did so on the authority of *Benschor* v. *Coley* (1883), 52 L.J., Q.B. 398. In that case, the defendant recovered a verdict, and the learned trial Judge, being in doubt as to whether there was evidence to support it, left him to move for judgment before a Divisional Court. On coming before the Divisional Court, it was held, in effect, that the course adopted was authorized by section 17 of 39 & 40 Vict., Cap. 59 (Imp.) There is no similar legislation here nor have we a Divisional Court, hence, the case cited is not in point. The present case must be referred back to the Court below, with liberty to both parties to take such steps as may be deemed advisable. There will be no order as to costs.

Judgment of WALKEM, J.

DRAKE, J.: This is a motion for judgment by the plaintiff on the findings of the jury for $3,000.00 damages, a cross-motion by the defendants that judgment be entered for them or for a new trial on the grounds that no evidence was adduced by the plaintiff of any breach of duty on the part of the defendants, that there was no finding of negligence on the part of the defendants, that the findings of the jury were against the weight of evidence and excessive damages.

Judgment of DRAKE, J.

The case comes before us in an unusual way, because on the findings of the jury, the learned Chief Justice refused to enter a judgment. The Full Court sits as an Appellate Court from final and interlocutory judgments. The only order in this case is that the Chief Justice, not thinking fit to enter any judgment on the findings, gives the parties leave to move before the Full Court as they may be advised.

I do not think that the learned Chief Justice considered the effect of section 72 of Cap. 56 of R.S.B.C. 1897, which gives the Full Court jurisdiction. Rule 439 says that if the Judge abstains from direct-

ing any judgment to be entered, the course is for the plaintiff to set down a motion for judgment, and if he does not within ten days after trial do so, the defendant may do so, and on any judgment given in pursuance of such motion for judgment, the other party may apply to set it aside. When these steps have been taken an appeal lies and not before, but neither party here has moved for judgment and there is no judgment on which an appeal can be taken. This point was not raised on the argument and we have heard the case in full, as I think without jurisdiction.

The learned Chief Justice referred to the case of *Benschor* v. *Coley* (1883), 52 L.J., Q.B. 398 as a direct authority for the course he adopted. That case was decided on the ground that a Divisional Court had jurisdiction to entertain a motion for a judgment, and the Imperial Act, 39 & 40 Vict., Cap. 59, Sec. 17, enacted that every action should as far as practicable be heard and decided before a single Judge with this proviso, that Divisional Courts might be held for the transaction of any business which might be ordered by the Rules of Court to be heard by a Divisional Court. The Court in the case referred to held that the Divisional Court had jurisdiction to entertain a motion for judgment, as it had been frequently so decided. We have no Divisional Court and the jurisdiction of the Appeal Court is limited as I have pointed out. Under the circumstances I am of opinion we have no jurisdiction to entertain this application, and any judgment we might render would be a nullity. Under the circumstances there should be no costs.



MARTIN, J.: It is with regret that I find myself unable to come to the same conclusion as my learned brothers.

So far as the question of jurisdiction is concerned, the point was not raised by counsel, who directed their argument solely to the merits, nor by the Court, and the appeal was heard on the merits solely. Under such circumstances I do not think the point should now be raised by the Court after judgment has been reserved and counsel have returned to Rossland, whereby we are prevented from having their assistance on such an important point. A decision so arrived at could hardly be regarded as a precedent, and we should consequently, in my

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opinion, deal with this case in the same manner in which we allowed it to proceed, *i.e.*, on its merits, and I have come to the conclusion that judgment should be entered in favour of the defendant Company with costs.

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I agree with the opinion expressed by the learned trial Judge that the cage of the hoist cannot be regarded as "falling material" within the sense of these words as used in sub-section (20.) of section 25 of the Inspection of Metalliferous Mines Act. And so far as the amendment of 1899, Sec. 12, is concerned, reading it in the light of and in relation to the matters dealt with by the various sub-sections under the headings "hoisting and landing men," "shafts" and "timbering" (which the opening words of section 25 instruct us are to be observed "so far as may be reasonably practical"), I am of the opinion that it does not bear the construction sought to be placed upon it by the plaintiff's counsel. The language is unfortunately indefinite in neglecting to state where the bulkhead is to be placed or the fifteen feet of solid ground retained, and I find myself unable to say that the precautions adopted by the defendant Company, in the shape of lateral screens are not a sufficient compliance with the Act. The fact that a leaving of a "pentice" of fifteen feet of solid ground in the shaft appears from the evidence before us, to be something so very contrary to the ordinary conduct of approved mining operations in this Province, throws some light on the intention of the Legislature and renders it improbable that such was what the Act required, and further, by leaving the pentice, the mine owner would be absolved from obligations, whereas he became an insurer of the sufficiency of the alternative protection—a bulkhead. It also, as pointed out by the learned trial Judge, seems inconceivable that the Legislature would seek to give protection to the men below the cage, and leave unprotected those who are in the cage itself. To establish the liability contended for the statute must be amended.

Judgment of MARTIN, J.

*Referred back, Martin, J., dissenting.*

## RAE v. GIFFORD.

MARTIN, J. (In Chambers.)

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*Election petition—Presentation of—Time—Computation of.*

An election petition under R.S.B.C. 1897. Cap. 67, Sec. 214, must be filed within twenty-one days of the exact time of the return.

SUMMONS in Chambers by petitioner (plaintiff) for an order disposing of the preliminary objections filed by respondent (defendant) to the petition filed against the return of the respondent as a member of the Legislative Assembly of British Columbia for New Westminster Electoral District. Many objections were included in the notice of objections, but the only one necessary for the purpose of this report was "The petition was not presented within twenty-one days after the return of the respondent was made to the Deputy Provincial Secretary."

Statement.

The summons was argued before MARTIN, J., on 9th December, 1901. The facts appear in the judgment.

*Martin, K.C.*, for petitioner.

*A. E. McPhillips, K.C.*, and *Duff, K.C.*, for respondent.

11th December, 1901.

MARTIN, J.: The question now to be determined is—Was the petition presented within twenty-one days after the return was made, as required by sub-section (2.) of section 214 of the Provincial Elections Act? It will be noted that the language is "after the return," not after the day on which the return was made, and it is contended on the one hand that the petitioner had the whole of the day on which the return was made and twenty-one days thereafter within which to make presentation, while on the other hand it is urged that under the circumstances, and according to the true meaning of the Act, fractions of the day must be considered, and that the time began to run against the petitioner immediately after the return was in fact made.

Judgment.

From the evidence I find that the return was made to the

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Deputy Provincial Secretary on Saturday, September 21st last, not later than 9.30 A.M., and the petition was presented to the Registrar of this Court about noon on Saturday, October 12th.

Section 27, sub-section (3.) of the "Provincial Elections Act Amendment Act, 1899," requires the presentation to be made at the office of the Registrar "during office hours."

Now the return having been made at half-past nine on September 21st, I am of the opinion that there is nothing in said section 214 to prevent a petition being presented at the earliest possible time thereafter, *i.e.*, when the Registry of this Court opened at ten o'clock that same morning: the only restriction in the statute is that the presentation must be after the return, not, as I have above pointed out, after the day on which the return was made.

Such being the case, what the petitioner has to establish is that in the computation of the twenty-one days, he is entitled to exclude the first day on which it was possible for him to have made the presentation.

Many cases have been decided on the computation of time, but it would not be profitable to discuss them because the point has been decided by the Court of Appeal *In re North: Ex parte Hasluck* (1895), 2 Q.B. 264, wherein the rule is laid down by Lord Esher as follows: "No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. . . . If they (the older decisions), or any of them, laid down any general rule as to the mode of computing time, that rule has been departed from in recent times, and no longer exists." And Lord Justice A. L. Smith states, at p. 272, "each case must depend on its own circumstances and subject-matter. . . . ." Lord Justice Rigby takes the same view and adds, p. 274, "In my opinion, although Sir William Grant did not put the proposition in so many words, his judgment leads us to the conclusion that the question of whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested."

Judgment.

Here, the "person primarily interested" is undoubtedly the member who has been returned and whose seat is attacked, and it was not disputed on the argument that the policy of the law has been to construe the Act in favour of such member where it can reasonably be done, and to hold the petitioner strictly to the statute—*Collins* v. *Ross* (1891), 7 Man. 581; 20 S.C.R. 1; *Duval* v. *Maxwell* (1901), 8 B.C. 65, affirmed by the Supreme Court but not yet reported. As was said by Mr. Justice Grove in *Williams* v. *Mayor of Tenby* (1879), 5 C.P.D. 135 at p. 137—"The meaning of the enactment is that the petition shall not be kept long hanging over the heads of persons elected . . . ." The present objection is consequently not one of that technical nature which I had to consider in *Stoddart* v. *Prentice* (1898), 7 B.C. 498, but one which goes to the root of the whole matter; *i.e.*, the time within which the statute permits the seat of a member to be attacked.

I have been referred by the petitioner's counsel to the article on "Time," Vol. XII., Encyclopædia of the Laws of England, but I do not think full effect has been there given to the judgment *In re North*, *supra*, and further, there is at least as good ground for holding this case to be an "exception" as for so holding any of the cases there cited. Take for example *The King* v. *Adderley* (1780), 2 Doug. 462, wherein Lord Mansfield said that in the case of *Bellasis* v. *Hester* (1697), 1 Raym. (Ld.) 280, "it is laid down by the majority of the Court that where the computation is to be made from an act done . . . . the day when such act was done is to be included." This case was followed in *Castle* v. *Burditt* (1790), 3 Term Rep. 623. It would appear from the brief note of the case of *Thomson* v. *Quirk* (1889), 18 S.C.R. 695, that fractions of a day were considered in deciding the question of the renewal of a chattel mortgage, even though it was decided before *In re North*.

Judgment.

If the Court can inquire at what period of the day a writ was issued—*Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63—it is open to it "where the circumstances and subject-matter" suggest it as a "rational mode of computation," to take account of fractions of a day, and I am of the opinion that it should be done in the present case. If I were to accept the petitioner's contention the

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fact would be that he would be given twenty-two, and not merely twenty-one, days to present his petition. But, to adopt Lord Justice Rigby's language *In re North*, "Why am I to be driven to say, contrary to the fact" that he waited only twenty-one days before presenting it?

From the authorities above cited the respondent is entitled to the benefit of any rational construction, and in my opinion the objection that the petition was presented too late must prevail, and it is hereby dismissed with costs."

*Petition dismissed.*

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## REX v. NICHOL.

*Costs—Criminal libel—Depositions not used at trial—Abortive trial—Cr. Code, Secs. 833 and 835.*

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In a criminal libel action, defendant in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken, for use at the trial. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial defendant was acquitted, but the evidence was not used owing to the private prosecutors giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

*Held*, by DRAKE, J., that as the commission evidence was not put in by defendant as part of his case defendant should be deprived of the costs of it.

*Held*, also, that defendant was not entitled to the costs of the abortive trials.

Statement.

MOTION by defendant for an order that all the costs reserved to be dealt with by the trial Judge by the order of MCCOLL, J. (now C.J.), dated 31st August, 1898, be taxed and paid to defendant. In 1897 the defendant was indicted for a criminal libel at the instance of John Herbert Turner (then Premier and Minister of Finance) and Charles Edward Pooley, K.C. (then

President of the Council.) On 31st August, 1898, defendant applied and obtained from McColl, J., an order allowing him to take the evidence on commission of certain witnesses in England, and by the order it was provided that the costs of the commission be reserved to be dealt with by the trial Judge. The indictment was tried three different times. The first trial was before McColl, C.J., and defendant put in the commission evidence which was in support of his plea of justification. The jury disagreed and were discharged. At the second trial the jury disagreed and were discharged. At the third trial the defendant was acquitted. At the second and third trials the commission evidence was not used, but many of the documents referred to in it and marked as exhibits were identified by the prosecutors in cross-examination and put in by counsel for defendant and marked as exhibits.

Statement.

The motion was argued before Drake, J., on 23rd November, 1901.

*Langley*, for the motion: The statutory enactment (Cr. Code, Sec. 833) covers both party and party and solicitor and client costs. The costs must have been incurred by reason of the indictment. At the first trial neither of the prosecutors gave evidence and their counsel objected to the commission being read, and we would have been helpless without it. At the other trials they knew we had it so gave evidence themselves and many of the documents referred to in the commission were identified by the prosecutors in cross-examination and put in evidence by counsel for defendant. It was necessary and proper at the time to get the evidence, and under the decision in *Bartlett* v. *Higgins* (1901), 2 K.B. 230 the defendant should get the costs of it. He cited also *Levetus* v. *Newton* (1883), 28 Sol. Jo. 166; Folkard, 869 (note) and *The Queen* v. *Steel* (1876), L.R. 1 Q.B. 482.

Argument.

*Cassidy, K.C., contra*: The practice is that the costs of evidence not used at a trial cannot be taxed against the losing party, and as the commission evidence was not put in by defendant at the last trial, the cost of it cannot be taxed. He cited *Ridley* v. *Sutton* (1863), 1 H. & C. 741; Gray on Costs, 375, 406; *Curling* v. *Robertson* (1844), 7 M. & G. 525; *Brown*

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v. *Clarke* (1843), 12 M. & W. 24; *Seely* v. *Powers* (1835), 3 Dowl. 372; *Waite* v. *Spurgin* (1836), 4 Dowl. 575, and *Dominion &c., Co.* v. *Stinson* (1881), 9 Pr. 177.

As to meaning of incurred he cited *Stumm* v. *Dixon* (1889), 58 L.J., Q.B. 186; *Jewell* v. *Parr* (1857), 2 C.B.N.S. at p. 811, and *Brydges* v. *Fisher* (1835), 1 Scott, 490.

At the conclusion of the argument His Lordship asked counsel if they wanted him to deal with the question of all the costs of the abortive trials as well as of the costs of the commission. Counsel for the prosecutors said he wanted the whole matter dealt with, but counsel for defendant said his motion asked for the costs of the commission only and he objected to anything else being dealt with.

His Lordship said he would deal with the whole matter notwithstanding the objection and reserved his judgment.

27th November, 1901.

DRAKE, J.: The questions argued on this summons were first, the question whether the evidence taken by commission on behalf of the defendant not being used could be taxed against the prosecutors.

Second. Whether the defendant was entitled to tax the costs of the abortive trials against the prosecutors.

Judgment.

The defendant was indicted for a criminal libel, and two trials took place in which the juries failed to arrive at a verdict, and were discharged. On the third trial there was a verdict for the defendant. In the first trial the evidence on the commission was read and used by the defendant. In the last and successful trial the defendant called no evidence, and therefore his counsel had the closing address to the jury.

The language of section 833 is that if judgment is given for the defendant he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment, and if no tariff of fees is provided with respect to criminal proceedings, the costs are to be taxed by the proper officer according to the lowest scale of fees allowed in such Court in a civil suit; but if such Court has no civil jurisdiction the fees shall be those allowed in a civil suit in a Superior Court according to the low-

est scale. The result of this section is that the costs will have to be taxed according to the tariff of the Supreme Court.

Under the practice cases evidence not used at a trial cannot be taxed against the losing party. See *Ridley* v. *Sutton* (1863), 1 H. & C. 741 and *Curling* v. *Robertson* (1844), 7 M. & G. 525. The fact that the evidence was used on the abortive trial is not the same thing as if used on the successful trial. The evidence used at the abortive trial cannot be treated as used at a subsequent trial without consent. If it was so, the parties might rely on the notes of evidence taken at the first trial and not call witnesses. This is sometimes done by consent, but I apprehend the Court would not have power to order this course to be adopted.

The other point as to the costs of abortive trials. The reports shew but few cases on this head. The case of *Seely* v. *Powers* (1835), 3 Dowl. 372, was followed by *Waite* v. *Spurgin* (1836), 4 Dowl. 575; and it is there laid down that if a Judge discharges a jury from giving a verdict on the ground of their not being able to agree, the successful party will not be entitled to costs of the first attempt at trial. The case *Pugh* v. *Kerr* (1840), 8 Dowl. 218, although not exactly in point, has a bearing on the views held by the Court on this question. In this case the case had been set down for trial and the venue changed at the defendant's request, and he was to pay the costs. This he neglected to do, and the plaintiff set down the case again and obtained a verdict. It was held he could not tax the costs of the abortive attempt to try as costs in the cause. Consequently he was not entitled to them. *Brown* v. *Clarke* (1843), 12 M. & W. 24, is a further authority following *Seely* v. *Powers*, *supra*, and Lord Abinger places it on the ground that an abortive trial such as this is is analogous to a *venire de novo*, and the party ultimately successful is entitled only to the costs of the trial on which he succeeds.

Judgment.

Under these authorities I am of opinion that if the costs are to be taxed according to the laws governing the taxation of costs in civil cases that the evidence taken on commission, and not used at the trial on which a verdict was obtained, could not be taxed against the unsuccessful party, neither could the costs of

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the abortive trials. Each trial would be considered as a *venire de novo*, and the question is, does the language used in section 833, "The costs incurred by him by reason of such indictment," taken in conjunction with section 835, authorize the taxation of any other or different costs than such as would be allowed in a civil case. Section 833 is similar to the language in the English Statute, 6 & 7 Vict., Cap. 96, Sec. 8, but that Act does not contain our section 835.

I think that section 835 indicates sufficiently that the costs to be allowed are all such costs as would be allowed in a civil case as far as applicable; and if the costs occasioned by an abortive trial, or by a commission not used, would be disallowed in a civil case, they ought equally to be disallowed in a libel case, and I so order accordingly.

Judgment.

*Order accordingly.*

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## MANLEY v. O'BRIEN: *IN RE* MACKINTOSH.

*Sale of land under Judgments Act—Equitable mortgagee—Notice—Right to dispose of timber—Estoppel by course of litigation.*

In 1891, O'Brien pre-empted Provincial Crown land, and in 1898, Manley obtained a judgment against him which provided that he might cut timber from off O'Brien's pre-emption and apply the proceeds in satisfaction of the judgment, and which restrained O'Brien for six months from cutting or selling timber. Manley registered his judgment in 1899. In January, 1900, O'Brien agreed to sell to Mackintosh the timber for $1,050.00 payable at various times, part of the consideration being the fees payable to the Crown for Crown grant and on these being advanced by Mackintosh the Crown grant was delivered to him as security for such advance.

Plaintiff moved for liberty to sell the land under his judgment and DRAKE, J., made an order for sale, and holding that Mackintosh, being an equitable mortgagee, was excluded by the statute.

*Held*, by the Full Court, reversing DRAKE, J., that the sale should be subject to Mackintosh's interest.

*Held*, also (*per* MARTIN, J.), that as the plaintiff at the trial induced the Court to grant him a judgment recognizing defendant's right to timber, he was estopped from afterwards contending that the defendant had no right to dispose of timber.

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APPEAL by defendant and C. H. Mackintosh from an order of DRAKE, J., whereby it was ordered that the plaintiff should be at liberty to sell lot 4,664, group one, Kootenay District, property of defendant under a judgment. The lot was pre-empted by defendant in 1891, and a Crown grant thereof was issued to him on 24th July, 1900.

On April 20th, 1898, plaintiff at the trial before IRVING, J., obtained against defendant judgment for $545.20 and costs, and in December, 1899, registered certificate thereof under the Land Registry Act and the Judgments Act, 1899. The judgment after directing the payment of the money proceeded thus:

"(2.) And it is further ordered that the plaintiff, his agents, servants and workmen, have the right as against the defendant and all persons claiming, through or under him, to enter upon the defendant's pre-emption, near the City of Rossland, B.C., and cut timber and remove the same thereoff for his own use, and to account to the defendant for the same at the rate of twenty-five cents per cord, to be applied on account of the money due the plaintiff hereunder for the debt and costs until the same shall have been paid in full, together with interest, when the right of the plaintiff to enter and cut wood as aforesaid shall determine.

Statement.

"(3.) And it is further ordered that the defendant be, and his servants, workmen and agents, are hereby restrained from cutting down any timber or other trees growing on the pre-emption of the defendant in the plaintiff's statement of claim mentioned, or from removing thereoff any timber already cut, or attempting to sell the same or any part thereof until the expiration of six months from the date hereof, or until the plaintiff has been paid debt, costs and interest, whichever event shall first happen."

A judgment obtained by Hunter Bros., against the defendant, was registered in the Land Registry Office on 4th October,

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1897. The remaining statement of facts is taken from the judgment of MARTIN, J., on appeal:

"On January 13th, 1900, the defendant entered into an agreement to sell to Mackintosh 'the timber and cordwood standing or cut' on the defendant's pre-emption for the sum of $1,050.00 payable at various times. But as I understand the effect of the clumsily-worded document, the sale was only to become operative 'in case the said party of the first part (defendant) obtains in a reasonable time, not exceeding four months, the patent to the said lot ———.' And it was further agreed that 'in case the party of the first part shall not, within the period hereinbefore mentioned, obtain a Crown grant to the said land, then and in such case, the party of the first part shall repay to the party of the second part all moneys advanced by him under this agreement.'

"Part of the consideration—the $1,050.00—was the payment by Mackintosh of the 'amount of the fees payable to the Crown and expenses incidental thereto,' and in pursuance of this clause, Mackintosh advanced to the defendant the amount necessary to pay the fees due to the surveyors and Government before the issue of the Crown grant.

Statement.

"On the 24th of July, 1900, a Crown grant to the above lands issued to the defendant, and shortly thereafter, in pursuance of the previous arrangement, it was delivered to Mackintosh, who retains it as security for the moneys he advanced to the defendant for the said fees."

Plaintiff moved (notifying defendant and Hunter Bros.) for liberty to sell under his judgment, and on the motion coming on before DRAKE, J., an order for sale was made, His Lordship delivering the following judgment:

7th November, 1900.

The evidence satisfies me that the offer of Mr. *Hamilton* to sell the judgment in question to Mr. Mackintosh was not accepted in terms. Mr. Mackintosh's recollection of the transaction is not very clear. The greatest length that he will go is the answer, "I agreed to buy." The terms of payment were apparently left open and Mr. Mackintosh says the impress-

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ion in his own mind was that the purchase depended on the issue of the Crown grant.

On the other hand, Mr. *Hamilton* on 13th February, wrote to Mr. Mackintosh recapitulating the result of the conversation and asking him to state clearly whether he would buy the judgment or not, and fixing 20th February as the date at which negotiations were to be considered off. To this letter no reply was given. Mr. *Hamilton*, in such circumstances, would be justified in concluding that the negotiations were at an end. However, on 25th June, Mr. *Hamilton* refers to his previous letter stating he could dispose of the judgment. To this he received no reply. If Mr. Mackintosh, as he now says, agreed to buy the judgment, he could have no hesitation in putting this agreement in writing. But he has refrained from doing so, and now claims a different agreement to that detailed in Mr. *Hamilton's* letter with regard to the purchase and payment of the money. Unless a Crown grant was issued to O'Brien, he was not to buy. The two statements of an unqualified agreement to purchase and a qualified agreement to purchase only if a Crown grant was issued are not reconcilable. I must, therefore, hold that there was no agreement binding Mr. *Hamilton* for the sale of the judgment. The grant has been issued to Mr. O'Brien and Mr. Mackintosh claims an equitable mortgage over the lands in priority to the plaintiff's registered judgment.

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The plaintiff's judgment was registered in December, 1899. By section 3 of the Judgments Act, 1899, a judgment registered shall form a lien and charge on all lands of the judgment debtor, in the several districts in the Land Registry Offices of which such certificate is registered, the same as though charged in writing by the judgment debtor. Mr. *Duff* contends that the meaning of this, is that a registered judgment can only affect lands which belonged to the judgment debtor at the time the judgment was registered. If he became possessed of lands subsequent to such registration, they are not affected by it, and the ground he puts it on is, that as a judgment debtor could not affect pre-empted land by a charge, any charge made by him cannot affect Crown granted lands which are based on a pre-emption, and that a fresh registration of judgment must be

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made. The Judgments Act does not repeal section 33 of the Land Registry Act, under which section the registration of a judgment binds all lands belonging to the judgment debtor, or to which he was at the time of registering the judgment, or at any time afterwards became, seized, possessed or entitled in possession, reversion, remainder or expectancy, or over which such person had at the time of registering, or at any time afterwards any disposing power, and shall be binding on the person against whom judgment shall be registered; and all other persons claiming under him after such judgment and registry. In reading these two sections together, I am of opinion that the defendant's lands, as soon as they became *in esse*, were bound by the judgment.

Mr. Mackintosh, owing to section 30 of the Land Registry Act, cannot register his alleged equitable mortgage, and under section 8 of the Judgments Act, the only person to whom notice of an application for sale of the debtor's land has to be given is some one in whom the legal estate to the land in question is vested, equitable interests not being recognized.

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I, therefore, order that so much of the land of O'Brien the judgment debtor, as will satisfy the plaintiff's claim, interest and costs, after providing for Hunter Bros.' judgment for $130.57 be sold by public auction, giving liberty to the judgment creditors to bid at such auction. Costs of and consequent on this application to be taxed and added to the plaintiff's judgment.

The defendant and Mackintosh appealed on the grounds (1.) that Mackintosh was entitled under the agreement to the timber standing on the property, and the order should have been made subject to the rights of Mackintosh, and (2.) that Mackintosh was an equitable mortgagee of the said property by virtue of the deposit with him of the Crown grant, and any order for sale should have been made subject to his rights.

The appeal came on for argument at Vancouver on 7th March, 1901, before MCCOLL, C.J., WALKEM and MARTIN, JJ.

Argument.

*Duff, K.C.*, for the appeal, read from the evidence and contended that there was an agreement between plaintiff and Mack-

intosh for the purchase of the judgment. Mackintosh should have had notice of the motion as under section 8 of the Judgments Act equitable interests as well as legal must be recognized. The effect of the agreement of 13th January, is that Mackintosh became entitled to an interest in the Crown grant when it issued and Manley's judgment is subject to that: see *Hjorth* v. *Smith* (1896), 5 B. C. 369. The plaintiff at the trial before IRVING, J., induced the Court to allow plaintiff to go on and cut timber and to restrain defendant from doing so, thus shewing that the Court was satisfied that pre-emptor had rights over timber and plaintiff cannot now question defendant's right to deal with timber: see *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at p. 81.

*L. G. McPhillips, K.C.*, for respondent, read from the evidence to shew that there was no agreement between plaintiff and Mackintosh for the purchase of the judgment. Our judgment was registered in December, 1899, and under section 33 of Cap. 111, R.S.B.C. 1897, we are entitled to certain priorities which are preserved by section 4 of Cap. 15 of the Statutes of 1900, and the priority takes effect from the date of the registering of the judgment. The agreement of 13th January, 1900, because of section 63 of Cap. 66, C.S.B.C. 1888, only takes effect after the issue of the Crown grant in August, 1900, and our registered judgment cuts in on the land. The judgment clearly gives a charge on after acquired lands: see *Harris* v. *Rankin* (1887), 4 Man. 115. O'Brien pre-empted in 1891, and by section 28 of the present Land Act, R.S.B.C. 1897, Cap. 113, his title was completed under the old Land Act (C.S.B.C. 1888, Cap. 66), Secs. 63, 73, 77 and 78 of which shew that the agreement to sell the timber could not be enforced.

Argument.

As to the contention that the decision of IRVING, J., in the prior case of *Manley* v. *O'Brien* is *res judicata*, it cannot be considered so, as there was no argument, and the decree was made by consent. *Gandy* v. *Gandy* cannot apply, as the parties were the same in both actions, but here is a different action with different parties.

If the learned Judge's decision in this case is right, it turned upon the question of an admission by a party to a deed, of the meaning which he intended it should have, and the question was

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one of a party agreeing to a certain meaning of a deed, and then denying or repudiating the contract. This is a very different thing from a judicial construction of a statute, and a party cannot be bound in one action by the argument of his counsel in another, whether the Court, in the first action, gave way to his argument or not.

*Duff*, in reply: If land is taken up as agricultural land it must be cleared of timber, so the pre-emptor must cut it. Lands pre-empted are not Crown lands and the pre-emptor is not a mere licensee: see *Boulton* v. *Jeffrey* (1845), 1 E. & A. 111.

On 5th July, 1901, the Court delivered judgment, MCCOLL, C.J., stating in effect that the appeal ought to be allowed and the matter referred back to DRAKE, J., to have the various interests in the land defined; and the following written judgment was delivered by

MARTIN, J.: During the argument we informed the respondent's counsel that we were satisfied no definite agreement had been come to for the purchase of the judgment.

Then as to the other branches of the case. [The learned Judge here stated the facts as above and proceeded:]

It is contended for the appellants, the defendant and Mackintosh, that (1.) Mackintosh should have had notice of the motion under section 8 of the Judgments Act, to sell the land; and (2.) the order for sale should be varied so that such sale should be declared to be subject to Mackintosh's interest.

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The learned Judge appealed from took the view that under said section 8, only legal estates, and not equitable interests, were recognized, and that the owners of the latter were not entitled to notice of the proceeding to sell the land under the judgment.

While it is true that the section contains no express reference to equitable interests, still that is a very different thing from saying that they should not be recognized, and, as was stated during the argument, we are all agreed that equitable interests are not excluded by the statute.

But it is urged by the respondent that the agreement is invalid and cannot be enforced, that the defendant could not sell

the timber, nor Mackintosh buy it, because by section 63 of the Land Act, Cap. 66, C.S.B.C. 1888, "it shall be unlawful for any person, without a licence in that behalf, to be granted as hereinafter mentioned, to cut, fell, or carry away any trees or timber upon or from any of the Crown or patented lands of this Province."

In reply to this argument it was submitted that assuming the defendant had not the right to dispose of the timber, either by virtue of section 63 of the Land Act, Cap. 113, R.S.B.C. 1897, as "a farmer cutting timber in connection with his farm," or otherwise, nevertheless the plaintiff cannot now raise the question of the defendant's right to deal with the timber on his pre-emption because of certain provisions contained in his judgment against the defendant, which judgment, after directing the payment of $545.20, proceeds thus: [Setting out clauses 2 and 3 as above.]

The defendant, as well as Mackintosh, is a party to this appeal, and his rights in the land are being determined even though the determination may take the form of what, it is contended, is only a settling of priorities. While it is true that in determining the defendant's rights we also determine Mackintosh's, nevertheless that does not entitle the plaintiff to take a different stand to-day in regard to the defendant's rights from that which he took when he succeeded in inducing the Court to grant him a sweeping, and, if I may say so, novel judgment appropriating this very timber to his own use. I am unable to perceive how the situation differs in principle from that in *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at p. 82, wherein Lord Justice Bowen spoke very strongly as follows:

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"The husband having got the benefit of our decision on the appeal from the Divorce Court, on the ground that he was acknowledging his continued liability to pay for the maintenance of the two youngest children, now turns round and declines to contribute to their maintenance and education. I am not quite sure (and I reserve the point for further consideration) that the decision of the Court on that appeal did not involve a judicial construction of the covenant which, whether it was right or wrong, would be binding upon the parties. I am not certain

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that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject-matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the Court allowed that."

In my opinion it would be unseemly if the plaintiff were, at this stage, allowed to dispute the right of the defendant to deal with the timber.

Since much was said about the prohibition contained in section 26 of the Land Act, it may not be out of place to add that, in my opinion, a fair statement of the result of *Hjorth* v. *Smith* (1897), 5 B.C. 369, is that an agreement entered into to convey after Crown grant is not illegal, because such an agreement contemplates the recognition of the statute. Such a view does not conflict with *Turner and Jones* v. *Curran* (1891), 2 B.C. 51, and see *Meek* v. *Parsons* (1900), 31 Ont. 535, where Chief Justice Armour says, "I see no reason why the present agreement, although entered into before the patent had issued, but not to be carried out by the vendors until after the patent should have issued, should not be enforceable, and should not be enforced by this Court."

Judgment of MARTIN, J.

Holding these views, it is unnecessary to consider the other questions raised. The order should be varied by providing that the sale should be subject to Mackintosh's interest, and if a further consideration, or definition, of that interest is necessary the matter should be referred back for that purpose to the learned Judge who made the order.

The appellants are entitled to the costs of this appeal.

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Note:—The minutes of the Full Court order provided that the appeal be allowed with costs; that the order of DRAKE, J., be varied by providing that the sale by it directed should be subject to Mackintosh's interest in the land; and that, in the event of any difference between the parties as to the interest of Mackintosh, it be referred back to DRAKE, J., for a definition of such interest.

## KING v. THE MUNICIPALITY OF MATSQUI.

McColl, C.J.

1901.

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*Homestead—Taxes—Municipality.*

Where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a Municipality although the holder personally is.

STATED case argued at New Westminster, before McColl, C. J. In 1892, the application of George Clement King, the plaintiff's husband to purchase 160 acres of Crown lands in the Dominion Railway Belt in New Westminster District in the limits of the defendant Municipality was accepted and the sum of $200.00 was paid down and the receipt usually given by the agent of Dominion lands upon a sale being made was issued. At the time of the application to purchase which was at $5.00 per acre the regulations did not permit the lands within the said Belt to be applied for and entered upon as homesteads, but in 1896, the regulations were amended so as to permit that being done, so the plaintiff's husband with the consent of the Dominion Government had his application to purchase changed to a homestead entry which under homestead regulations was $1.00 per acre. Previous to such homestead entry plaintiff's husband had resided on the land and this period of residence was allowed as part of the homestead residence and on his completing the balance of the required period of residence and complying with the regulations, in October, 1897, a Crown grant was issued to the plaintiff at the instance and request of her husband and herself. The lands were assessed in the years 1893, 1894, 1895 and 1896 for taxes in the name of George Clement King, and the taxes not being paid they were offered for sale and sold, the defendant Municipality purchasing. The plaintiff commenced an action and obtained an injunction restraining the Municipality from selling or otherwise disposing of the land so sold or purchased. The question for the opinion of the Court was whether the defendant was entitled to assess the said lands for taxes during the years 1893, 1894, 1895 and 1896, or any of them under the above facts.

Statement.

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*Howay*, for plaintiff, opened and stated that the point involved was as to the right of a Municipality to assess and sell for taxes land agreed to be sold by the Crown, but of which the fee still remained in the Crown at the time taxes were assessed, and cited R.S.B.C. 1897, Cap. 144, Sec. 168, Sub-Sec. (4*a*.), "Where any property mentioned in the preceding clause is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable."

The Chief Justice called upon

*Dockrill*, for the defendant: Section 168 made liable to taxation all land within the Municipality. The land here does not fall within sub-section (4*a*.) because it was neither unoccupied nor occupied in an official capacity, and it was therefore subject to taxation. Sub-section (4*a*.) was unnecessary and only inserted *ex abundante cautela* and referred to properties leased by the Dominion Government. He cited *Church* v. *Fenton* (1878), 28 U.C.C.P. 384; (1879), 4 A.R. 159; (1880), 5 S.C.R. 239; *Street* v. *The Corporation of the County of Kent* (1861), 11 U.C.C.P. 255; *The Rural Municipality of Cornwallis* v. *The Canadian Pacific Railway Company* (1891), 19 S.C.R. 702; *In re Municipality of South Norfolk* v. *Warren* (1892), 12 C.L.T. 512; *Victoria Lumber Company* v. *The Queen* (1893), 3 B.C. 16; *The Queen* v. *The Victoria Lumber and Manufacturing Company* (1897), 5 B.C. 288; *The Canadian Pacific Railway Company* v. *Burnett* (1889), 5 Man. 398 and *Totten* v. *Truax et al* (1888), 16 Ont. 490.

Argument.

*Howay*, in reply, pointed out that the Municipal Clauses Act gave no power to tax the interest that the plaintiff had in the land and referred to sections 4 and 100 of Cap. 179, R.S.B.C. 1897. He cited *Street* v. *The Corporation of the County of Kent, supra*; *Street* v. *The Corporation of Simcoe* (1862), 12 U.C.C.P. 288; *Austin* v. *The Corporation of the County of Simcoe* (1862), 22 U.C.Q.B. 76; *Church* v. *Fenton, supra*; *Stevenson* v. *Traynor* (1886), 12 Ont. 807; *Quirt* v. *The Queen* (1891), 19 S.C.R. 510, *per* Strong, J., at p. 518; *The Rural Municipality of Cornwallis* v. *The Canadian Pacific Railway Company, supra*; *Colquhoun* v. *Driscoll* (1894), 10 Man. 254 and *Ruddell* v. *Georgeson* (1893), 9 Man. 407.

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His Lordship after consideration gave the following judgment: In my judgment section 168, sub-section (4*a*.) of Cap. 144, R. S.B.C. 1897, applies and means that the interest of the person assessed in the lands in question is not liable to taxation by the Municipality though he personally is. There will be judgment therefore in terms of the case stated.

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B. C. BOARD OF TRADE v. TUPPER & PETERS

## B. C. BOARD OF TRADE BUILDING ASSOCIATION, LIMITED LIABILITY v. TUPPER AND PETERS.

*County Court—Equitable jurisdiction—Action for rent—Void lease.*

It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease if valid would exceed $2,500.00 the County Court has no jurisdiction.

ACTION in the County Court for $75.00 being one month's rent alleged by the plaintiffs to be due them from defendants. Statement.

The trial took place 26th November, 1901, before DRAKE, J.

*Luxton*, for plaintiffs.

*Duff, K.C.*, for defendants.

29th November, 1901.

DRAKE, J.: The plaintiffs by writing dated July 13th, 1898, offered to let certain rooms in the Board of Trade Buildings to the defendants for five years at a rental of $75.00 a month. The defendants accepted and took possession, and remained in occupation until the 5th of August, 1901, when they gave a month's notice to quit, alleging as a ground the unsanitary condition of the premises, and the plaintiffs sued for one month's rent, due from 31st August to 30th September, 1901. Judgment.

The defendants raised several defences: First, that the letters do not consitute such an agreement as would be enforceable under the Statute of Frauds, the period of commencement of the

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lease not being stated. I think that difficulty is got over by the fact that the defendants have been three years in occupation, and have fixed the commencement of the term by their own act.

The next objection is that the amount is beyond the jurisdiction of the County Court, inasmuch as the value of the property is more than the amount over which the County Court has jurisdiction.

This lease is for more than three years, and therefore must be by deed under seal under Statute, 8 & 9 Vict., Cap. 106, Sec. 3, and is therefore void at common law, but it may operate as an agreement for a lease in equity. It has been held that a tenant entering under a void lease under the decisions prior to *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, became a tenant from year to year upon the terms of the writing so far as they are applicable to a yearly tenancy and not inconsistent therewith. Here the terms of letting were for five years, and Jessel, M.R., in *Walsh* v. *Lonsdale*, *supra*, stated the principle as follows: A tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year. He holds under the agreement and every branch of the Court must now give him the same rights. This must mean that every branch of the High Court, or other Court, having equitable jurisdiction over the amount in question. This case has been twice approved of, Field, J., *In re Maughan* (1885), 14 Q.B.D. 956; and by Chitty, J., in *Allhusen* v. *Brooking* (1884), 26 Ch. D. 565; and by Mowat, V.C., in *Simmons* v. *Campbell* (1870), 17 Gr. 612, accepting this principle.

Judgment.

Mr. *Duff* relies on *Foster* v. *Reeves* (1892), 2 Q.B. 255, as excluding the jurisdiction of the County Court. In that case the lease was void at common law as not being by deed, the same as in this case; but it was said that equity would decree specific performance, and if so the lease would be treated in equity as granted. But here, as in England, a County Court has only jurisdiction when the value of the lease is $2,500.00, and as this lease is of greater value whether it is considered that the total rent for five years is the value or if the yearly rent was capital-

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ized on a basis of six per cent., the legal rate of interest. Fry, L.J., pointed out that rent under a void lease was an equitable debt, because it could not be recovered in equity provided that the agreement under which it was claimed was one that would be enforced by a Court of Equity. Independently of this he said there was no right to sue for it, and as the County Court Judge had no right to grant specific performance, the value being beyond his competence, he therefore could not entertain the action.

I am bound by this case, and therefore sitting as County Court Judge I have no jurisdiction. The right to enforce payment of rent under a void lease belongs exclusively to the equitable jurisdiction of the Court, and is limited by the value of the lease. The plaint must be dismissed.

Judgment.

## LEROY v. SMITH *ET AL.*

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*Contract—Term of, whether condition precedent or not—Mechanic's lien.*

Plaintiff agreed with Smith to do tunnelling in mineral claims in which Smith and McLeod were interested, and the agreement was contained in correspondence part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work." McLeod did not give a certificate.

In an action by plaintiff to enforce a mechanic's lien it was held by BOLE, Co. J., and affirmed by the Full Court (IRVING, J., dissenting), that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover.

APPEAL from the judgment of BOLE, Co. J. dated 20th January, 1900, dismissing the plaintiff's action to enfore a mechanic's lien. The following statement of facts is taken from the judgment (dissenting) of IRVING, J., on appeal:

Statement.

"This action is brought to enforce a mechanic's lien filed by the plaintiff against a group of three mineral claims in respect of

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which three claims the Gold Commissioner had issued certificates of work in consideration of the necessary work having been done on one of them. The defendants, Hendry, McCusker, Mahoney and Falls who were the owners of the claims gave the defendant McLeod an option to purchase the claims under the terms of which they agreed to convey to McLeod upon payment to them of $15,000.00 within twelve months—McLeod to be at liberty to take possession at once and mine and the proceeds of all ore shipped to be placed to the credit of the vendors. The defendant McLeod was to expend at least $2,000.00 during the term of the option and do the assessment work.

"In some way or other the defendant Smith became associated with McLeod in the option and on the 26th of September, 1898, a contract was entered into between Smith and the plaintiff. It is as follows:

"'Vancouver, B. C., Sept. 26th, 1898.

"'J. T. Smith, Esq.,

"'Vancouver, B. C.

"'I hereby agree to run a tunnel four feet and six feet high three hundred feet on your property mining claims on Seymour Creek for the sum of $9.00 per foot. At the termination of each one hundred feet, I to receive 80 per cent. of the estimate. The balance you to hold back for security. That I fulfil the contract, if in the event I do not complete the work, I agree further to accept $1.00 per foot for the work I do. I further agree to work in different places on the claims. If you want to change the location of the tunnel, I further agree to work two shifts of two men each shift until the work is completed.

'George Leroy.'

Statement.

"'Witness, T. A. McLeod.

"'I hereby accept the above agreement, J. T. Smith.'

"Subsequently a change was made. The altered contract is set out in the letter of 12th of November, 1898:

"'Juneau, Alaska, November 12th, 1898.

"'Geo. Leroy, Esq.,

"'Vancouver, B. C.

"'Dear Sir,—

"'Yours of Oct. 27th, received to-day. I have been absent

from here a week. I am surprised at the men. They all see and knew what your contract was before commenced working. As to the merchants you said you were good to them—and had enough supplies brought to run you for 90 days. My contract reads—That at the end of each 100 feet I am to pay you 80 per cent. of the work done. I will say now that I am willing to pay you at the end of each 80 feet. All you need to do is to have McLeod to certify that you have done the work. At the end of each 80 feet then I will pay, if I am not there put it in the Bank—a draft for 80 per cent. of $11.00 per foot with McLeod's certificate that you have done the work. I cannot leave here until next week, then will only stop off at Vancouver for one day. I have everything arranged to pay the money for the contract. I think some one there is trying to do me harm by making such reports. You need not be afraid. I will surely be on hand no matter what anyone reports.

"'Respectfully yours, J. T. Smith.

"'Do not listen to any idle gossip, as I am sure now that I know who is reporting this, and it is for gain.'

"The plaintiff filed an affidavit in support of his claim, paragraphs 3 and 7 of which were:

"'(3.) That the particulars of the work done for which I claim a lien are for running a tunnel in rock on the.....mineral claim on Seymour Creek in the Westminster Mining Division of British Columbia, being one of the group of claims on which the said work was to apply and be recorded.

Statement.

"'Particulars:

"'To tunnel 80 feet in length by 6 feet high and 4 feet wide at $9.00 per foot.....$720.00.

"'(7.) That the description of the property to be charged is as follows: Those certain mineral claims situate on Seymour Creek, in the New Westminster Mining Division of British Columbia, and known as the Seymour, located the.....day of..... and recorded at New Westminster the 3rd day of September, 1896, the Star located the.....day of.....and recorded at New Westminster the 29th day of September, 1896, and the Silverdale located the.....day of.....and recorded at New Westminster on the 7th day of October, 1896.'"

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The following is the judgment of

BOLE, Co. J.: This suit is brought to declare valid and enforce a mechanic's lien for $724.00 for making 80 feet of tunnel in one of a group of three mineral claims owned by the defendants and situate at Seymour Creek. The owner gave one McLeod, hereafter referred to, an option of purchasing same, but this option does not appear to have been acted upon, and it is unnecessary to further refer to it.

A written contract was entered into on 26th September, 1898, between Smith, one of the defendants, and plaintiff, whereby plaintiff agreed to make 300 feet of tunnel work at $9.00 a foot on said claims; payment to the extent of 80 per cent. to be made on completion of every 100 feet of tunnel. Subsequently it is admitted that an entirely new contract with respect to this identical work was made on 12th November, 1898, between Smith and plaintiff, the terms whereof are all set out in a letter of that date from Smith to Leroy. It was agreed that plaintiff should make 300 feet of tunnel as contemplated in the first and rescinded agreement, payment, however, to be made on completion of each 80 feet of tunnel to the extent of 80 per cent. of the price of the work done upon plaintiff obtaining the (written) certificate of McLeod (before referred to.) No objection appears to have been raised against Mr. McLeod, acting as judge of the nature and value of the work, though I gather from the evidence, that plaintiff was aware of McLeod's having an option with respect to the purchase of the claims.

Judgment of BOLE, CO. J.

Plaintiff alleges he completed 80 feet of the tunnelling and requested Mr. McLeod to certify so that he could take that certificate to the Bank and obtain payment thereon, pursuant to the agreement of 12th November, 1898. McLeod did not give Leroy any certificate, but put him off, saying he wished to see Smith and as a matter of fact admittedly never did give any certificate of completion of the work or any part thereof. The right to recover payment for the work done under the contract was to my mind made dependent upon plaintiff first obtaining a certificate from McLeod. There is no suggestion that McLeod did not act fairly between the parties or manifested any undue leaning, bias

or partiality, or acted corruptly, or wrongfully or fraudulently withheld the requisite certificate, and consequently in my opinion, plaintiff, when he filed the alleged lien, had no claim against defendants capable of enforcement, there being no money then due by defendants to plaintiff under the contract sued on within the meaning of section 5 of the Mechanics' Lien Act, which enacts: "Such lien shall be limited in amount to the sum actually owing to the person entitled to the lien." As I have, from the evidence come to the conclusion that the obtaining of McLeod's certificate that 80 feet of tunnel work was done according to contract was a condition precedent to the plaintiff's right to recover on foot of the contract, and as that condition has not been complied with and no improper conduct on McLeod's part or collusion with the defendants has been shewn or suggested, having in view the principles laid down in *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Bank of China, Japan, and the Straits* v. *American Trading Company* (1894), A.C. 266; *Munro* v. *Butt* (1858), 8 El. & Bl. 738, approved in *Sumpter* v. *Hedges* (1898), 1 Q.B. 673; *Ashmore & Son* v. *Cox & Co.* (1898), 68 L.J., Q.B. 72 and *The Northern Pacific Express Company* v. *Martin* (1896), 26 S.C.R. 135, and specially the judgment of His Lordship the Chief Justice at page 141, I think I must find in favour of the defendants; but taking all the circumstances of the case into consideration, each party will bear his own costs. Judgment will be entered accordingly.

Judgment of BOLE, CO. J.

The plaintiff appealed and the appeal was argued at Vancouver on 28th May, 1900, before MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ.

*A. D. Taylor*, for appellant.
*Davis, Q.C.*, for respondents.

On 5th March, 1901, the Court delivered judgment dismissing the appeal, the Court holding that the obtaining of the certificate was a condition precedent to plaintiff's right of action and the following judgments were delivered:

IRVING, J. [after setting out the facts as above, proceeded:] The learned County Court Judge came to the conclusion that the obtaining a certificate from McLeod was a condition precedent

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and that as such certificate had not been obtained the action must be dismissed.

Whether the certificate was a condition precedent or not depends upon the construction to be placed upon the letter of 12th November, 1898. Mr. *Taylor* contended that as McLeod was not a dispute preventer but a mere checker performing ministerial functions, the certificate was not a condition precedent. That there is a distinction of this sort is recognized—see *Morgan* v. *Birnie* (1833), 9 Bing. 672—must be admitted, but the line of distinction is exceedingly fine and in this case one would have very great difficulty in saying upon which side of that line this case should be placed. Happily, in the view I take of the matter, I am not compelled to decide that point.

It seems to me that a person entering into a contract such as this, if he wishes to insert a condition, must express himself with clearness and precision; and he cannot expect the Courts to construe an equivocal expression into a condition precedent. In his letter of 12th November, the defendant says: "Yes, I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work." That seems to me to fall short of what is required as a statement that the certificate is a condition precedent. It might be read either as intimation that McLeod will be my agent in this matter for this purpose, or as one of several—but not the only—ways of having the amount payable determined. Many good reasons were advanced in favour of this being a condition precedent; but, on the whole, I think the rule of construction I have mentioned should govern and I am of opinion that this certificate was not a condition precedent.

Judgment of IRVING, J.

Then as to the form of the affidavit filed: That a lien can be secured only by compliance with the statute and that failure on the part of the claimant to observe the requirements prescribed for securing the benefits of the Act are established as two of the principles governing in cases of this nature. *Haggerty* v. *Grant* (1892), 2 B.C. 175, and *Smith* v. *McIntosh* (1893), 3 B.C. 26, are cases carrying out these principles.

The Act requires that the claimant shall file an affidavit stating in substance (*b.*) The particulars of the kind of work done;

(*e.*) The description of the property to be charged: the lien then attaches to the lands and premises occupied (by the improvement) or enjoyed therewith (which by no means is confined to the particular piece on which the work was done.) The point on which my decision turns is contained in these last few words. The function of paragraph (*e.*) is to describe the property which is sought to be charged; whether the whole of the property described is in fact subject to the lien is a question to be determined by the Court.

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By the affidavit filed the plaintiff claims a lien on three claims, describing them. The paragraph in which the blank occurs is paragraph (*b.*); its function is to describe "the particulars of the kind of work done." I do not see anything in the words "the particulars of the kind of work done" requiring a statement of *where* the work was done. The particulars of the kind of work done are set out, and, although it may be convenient and proper to mention the particular place where the work was done, we should not set aside a lien because the claimant omits so to do. Unless there is a failure to comply with the requirements of the statute, the lien should be supported.

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There is a discrepancy between sub-section (*b.*) of section 8 and the schedule "A" (2.); one requires particulars of the *kind* of work done, the other particulars of the work done. But, I think the claim as filed is sufficient to satisfy the statute.

In my opinion, section 7 covers this case and the appeal should be allowed with costs.

MARTIN, J.: In this matter I have come to the conclusion that no good ground has been shewn for disturbing the judgment arrived at by the learned County Court Judge. The plaintiff, with full knowledge that McLeod had an interest in the mineral claims against which the lien is sought to be enforced, subsequently entered into a contract with Smith, which, it is admitted, is contained in Smith's letter to plaintiff of November 12th, 1898; and the condition of the contract was that the plaintiff was to receive payment when McLeod certified for the work. McLeod has not certified for the work, and no legal excuse is put forward to account for the absence of the certificate. The only explana-

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BOLE, CO. J.

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tion the plaintiff can give is that he asked McLeod to go with him to measure the work and that McLeod said he would wait till Smith came back. No fraud, collusion, or improper conduct of any kind is alleged, and no case of procurement or prevention on the part of Smith is sought to be made out. The only cases relied upon by the plaintiff's counsel are *Smith* v. *Gordon* (1880), 30 U.C.C.P. 553; *Lewis* v. *Hoare* (1881), 44 L.T.N.S. 66 and *Petrie* v. *Hunter et al* (1882), 2 Ont. 233. I have examined these cases, and they not only do not support the appellant's contention, but are really in favour of the respondent. The case of *McRae* v. *Marshall* (1891), 19 S.C.R. 10, cited by the respondent as to the duty of Courts to enforce contracts which are plain and clear, even if oppressive, points out the only course open to us in this case. Under the circumstances, the plaintiff cannot recover in the absence of a certificate.

Judgment of MARTIN, J.

The principles generally applicable to this case have lately been elaborately considered by me in the case of *Walkley et al* v. *The City of Victoria* (December 8th, 1900*), so it is unnecessary to add anything further now; and I simply refer to my judgment in that case.

It follows that the judgment below should be affirmed, and this appeal dismissed with costs.

*Appeal dismissed.*

* Reported in 7 B.C. 481.

## ROBERTSON *ET AL* v. BOSSUYT.

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ROBERTSON v. BOSSUYT

*Yukon law—Solicitor and client—Lump charge for professional services—Whether champertous.*

Plaintiffs, Advocates in the Yukon, sued defendant for a lump sum for professional services in obtaining a judgment for the defendants against one H., it being alleged by the plaintiffs that they were to charge $600.00 if the amount was collected and by the defendant that they were to get 10 per cent. if collected by them.

*Held*, in appeal, reversing CRAIG, J., and dismissing the action, *per* DRAKE, J., that by Yukon law an Advocate cannot legally obtain a lump sum for professional services except under r. 524* of the North-West Territories Judicature Ordinance of 1893.

*Per* MARTIN, J., that the plaintiffs failed to prove any agreement.

APPEAL by defendant from the judgment of CRAIG, J., in the Territorial Court of the Yukon Territory to the Full Court of the Supreme Court of British Columbia. The plaintiffs, Robertson and de Journel, a Dawson firm of Advocates, by the statement of claim alleged that defendant was indebted to them "in the sum of $669.15, being the amount of their account duly signed and delivered on the 22nd day of January, A.D. 1900, and which amount was settled and agreed and accepted by the defendant, but which amount the defendant refused to pay;" and the particulars stated the claim as follows:

Statement.

"To fee as agreed upon in action Charles Bossuyt and E. B. Hill.....$600 00

" taxed costs in above action..... 44 15

" fee in action between Hilliard and Bossuyt and making settlement in said action... 25 00

$669 15"

The defendant admitted owing the $25.00, being the third item in the particulars, and as to the balance denied the account

* "524. In all cases and proceedings as also upon interlocutory applications where a party becomes entitled to costs from any other party the same shall be taxed by the clerk in accordance with the authorized tariffs unless the Court or Judge by order directs the payment of a sum in gross in lieu of taxed costs and by and to whom such sum in gross shall be paid."—Section 456 of 1888, Cap. 58 and Con. Ord. N.-W. T. 1898, Cap. 21, Sec. 523 are identical.

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stated and alleged that before action he satisfied the plaintiffs' claim by payment.

At the trial the plaintiffs' case was to the effect that they had made a verbal agreement with defendant to collect from one Hill a bill amounting to something over $6,000.00, the terms of their employment being that they were to get $100.00 cash and $600.00 when the bill was collected, either by them or by the defendant. The plaintiffs got $100.00 cash, sued and obtained judgment for $6,368.27 debt and $44.15 costs. The plaintiffs put in as part of their case a satisfaction and release of judgment (in action of *Bossuyt* v. *Hill*) signed by defendant in which he stated that Hill had paid him the amount of the judgment and costs and requested plaintiffs as his advocates to enter it, and in pursuance of the request the document was filed in the Court at Dawson. The defendant swore that the plaintiffs' proposal to him was "it will cost you $100.00 cash for a judgment and if we collect judgment we will charge you 10 per cent. for the whole amount," and to that proposal he answered, "go ahead and get the judgment." Defendant's counsel then asked defendant, "Have you received any money out of that judgment?" but defendant's answer was incomplete, he only saying, "I have received money," when plaintiffs' counsel objected to any evidence as to whether defendant got the money and the objection was apparently sustained as that line of questioning was abandoned.

Statement.

Judgment was given as follows by

CRAIG, J.: Judgment for the plaintiff in this case for $600.00. I consider that the absence of a plea of no bill signed should have been raised upon the pleadings. *Scarth* v. *Rutland* (1866), L.R. 1 C.P. 642, is very clear on that point, and I also think that there being a Solicitors' Act in force in this Province, the English Act does not apply here. Therefore, judgment as prayed for.

Judgment of CRAIG, J.

The defendant appealed to the Full Court of the Supreme Court of British Columbia and the appeal was argued at Victoria on 19th and 21st January, 1901, before DRAKE, IRVING and MARTIN, JJ.

*Peters, Q.C.*, for appellant: An agreement for a lump sum is void unless authorized by statute and the statute requires that

Argument.

such an agreement be in writing. The claim is framed on an account stated so we only pleaded as to that. He referred to the following statutes and cases: 61 Vict., Cap. 6, Sec. 9; R.S. Canada, 1886, Cap. 50, Sec. 11, which brought in the law as it existed in England on 15th July, 1870; The Solicitors' Act of 1870 (assented to on 14th July, 1870), Cap. 28, Sec. 4, which allows an agreement in writing for a lump sum; N.-W. T. Ordinance, 1895, Legal Professions Act; *Lemere* v. *Elliott* (1861), 30 L.J., Ex. 350; *Kerr* v. *Burns* (1860), 9 N.B. 604; *Berry* v. *Andruss* (1835), 3 U.C.Q.B. (O.S.) 645; *Ridout* v. *Brown* (1835), 4 U.C.Q.B. (O.S.) 74. In any event an agreement for a lump sum is void on ground of protection of clients: see *Philby* v. *Hazle* (1860), 29 L.J., C.P. 370; *Pince* v. *Beattie* (1863), 32 L.J., Ch. 734; *Re McBrady and O'Connor* (1899), 19 Pr. 37 and 44 and Cordery on Solicitors, 260.

*Harold Robertson*, for respondent: Prior to 1870, a solicitor in England could contract for a lump sum; Poley, 248; Cordery, 261; *Scarth* v. *Rutland* (1866), L.R. 1 C.P. 642, in effect overruling *Philby* v. *Hazle*, cited by counsel for appellant. The intention of Dominion Parliament was to create a new district and give control to its Legislature, and from the time the Legislature dealt with a subject it became exclusively within their purview. He referred to N.-W. T. Ordinance 1895, No. 9, which by Sec. 35 repealed Ordinance No. 19 of 1890, and contended the effect was that except under the Ordinance of 1895, there is no law as to solicitors: see Hardcastle, 214-5 and 342; *In re Russell, Son, & Scott* (1885), 30 Ch. D. 114; *Bell* v. *Cochrane* (1897), 5 B.C. 211; *In re Whitcombe* (1844), 8 Beav. 140.

Argument.

[The Court: We would like to hear you on the question of champerty.]

He contended the elements of champerty were lacking and cited *Fischer* v. *Naicker* (1860), 8 W.R. 655; *Scott* v. *Harm* (1872), 109 Mass. 237; *In re Attorneys and Solicitors Act, 187* (1875), 1 Ch. D. 573; *O'Connor* v. *Gemmill* (1899), 26 A.R. 27; Pollock on Contracts, 320. The laws respecting champerty have been held inapplicable to India and in a country like the Yukon they would also be inapplicable: see *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186.

*Peters*, was not heard in reply.

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On 23rd March the Court delivered judgment allowing the appeal with costs, and the following judgments were handed down by

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DRAKE, J.: The plaintiffs are solicitors and advocates practising in the Yukon Territory, and sue the defendant for money due on an account stated. To this the defendant pleaded denying any account stated, and payment into Court of part of the sum claimed, and except as to the sum paid in, payment before action brought.

The evidence did not support the plaintiffs' claim, and instead of an account stated the plaintiffs relied on a verbal agreement by the defendant to pay them $700.00 as a lump sum for undertaking to obtain judgment for the defendant against a man named Hill, of which sum they received $100.00 for the purpose of obtaining the judgment, and, according to the plaintiffs' statement were to receive $600.00 after the money was collected, whether they collected it, or the defendant.

This agreement the defendant denies, and says he paid the plaintiffs $100.00 to obtain the judgment, and never agreed to pay any further sum, and says that the plaintiffs' proposal to him was $100.00 cash for a judgment, and 10 per cent. on the whole amount of the judgment if collected by the plaintiffs. To this proposal the defendant says he made no reply, but told them to get the judgment.

Judgment of DRAKE, J.

If any agreement had been come to as to a per centage fee on the collection of the judgment, this would be void as against the policy of the law relating to contracts between solicitors and their clients for solicitors to share in the result of the litigation. See *Stanley* v. *Jones* (1831), 7 Bing. 369; *Earle* v. *Hopwood* (1861), 30 L.J., C.P. 217; *Pince* v. *Beattie* (1863), 32 L.J., Ch. 734. The agreement would be in the nature of champerty, and void at common law. If the agreement was for a lump sum for work to be done as a solicitor it would be void prior to the English Solicitors' Act, 1870, Cap. 28, passed on the 14th of July, 1870. By that Act, section 4, an agreement in writing for a lump sum, or by commission or per centage may be made subject to the proviso that the amount payable under the agreement

shall not be received until the agreement has been examined by the taxing officer of the Court; and if it shall appear that the agreement is unfair or unreasonable the taxing officer may take the opinion of the Judge, who shall have power to reduce or cancel the same, and order the solicitor's costs to be taxed as if no agreement had been made.

That being the English law on the subject, the question is whether it is applicable to the Yukon Territory. By the Yukon Territory Act, 1898, Cap. 6, Sec. 9, the civil and criminal law of the North-West Territories, as they then existed, shall be in force in the Yukon Territory so far as applicable. By the North-West Territories Act, Cap. 50 of the Revised Statutes of Canada, 1886, Sec. 11, the laws of England relating to civil and criminal matters, as they existed on 15th July, 1870, were made applicable to the Territories until varied, altered or repealed. In 1888, the Judicature Ordinance of the North-West Territories was passed, and by section 456, costs in all proceedings were to be taxed in accordance with the authorized tariff, unless the Court or Judge by order directed payment of a sum in gross in lieu of taxed costs; and by section 479 when no other provision is made the procedure and practice existing in England on 1st January, 1885, is held to be incorporated as part of the Ordinance. In 1893, another Ordinance was passed to come into force on the 1st of January, 1894, entitled the Judicature Ordinance, and this was consolidated by Ordinance of 1898; and it re-enacted the above section 456, and incorporated the procedure and practice of the Supreme Court of Judicature in England as it existed at the time of the coming into force of the said Ordinance.

Judgment of DRAKE, J.

Such being the existing Ordinances when the Yukon Territory Act came into operation, the legal practitioners are bound by this Act, and the tariff of costs existing in the North-West Territories in the year 1898. This tariff of costs was passed prior to 1898, but of the exact date I have no information.

The learned Judge in his judgment for the plaintiffs held that as the defendant had not pleaded no bill signed the plaintiffs were entitled to judgment under *Scarth* v. *Rutland* (1866), L.R. 1 C.P. 642. All that case decided was that under the English Solicitors' Act a solicitor might agree with his client for a lump

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sum, and which might be liable to taxation. The action here was not on a solicitor's bill, but on an account stated, and therefore the defence of non-delivery of a signed bill would be inappropriate. If such a defence had been put in the defendant would have been entitled to an order to tax. The result is that under the Judicature Ordinance, 1894, the plaintiffs were entitled to costs in accordance with the authorized tariff, and not to a lump sum in lieu thereof without an order of the Court or a Judge.

Judgment of DRAKE, J.

The Legal Professions Ordinance of 1895, provides for recovery of costs by advocates, and the effect of section 18 *et seq.*, is that a bill of costs must be signed and rendered a month before action brought; and under special circumstances the Court or Judge can refer for taxation even after the verdict, or lapse of twelve months. No application has been made under this Ordinance, and in my opinion the plaintiffs are not entitled to charge a lump sum for professional work except under r. 524 above mentioned.

MARTIN, J.: This case comes before us in a very unsatisfactory way. The plaintiffs sued on an account stated, which is a distinct cause of action, and the onus was on them to prove three things, first, that the account was in writing, second, that it was final, *i. e.*, that it must shew what balance was due, and third, that it was accepted as correct: Odgers on Pleading (1900), 217; Bullen & Leake (1897), 85-7. The plaintiffs delivered particulars shewing how the account was made up; but on the trial, abandoning in effect the cause of action as laid on the account stated, proceeded to prove their case on an agreement, and gave evidence as to the terms thereof. But when the defendant sought to give evidence shewing that the contract relied on had not been performed, plaintiffs' counsel objected to the evidence, and it was excluded. Upon what ground the exclusion took place I cannot conceive, because the evidence was not only relevant, but important.

Judgment of MARTIN, J.

The learned trial Judge primarily disposed of the matter on a question of pleading. But in my opinion the evidence is not sufficient to support the plaintiffs' case, and they cannot succeed

on it, quite apart from the further objection raised to the agreement as being champertous. Judgment should be entered for the defendant, and the appeal allowed with costs.

*Appeal allowed.*

CRAIG, J.

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## HARRIS v. HARRIS *ET AL* (TWO SUITS.)

## CREGAN *ET AL* GARNISHEES AND ROGERS *ET AL* CLAIMANTS.

FULL COURT At Vancouver.

1901.

March 8.

HARRIS *v.* HARRIS

*Debtor and creditor—Garnishee order—Claimant—Judge by consent trying issue summarily—Appeal.*

*County Court—Garnishee proceedings—Practice.*

Where the interested parties in garnishee proceedings agree that a County Judge may decide the matter in a summary way, he is in effect an arbitrator and no appeal lies from his decision.

*Eade* v. *Winser & Son* (1878), 47 L.J., C.P. 584, followed.

*Per* DRAKE, J., on appeal: (1.) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action and a garnishee is entitled to question the validity of the proceedings at the hearing.

(2.) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object.

(3.) The plaintiff may specify in one affidavit several debts proposed to be garnished.

APPEALS from the judgments of FORIN, Co. J., dated 16th March, 1900.

The plaintiff W. J. Harris on 29th November, 1899, commenced an action in the County Court and made and filed an affidavit, not stating what his cause of action was, but merely stating the fact that he had commenced an action and that certain persons, without any description, were indebted to the defendants in the sums set opposite to their respective names. Statement.

The plaintiff Caroline Harris on 29th November, 1899, com-

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menced an action in the County Court and W. J. Harris made an affidavit stating that he was plaintiff's husband and as such had knowledge of the matters in question in the action, and that certain persons, without any description, were indebted to the defendants in the sums set opposite to their respective names. Claude Cregan was amongst those named as so indebted and on 29th November, a garnishee summons was issued against Cregan. The claim against the defendants was for $1,055.00 and the garnishee summons was returnable 25th January, 1900.

Statement.

F. R. Stewart & Co., P. Burns & Co. and Rogers *et al* (the Parsons Produce Co.), were judgment creditors (in Supreme Court actions) of Daniel Harris *et al*, and garnishee orders were issued at the instance of the two last named creditors against, amongst others, Claude Cregan, Lawe, Good and Saunders, who were amongst the garnishees in the County Court action. These garnishee orders were also returnable on 25th January. Good, Saunders and Lawe paid into Court under the County Court garnishee and Cregan paid the amount of his indebtedness to his solicitor to abide the order of the Court, and his counsel (who was also his solicitor) so stated at the hearing.

The whole matter came on before FORIN, Co. J., in the County Court at Rossland and after consideration His Honour on 16th March, 1900, delivered judgment as follows:

Judgment of FORIN, CO. J.

That part of the Statute, section 102, Cap. 52, R.S.B.C. 1897, which requires verification of the debt is for the Registrar to deal with. These cases as they come before me are regular, the summons has been issued and the actions are down for trial. The Registrar must have been satisfied that the affidavit filed on behalf of the plaintiff before he issued the garnishee summons was sufficient. The affidavit is not now, I am of opinion before me, a motion to set aside the summons and plaint would have been the proper procedure. I will not set aside the whole proceedings at this stage on the application of the other creditors, but will give judgment in favour of the plaintiffs against the defendants and against the garnishees, but on the understanding that the plaintiffs will in case of disputes as to amounts owing by garnishees refer the matter to the Registrar. This is done owing to

the complicated condition of the accounts and the unsatisfactory practice in the County Court concerning an action where a garnishee is made a party. Judgment for plaintiff as above. No payment out for fourteen days to allow appeal if taken.

Cregan, Lawe, Good and the claimants appealed on the grounds that the affidavits filed by the plaintiffs on which the summonses were issued attaching the debts in the hands of the said garnishees are insufficient in law and do not comply with sections 102 and 103 of the County Courts Act; that the plaintiffs filed only one affidavit on which all the attachment summonses were issued, whereas they should have filed separate affidavits for each debt sought to be attached, and that there is no jurisdiction in the Registrar to attach by summons more than one debt or debts owing from more than one person.

The appeals came on for argument at Vancouver on 20th November, 1900, before McColl, C.J., Drake, Irving and Martin, JJ.

On the hearing of the appeals affidavits were read shewing what took place in the Court below and from them it appeared that on 25th January, 1900, all the matters came before Judge Forin, and in the ordinary course of business the Supreme Court matters were first called, whereupon counsel (Mr. *J. A. Macdonald*) for the plaintiffs in the County Court actions said the same debts had been attached in the County Court actions at the instance of his clients, and it was then and there agreed by the several counsel that the question as to who was entitled to the moneys in question should be determined when the said County Court cases were called for hearing; that the County Court cases were called the next day when counsel (Mr. *Hodge* this day) for the plaintiffs contended that counsel for the claimants had no status, whereupon Judge Forin stated that Mr. *Macdonald* had intervened in the Supreme Court matters and they had in consequence been enlarged till the County Court matters should be called for hearing, and held that counsel for claimants had a right to appear on the argument, and he then proceeded to treat the matter as an issue between the several claimants and to hear it in a summary way.

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*L. G. McPhillips, Q.C.*, for the appeal: The County Court garnishee summons was a nullity. The affidavit on which the garnishee summons was issued did not verify the debt as required by section 102 of the County Courts Act, and as the provision is imperative, the summons is an absolute nullity and our subsequent orders in the Supreme Court should be made absolute: see article in (1900), 20 C.L.T. 232, "Canons of Statutory Construction;" *French* v. *Martin* (1892), 8 Man. 362, 364: *McArthur* v. *Glass* (1889), 6 Man. 224; *McKay* v. *Nanton* (1891), 7 Man. 250; *Nagengast* v. *Miller* (1885), 3 Man. 241; *Martin* v. *Morden* (1894), 9 Man. 565 and *Adams* v. *Hockin* (1900), 33 C.L.J. 701.

*Davis, Q.C.*, for respondents: The issuing of a garnishee summons on insufficient material is an irregularity to be moved against and if not it stands. He referred to *Macdonald* v. *Crombie* (1883), 2 Ont. 246; (1885), 11 S.C.R. 112; *Marshall* v. *May* (1899), 12 Man. 381; *Ontario Bank* v. *Haggart* (1888), 5 Man. 204; *Dempster* v. *Elliott* (1892), 12 C.L.T. 278; *Holmes* v. *Russel* (1841), 9 Dowl. 487; *Herr* v. *Douglass* (1867), 4 Pr. 102; *Emeris* v. *Woodward* (1889), 43 Ch. D. 185; *Fry* v. *Moore* (1889), 23 Q.B.D. 395; *Jackson* v. *Gardiner* (1900), 19 Pr. 137; *Appleby* v. *Turner* (1900), 19 Pr. 145.

[The Chief Justice referred to *Spiers* v. *The Queen* (1896), 4 B.C. 388 and MARTIN, J., referred to *Hoffman* v. *Crerar* (1899), 18 Pr. 473.]

Argument.

Lawe and Good by paying in waived their right to dispute validity of summons.

*McPhillips*, in reply, referred to section 115 of the Act and American & English Encyclopædia of Law, Vol. 14, p. 852. Cregan cannot be said to have waived anything as he paid the money to his solicitor, which simply amounts to a retention of the money in his own hands. He referred to *Victoria Mutual Fire Insurance Co.* v. *Bethune* (1876), 23 Gr. 568; (1877), 1 A. R. 398; *Shand* v. *Du Buisson* (1874), L.R. 18 Eq. 283; *Parker* v. *McIlwain* (1895), 16 Pr. 555; (1896), 17 Pr. 84; *Roberts* v. *Death* (1881), 8 Q.B.D. 319 at p. 322 and *Dresser* v. *Johns* (1859), 8 C.B. 429.

*Davis:* The Judge as appears from paragraph 2 of Mr. *Abbott's* affidavit acted in the character of an arbitrator and there is no

appeal: see *Eade* v. *Winser & Son* (1878), 47 L.J., C.P. 584.

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*McPhillips:* There were two Courts and all that paragraph 2 of the affidavit shews is that the parties agreed to decide the matter in the County Court instead of the Supreme Court. Before the right to an appeal can be cut out the intention to do so must be plainly apparent. The Judge expressly gave the time to allow appeal: see section 167 of the Act.

*Cur. adv. vult.*

On 8th March, 1901, judgment was delivered dismissing the appeal, the Court holding that no appeal lay. Judgments were delivered as follows by

DRAKE, J.: The plaintiff in the first action commenced an action in the County Court and by his affidavit he did not state what his cause of action was, but merely stated the fact that he had commenced an action and that certain persons without any description were indebted to the defendants in certain specified sums of money.

In the second action he filed a similar affidavit only further alleging that he was the husband of the plaintiff and had knowledge of the matters in question in the action.

On the 29th of November, 1899, a summons under section 102 of the County Courts Act, was issued against Claude Cregan, alleging the claim to be $1,055.00, and returnable on 25th January.

Judgment of DRAKE, J.

This summons was taken out under clauses 102 *et seq.*, of the County Courts Act and whether or not Cregan was liable to pay over to the plaintiff the amount of his debt due to the defendant depends on the fact as to whether the plaintiff recovered judgment against the defendants. The effect of these clauses is to place a stop order on the debt alleged to be due until the judgment was obtained, and Cregan could dispute the debt due by him to the defendants or he could pay the money he admitted to be due into Court.

The affidavits on which these summonses were issued did not comply with the Act inasmuch as they do not state what the cause of action was; it might have been for damages or for some-

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thing which would not authorize the issuing of an attaching order.

On the 9th of December, 1899, Rogers and others obtained in the Supreme Court as judgment creditors of the same defendants a garnishee order against, amongst others, Claude Cregan, which order was returnable on 25th January.

On the hearing, according to the affidavit of Mr. Abbott, it was agreed by all the counsel that the question as to who was entitled to the moneys garnished should be determined by the Judge sitting in the County Court.

G. H. Good, I. D. Saunders and F. C. Lawe, three of the persons attached by the plaintiff Harris as well as by the Supreme Court order, paid the money into Court under the attaching order of the County Court. At the hearing the objection was raised that the attaching summons was irregular and no sufficient affidavit filed on which to initiate the proceedings, and it was also contended that a separate affidavit ought to be filed against each garnishee.

This last objection can be disposed of at once. It has been the practice of the Court to allow one affidavit to be filed specifying several debts proposed to be attached.

Judgment of DRAKE, J.

The learned County Court Judge held that the validity of the affidavit was not before him as the Registrar was the person to issue the attaching summons and he must be presumed to have been satisfied. I think he has gone astray here: as soon as the validity of the affidavit was attacked it was his duty to decide whether or not the summons had been properly issued. The Registrar is the officer of the County Court and issues all proceedings and they are examinable by the Judge and can only be dealt with by him; and, in my opinion the affidavit was insufficient as not verifying the debt which the plaintiff claimed against the defendant, but this question becomes of less importance in view of the ultimate action which was taken by consent.

The further questions raised here are first, whether or not the garnishees, other than Cregan, who have paid money into Court have waived their right to dispute the affidavit. Secondly, whether the plaintiffs in the Supreme Court action are entitled to intervene and raise the question which the garnishees were

entitled to raise before the County Court but which they waived. In my opinion the payment into Court on being served with the attaching summons is a waiver of all preliminary irregularities, as it was not a payment made under an order of the Court. The affidavit on which the order was made was decidedly irregular but not a nullity. Under r. 47 an application for leave to serve a writ out of the jurisdiction must be supported by affidavit shewing certain facts. It was held that the absence of such an affidavit was an irregularity only in *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62.

I am of opinion further that as regards the garnishee proceedings both in the Supreme Court and County Court the applicants there are barred, because it was agreed that the question should be decided by the County Court Judge in a summary way: the effect of which was the Judge sat as an arbitrator and there is no appeal. See *Eade* v. *Winser & Son* (1878), 47 L.J., C.P. 584, where it is pointed out that the Judge has power to direct an issue or determine the matter summarily. The parties by consenting to the latter course took the decision of the Judge as that of an arbitrator and his decision was final.

Judgment of DRAKE, J.

The proper course was an issue where all points both of law and fact could be dealt with and section 113 of the County Courts Act is to the same effect as the rule which was discussed in *Eade* v. *Winser & Son*, *supra*. The appeal should be dismissed with costs.

MARTIN, J.: In my opinion the facts set out in the affidavit of Abbott *et al*, of November 16th, 1900, bring this case within the principle laid down by *Eade* v. *Winser & Son* (1878), 47 L.J., C.P. 584, and, consequently, no appeal lies from the order made herein by the learned County Court Judge.

Judgment of MARTIN, J.

*Appeal dismissed.*

MARTIN, J.

1899.

April 27.

FULL COURT At Vancouver.

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ADAMS AND BURNS v. BANK OF MONTREAL, THE KOOTENAY BREWING, MALTING AND DISTILLING COMPANY, LIMITED LIABILITY, AND JOHN R. MYERS.

*Debtor and creditor—Preference—Collusion—Pressure—R.S.B.C. 1897, Caps. 86 and 87—Bank Act, Sec. 80.*

*Company—Mortgage by directors of—Ratification by shareholders—The Companies Act, 1890, and amendments of 1892 and 1894.*

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Where there is good consideration a mortgage comprising the whole of a debtor's property, will not be set aside notwithstanding that the mortgagor is in insolvent circumstances to the knowledge of the mortgagee and that the effect of the mortgage is to defeat, delay and prejudice the creditors, if there is pressure.

A mortgage made by the directors of a company prior to the consent of its shareholders without which consent there was no power to borrow may be ratified by the shareholders.

ACTION to set aside (1.) a mortgage of real and personal property dated the 23rd day of September, A.D. 1897, given by the Kootenay Brewing, Malting and Distilling Company, Limited Liability, to the Bank of Montreal; (2.) an assignment of book-debts by the Company to the Bank, dated October 2nd, 1897, and (3.) a judgment recovered by the Bank against the Company on December 1st, 1897, for $31,908.01.

The plaintiffs contended (1.) that the alleged mortgage was voluntary, fraudulent and void under the statute of Elizabeth; (2.) that it was also void as a fraudulent preference; (3.) that it was also void as not having been executed in accordance with the provisions of the Companies Act, 1890, under which the defendant Company was incorporated; (4.) that the assignment of book-debts was void for the same reasons, and also for having been carried out in contravention of the Bank Act; (5.) that the said judgment was voluntary, fraudulent and void under the statute of Elizabeth, and (6.) that the moneys received by the Bank of Montreal from the sale of the said assets and from realization of the said book-debts, are exigible under the plaintiffs'

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executions, and that the said Bank should be ordered to pay the same.

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At the trial relief was not asked against defendant Myers, who had purchased the assets of the defendant Company from the Bank and had re-sold them, or the greater part thereof, before he was made a party to the action and the action was dismissed as against him. The facts appear fully in the judgment of the trial Judge.

The trial took place at Rossland in February, 1899, before MARTIN, J.

*Galt*, for plaintiffs.
*Hamilton*, for defendants, the Bank of Montreal.
*Nelson*, for defendant Company.
*Cronyn*, for defendant Myers.

17th April, 1899.

MARTIN, J.: In this action the plaintiffs, on a variety of grounds, seek to set aside (1.) a mortgage of real and personal property dated the 23rd day of September, A.D. 1897, given by the Kootenay Brewing, Malting & Distilling Co., Ltd. Lty., to the Bank of Montreal, (2.) an assignment of book-debts by the Company to the Bank, dated October 2nd, 1897, and (3.) a judgment recovered by the Bank against the Company on December 1st, 1897, for $31,908.01.

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On October 28th, 1897, the plaintiffs obtained judgment against the Company for the sum of $5,634.98, and issued execution therefor, and subsequently obtained other judgments and executions against the Company, the amount thereof at the date of the writ being $13,909.14. On or about December 22nd, 1897, the Bank took possession of the real and personal property and effects of the Company comprised in the mortgage and on February 15th, 1897, sold them by public auction to the defendant Myers for $25,000.00 and a month later assigned the book-debts to him also. At the time the directors of the Company authorized the giving of the mortgage to the Bank the Company's indebtedness to the Bank was about $40,000.00.

The plaintiffs allege that the Bank's judgment against the

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Company was obtained by collusion, and so should be set aside as fraudulent and void. I deal with this point shortly by saying that the slight evidence offered does not at all establish this allegation.

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In the transaction attacked, the Bank charged the Company interest at the rate of 10 per cent. per annum, and it is contended that the mortgage and assignment are void on this account under section 80 of the Bank Act. But this section does not declare the note or other security void as was the case under the old Province of Canada Act, C.S.C. (1859), Cap. 58, Secs. 4 and 9, and the Bank Act of 1867, 31 Vict., Cap. 11, abolished all penalties and forfeitures for usury—McLaren on Banks, 164-6. A consideration of the case of *La Banque de St. Hyacinthe* v. *Sarrazin* (1892), 2 Quebec S.C. 96, where the defendants were sued as endorsers, shews that a demand for payment of over 7 per cent. can be successfully resisted; but from a careful perusal of the judgment I can find nothing to support the view that the transaction is void.

But the assignment of book-debts is also attacked under the last paragraph of section 64 of the Bank Act, which prohibits a Bank from lending money upon "the security of any goods, wares and merchandise." Applying the case of *Humble* v. *Mitchell* (1839), 11 A. & E. 205 to the words, "goods, wares and merchandise," I am of the opinion that they do not include choses in action: if the words were "goods and chattels" it might be different. It is alternatively argued that nevertheless the Bank had no power given it to loan on choses in action. That may be, but what has occurred here is that the Bank advanced a further sum of $4,000.00 to the Company on the strength of the assignment of the book-debts, and it has only been able to recoup itself out of that security to the extent of $800.00. Assuming that the assignment will not stand, the case of *Rolland* v. *La Caisse d'Economie Notre Dame de Quebec* (1895), 24 S.C.R. 405 (distinguishing *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603) shews that the Court will not allow the borrower to take the money and refuse to do equity: the Company here could not obtain a direction that the Bank should hand it over the amount collected from the book-debts so long as it was still in the Bank's debt on

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that transaction, and if the Company could not, its creditor cannot.

While on this question of book-debts I would further point out that the plaintiff has no status for it has been held in this Court in *Hudson's Bay Company* v. *Hazlett* (1896), 4 B.C. 450, that book-debts are not exigible under writs of execution in the sheriff's hands, and the late case of *Cummings* v. *Taylor* (1898), 28 S.C.R. 337, shews that the proper proceeding under such circumstances is by garnishee process.

Now, as to the mortgage alone. I find that at the time it was given the Company was in insolvent circumstances to the knowledge of the Bank.

So far as any argument directed to the effect of the statute of Elizabeth is concerned, I feel I can profitably add nothing to the judgment of the Supreme Court of Canada in *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523, and the plaintiff cannot succeed on that branch of the case.

But it is further contended that the mortgage is void as being contrary to the Fraudulent Preference of Creditors Act, R.S.B.C. 1897, Cap. 87, Sec. 3. In answer to that the Bank sets up "pressure," and submits that the evidence brings the case within *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88, and *Stephens* v. *McArthur* (1891), 19 S.C.R. 446, which cases, as was said by the present Chief Justice of Canada in *Gibbons* v. *McDonald* (1892), 20 S.C.R. at 589, settle and conclude the law on this subject. See also *Beattie* v. *Wenger* (1897), 24 A.R. 72 at pp. 76 and 81. I should point out that the head-note in *Gibbons* v. *McDonald* goes too far in inferring that *Stephens* v. *McArthur* requires a want of notice of insolvency in order to uphold the mortgage. Applying these cases to the present I am of the opinion that there was ample pressure here to rebut the presumption of a preference, and consequently the question of notice of the insolvency becomes immaterial. *Stephens* v. *McArthur*, pp. 451, 446: "When there is pressure on the part of a creditor seeking payment or security for a debt honestly due there can be no fraudulent preference," *Ib.* 452. These expressions are applicable to the present case. I cannot accede to the suggestion that the pressure here was a "sham" pressure, as in *Davies* v. *Gillard* (1891), 21 Ont.

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431, for the circumstances here do not warrant my taking such a view. Counsel for the plaintiffs on the authority of this last named case argues that the doctrine of pressure does not apply where the debtor has transferred the whole of his property, or as the expression there is "strips himself of everything in favour of one creditor." A perusal of *Davies* v. *Gillard* shews that it is an extreme case, and differs materially from the one under consideration. The mortgage here was authorized to be given at a board meeting on 13th September, and that the Company still had assets which were at least considered to be substantial is proved by the fact that on the 2nd of October following a considerable further advance, $4.000.00, was obtained from the Bank on the security of the book-debts. I have come to the conclusion that the officers of the Company at the time the mortgage was given believed that they might still tide over the difficulties which beset them: in *Davies* v. *Gillard* there could have been no such belief. I might further point out that the two learned Judges who decided that case put their decisions on different grounds, and Mr. Justice Falconbridge does not adopt the conclusions of Mr. Justice Street on the point taken before me, nor did the trial Judge, Chief Justice Armour, take that view. But *Davies* v. *Gillard* is prior to *Stephens* v. *McArthur*, and in *Stephens* v. *McArthur*, as I read it, the whole stock in trade of the partnership was covered by the mortgage which was upheld.

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As to the contention that the mortgage was retained by Mr. *Nelson*, the solicitor of the Company, who was also the Vice-President, for some days and not handed over to the Bank's solicitors till the same day the writ was issued, but before the Company had notice that the writ had been issued: the answer to this is, in my opinion, in view of all the circumstances, that Mr. *Nelson* had the custody and possession of that mortgage on behalf of the Bank's solicitors, and it was his duty morally and legally to them to act as he did: his evidence and his letter of the 23rd of September, 1897, satisfy me that he held the mortgage for the purpose of protecting the interests of the Bank should that become necessary, as it did, though it was hoped to the last, however vainly, that disaster might be averted.

I do not attach much importance to the telegram* sent by Mr. *Nelson* in reply to one received from Mr. *Galt* after the writ had been issued: I regard the expressions therein as being more denunciatory than otherwise, even assuming that they were material in view of my opinion as above expressed. And if Mr. *Nelson's* motives were what has been termed "mixed motives," and I was entitled to disregard those of the President of the Company, still "it has been settled in the Exchequer Chamber by *Brown* v. *Kempton* (1850), 19 L.J., C.P. 169, that the intent to give a preference . . . . . must be the sole motive with which it is made, so that if the transfer be found to be the result of mixed motives, one of them only being the intention to prefer, it must be held good."—*Davies* v. *Gillard, supra.*

Transactions of this nature must, I think, be viewed and judged as a whole, and a circumstance here and there in the chain of events, which standing by itself might be of much weight, should not be singled out and magnified into undue importance.

Finally it is urged that the mortgage will not stand because the directors did not comply with the last clause of section 8 of the Companies Act of 1890, under which the Company was incorporated. This section, after conferring upon the Company power to mortgage, proceeds as follows: "These powers shall not be exercised except with the consent of the shareholders representing two-thirds of the capital stock of the Company actually paid in."

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It is contended that this clause is imperative and not directory,

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*Nelson, B.C., October 2nd, 1897.

To W. J. Nelson, Rossland: Writ issued against Kootenay Company and Bank for overdue account, and injunction against completing mortgage. Have you any offer to make before we apply? See Fraser and answer before noon. A. C. Galt.

Rossland. October 2nd, 1897.

To A. C. Galt. Nelson: Your conduct and proceedings are so completely in breach of faith that I decline to negotiate with you. Fortunately I knew of your contemplated action in time to frustrate it. W. J. Nelson.

Nelson, B.C., October 2nd, 1897.

To W. J. Nelson, Rossland: Your telegram shews that the real breach of faith was by you. A. C. Galt.

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consequently the mortgage was *ultra vires*, wholly void, and incapable of ratification. The steps taken to ratify the mortgage appear from the minute-book of the Company, put in by the plaintiffs, at a special meeting of the shareholders held on the 25th of October, 1897. It should be noted here that according to the evidence of Deputy Sheriff Robinson the writs of *fi. fa.* were not placed in his hands till the 1st of November. It appears that 485 shares of the Company had been issued and taken up, and that shareholders representing 440 of these shares "approved, ratified and confirmed" the action of the directors. It is objected by the plaintiffs that this ratification took place at a meeting called only to consider the question of issuing debentures, and therefore is invalid; and also that Mr. John R. Myers, who acted as proxy for a large number of shareholders, is not a shareholder and consequently could not, under the Companies Act, represent the shareholders. In answer to this the Bank and the defendant Company contend that the clause relied on does not require a meeting to be held at all, and that the consent of the shareholders is sufficient, if I am satisfied from the evidence that such consent was actually obtained, in whatever form. The clause is certainly most unusual, the customary provision in similar cases being that the consent of the shareholders shall be obtained at a meeting called for that special purpose. This is now required by our present Companies Act, Sec. 122, Sub-Sec. (2.); see also Sec. 160; and compare the Ontario Joint Stock Companies Act, Cap. 157, R.S.O. 1887, Sec. 38; *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366 at p. 373; *Merchants' Bank of Canada* v. *Hancock* (1884), 6 Ont. 285; and *Sheppard* v. *Bonanza Nickel Mining Co.* (1895), 25 Ont. 305. In Lindley on Companies at p. 303 it is stated "The shareholders of a Company cannot usually exercise any control over the management of its affairs, except at meetings duly convened." This is very far from saying that it can never be done in any other way, and I feel that where the Legislature did not in 1890 see fit to require the consent to be expressed at a general meeting I would not be warranted in insisting upon a requirement which by a subsequent statute has been made necessary. I am quite satisfied that these shareholders "consented" to this ratification

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through their representative, Mr. Myers; and no objection was taken to his representation of them. My attention has been called to the form of the so-called proxies, which goes much further than is usual, the concluding words being—"the intention hereof being that my said proxy shall act in my place and stead in all affairs and at all meetings connected with the said Company." No authority having been quoted to me in opposition to the above view I must abide by it and uphold the ratification.

Then as to the point that the mortgage being wholly void is incapable of ratification. A mass of authorities has been quoted to me on both sides, and I have had the benefit of comprehensive arguments. As Lindley says, 173, "Statutes which are directory only are common enough, but it is not easy to recognize them with certainty before they have been judicially interpreted. There is, however, a natural tendency on the part of Courts of Justice to uphold an honest transaction although somewhat irregular, if to do so is consistent with the statute which is to be construed." Guided by these expressions I feel, after a careful perusal of all the cases cited, and others, that I am unable to distinguish this case in principle from a long line of authorities beginning with (for convenience) *Royal British Bank* v. *Turquand* (1855), 5 El. & Bl. 248; followed by *Fountaine* v. *Carmarthen Railway Co.* (1868), L.R. 5 Eq. 316; *Landowners West of England and South Wales Land, &c., Co.* v. *Ashford* (1880), 16 Ch. D. 411, 438; *McDougall* v. *Lindsay Paper Co.* (1884), 10 Pr. 252; *Purdom* v. *Ontario Loan and Debenture Co.* (1892), 22 Ont. 597; *Sheppard* v. *Bonanza Nickel Co., supra*; see also Brice on *Ultra Vires* (1893), 603, 631, 632, propositions 249, 250, 251, 252; Lindley, 176 and 177, and there is no other course open to me than to construe this clause as directory and not imperative. I may add that I see no essential difference between this clause and section 38 of the Ontario Act above referred to under which *Purdom* v. *Ontario Loan and Debenture Co.* and *Sheppard* v. *Bonanza Nickel Co.* were decided. Of course if no power to mortgage had been given the result would have been different.



But the plaintiffs' counsel urges that I should not apply the principle of ratification to this case because the Bank had notice

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of the fact that there had been no consent of the shareholders. It would appear that the Bank took the mortgage either under the idea that no consent was necessary, or that the ratification could be obtained without difficulty; it is not quite clear which. I do not see how the question of notice affects this case, and no authority has been cited to shew that notice prevents ratification under the circumstances I have to deal with here. Notice would of course be all important if the Bank were endeavouring to hold the Company to a contract, but the Company is a co-defendant here, and not only does not seek to set aside the mortgage, but comes into Court and upholds it: it is a creditor of the Company, not the Company itself that seeks to set it aside. Now, if the Company is estopped by its acquiescence the creditor must be. Commenting on *Bargate* v. *Shortridge* (1855), 5 H.L. Cas. 297; 24 L.J., Ch. 457, Brice says at 605, "This case goes farther than this, for it was a creditor of the company who was attempting to get his debt paid by process against a shareholder, and the decision was that, as the company itself was estopped by its acquiescence, so also its creditors claiming through it were barred by the same acquiescence." See also Lindley, 175, where it is stated, "When a contract has been entered into on behalf of a company informally, but has been acted upon and is then disputed by the company, the question naturally arises whether it has not been ratified or otherwise adopted by the company and so become binding on it." And here I call attention to the language of Fry, J., in the analogous case of *Landowners West of England and South Wales Land, &c., Co.* v. *Ashford, supra*, at p. 438, "The case I was referred to before Lord Hatherley, of *Fountaine* v. *Carmarthen Railway Co.* (1868), L.R. 5 Eq. 316, does shew that the provision with regard to the general meeting is inserted in the Act of Parliament for the benefit of the shareholders, and not of the creditors. They could not stop the Company exercising that power, and therefore it does not interest them." In a similar case, *Greenstreet* v. *Paris* (1874), 21 Gr. at p. 234, Vice-Chancellor Blake says: "It is clear that this mortgage is a matter which might be confirmed by the shareholders, and if, when the acts complained of are capable of confirmation a single shareholder cannot impeach them, I think it *a fortiori*

that an outsider should not have this right." There the "outsider" was a subsequent incumbrancer. This ruling has been repeatedly followed—*Bank of Toronto* v. *Cobourg, &c., Railway Co.* (1885), 10 Ont. 376; *Merchants' Bank* v. *Hancock, supra,* and the other Ontario cases above quoted. In the last named case Chancellor Boyd lays it down, p. 289: "According to *Greenstreet* v. *Paris*, an outsider, such as an execution creditor, could not be allowed to interfere in such circumstances, and where there is no imputation of fraud or illegality in its broad and culpable sense." I have found these elements are not present here.

The plaintiffs then are not in a position to attack the ratification, or the means taken to bring it about.

In view of the conclusion I have thus arrived at it becomes unnecessary for me to consider the point taken by the Bank that the property having been sold too late for relief there is no procedure or authority for making it accountable for the proceeds.

I call attention to the somewhat peculiar form this action takes. The plaintiffs, while complaining that the defendant Bank has secured itself with intent to defeat and delay the general body of creditors, do not ask that such creditors be granted relief, but merely that they (the plaintiffs) be substituted for the Bank, in other words, put in the Bank's shoes to the extent of their execution; the statement of claim asks that the Bank be ordered to pay the plaintiffs that amount. The general body of creditors would probably not like the plaintiffs to have priority over them any more than the Bank, which certainly aided the Company generously in its effort to establish itself, but it is unnecessary to pursue the point.

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I have experienced not a little difficulty in coming to a conclusion on some of the points in this complicated and lengthy case (I may say the mere perusal of the evidence, exhibits and cases cited occupied several days), and I think the plaintiffs are not entitled to succeed. The action will consequently be dismissed with costs.

17th August, 1899.

Since writing the above I have learned that the case of *Davies* v. *Gillard, supra,* on which the plaintiffs' counsel placed not a

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little reliance, and which consequently, I considered at some length, was reversed on appeal—(1892), 19 A.R. 432. Of course I am quite satisfied that this fact escaped the attention of the learned counsel who cited the case, and my attention was not drawn to it by the opposing counsel. Fortunately, no harm has arisen from the slip here as the case was distinguishable, but such an oversight might often have serious consequences, and the Court is entitled to assume as a matter of course that cases cited to it have not been reversed.

The plaintiffs appealed to the Full Court and the appeal was argued at Vancouver in September, 1899, before WALKEM, DRAKE and IRVING, JJ.

*Galt*, for appellants.
*Hamilton*, for the respondents, the Bank of Montreal.
*J. H. Senkler*, for the respondent Company.

30th November, 1899.

DRAKE, J.: The Brewing Company are a Corporation incorporated under the Companies Act, 1890, as amended by Cap. 7, Sec. 2 of 1892. That Act restricts the powers of the trustees in the management of the Company and was intended to protect shareholders from liability beyond the amount of the calls that might be legally levied upon their shares. The Company under its provisions cannot borrow money or mortgage their property or sign bills or notes and other evidence of or securities for money borrowed, or to be borrowed, without the consent of the shareholders representing two-thirds in value of the capital stock of the Company. This is a statutory addition to the memorandum of association, and the section is so framed that the consent of the shareholders is an imperative requirement to the exercise of the power of borrowing.

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The defendants, the Bank of Montreal, had for some months been allowing the Company an overdraft, and an overdraft is borrowing; and had advanced from time to time considerable sums of money to take up the Company's notes and bills. How far the directors were authorized to sign bills, notes or other evidence of debt, was not argued because these debts were swept into the mortgage which is questioned in this action. But this

section indicates that the Act was not intended for the incorporation of purely industrial companies as it would fetter all commercial transactions. An inquiry into the origin of the Act shews that it was intended for mining partnerships, but as the Company have incorporated under it, they are bound by its provisions. On July 2nd, 1897, the Company, being heavily indebted to the Bank, the Bank applied for security, and the Bank's solicitors prepared a mortgage of the Company's real and personal property which was not executed until the 23rd of September following. The Company appear to have hesitated about giving security, as they were in hopes of raising a sufficient sum by debentures to relieve the financial pressure they were suffering under.

The Company had invested all their capital in the brewery, buildings and plant, and had, in fact, no working capital but relied on their profits to carry them on.

The evidence of the financial position of the Company is disclosed on p. 45. There Mr. Burritt, the President of the Company, states that in the early part of June they were crowded for funds, and he says that in August the Company could not meet their obligations as they became due, and they staved off the Bank as long as they could. The Bank was thoroughly conversant with the plaintiffs' claim before the mortgage was executed, and it was the desire of the Company to prevent the plaintiffs getting judgment. Mr. Nelson confirms the last witness as to the desire of the Bank for security; and after the mortgage was given it was arranged it should not be registered at once.

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In June, 1897, the Company owed the Bank $11,901.00 on their own notes, and this indebtedness increased to $40,000.00. But the Bank, although not liking the transaction, apparently carried the Company on, and the Bank knew that a large proportion of the goods over which they required security was not paid for. The mortgage deed purports to transfer the lands, buildings and assets of the Company, whether then in existence, or which might be subsequently brought on to the premises. It is in the ordinary form, and there is no ultimate trust for the mortgagors.

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The plaintiffs contend that the mortgage deed was void under the statute of Elizabeth, as well as the assignment of book-debts which was subsequently executed, as having been given voluntarily and collusively for the purpose of defeating and delaying creditors. A deed may have that effect and yet not be void under the statute. This deed contains no ultimate trust for the benefit of the mortgagor except the clause that if after sale there should be a surplus that the same should be paid to the Company. This would be the right of the Company if such a clause were not inserted. Every mortgage deed contains a clause authorizing the mortgagees in case they sell instead of foreclosing to account to the mortgagor for any surplus. See *Boldero* v. *London and Westminster Loan Co.* (1879), 5 Ex. D. 47. No benefit is required for the mortgagor. Further, under the statute of Elizabeth it must be shewn that the deed was not *bona fide*. It is not denied here that the Company were indebted to the Bank in a large sum. The sole question on this point of the case therefore is *bona fides*. Mr. *Galt* in his able argument contended that the whole transaction was fraudulent because there was an agreement not to register at once; and more or less false information was given to the plaintiffs' agents as to the amount due to the Bank. The security was kept secret, and was taken when it was clear that the Company was insolvent; but as Sir G. Jessel says in *Middleton* v. *Pollock* (1876), 2 Ch. D. 108, there is no law which prevents a man in insolvent circumstances from preferring one creditor, except the bankruptcy law. Therefore, the mere fact of a deliberate intention of preferring, in case of insolvency, will not be sufficient to avoid the claim, assuming that it had been proved that the grantor was insolvent and insolvent to his own knowledge the security being *bona fide*. The statute has no regard to the question of preference or priority amongst the creditors of the debtor; and pressure is an indication of *bona fides*; and in *W. Morris* v. *A. Morris* (1895), A.C. 625, the Lord Chancellor says it is immaterial to inquire why the appellant refrained from registering his security, he was under no obligation to do so: no doubt he incurred the risk of losing his security.

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The case of *Alton* v. *Harrison* (1869), 4 Chy. App. 622, the

debtor expecting an execution against him executed a mortgage vesting his property in trustees for the benefit of five creditors, and the deed contained a proviso that the debtor should remain in possession for six months, but so as not to let in any execution; and in case any should be enforced possession was to cease; and it was there held that if the deed was *bona fide*, and not a mere cloak for retaining a benefit to the grantor, it was good under the statute of Elizabeth, and the proviso as to retaining possession for six months did not render the deed void. This case was followed in *Ex parte Games* (1879), 12 Ch. D. 314.

The plaintiffs further contend this deed was a collusive deed, and therefore void, because under the primary meaning of the term collusive "it is acting in concert," and the Bank and the Company were acting in concert in obtaining the security. The term collusive in the preamble to the Act of Elizabeth is used in connection with a fraudulent intention, every agreement is in one sense an acting in concert, but it is not therefore void. The intention in the Act is to hinder, delay or defraud creditors, but a deed which is *bona fide* and the result of pressure is held not to be within the Act although it may have the effect of delaying or hindering some creditors; and it matters not if it affects all or only part of the debtors' assets. Therefore, I am of the opinion that under the statute of Elizabeth this mortgage cannot be impeached.

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The further question argued was that the deeds were void under the Fraudulent Preference of Creditors Act, R.S.B.C. 1897, Cap. 87, Sec. 3. That section shortly says "in case any person being at the time in insolvent circumstances, or unable to pay his debts in full, makes any transfer with intent to defeat or delay the creditors of such person, or with intent to give one or more of the creditors of such person a preference over his other creditors, such deed shall be void as against the creditors of such person."

It has been held in *McCrae* v. *White* (1883), 9 S.C.R. 22; *Long* v. *Hancock* (1885), 12 S.C.R. 532; *Gibbons* v. *McDonald* (1892), 20 S.C.R. 587; *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88, that where security has been obtained as the result of pressure the Act does not apply.

But there is a further question here: Did the Bank know that

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the Company was in insolvent circumstances? Because that is an ingredient in the question of *bona fides* where the security is not obtained as the result of pressure. In *Gibbons* v. *McDonald*, *supra*, C. J. Ritchie says that there was no concurrence of intent on one side to give, and on the other to accept, a preference over other creditors as there is nothing to shew that the defendant was aware of the insolvency of the debtor. That was a deed not given under pressure. The cases of *Campbell* v. *Patterson* (1893), 21 S.C.R. 645; and *Stevenson* v. *The Canadian Bank of Commerce* (1893), 23 S.C.R. 350, both upheld the doctrine that the creditors' knowledge of the insolvency of the debtor makes the security fraudulent if it was given without pressure. The case of *Davies* v. *Gillard* (1891), 21 Ont. 431; (1892), 19 A.R. 432, was a case very much like this case on the facts, and the deed was upheld.

The Company state that they were in hopes of getting financial assistance from the East, but it was only a hope that did not materialize. I think from a careful consideration of the evidence that when the mortgage was taken both the Bank and the Company knew that the Company was in insolvent circumstances, and had been for some time before.

The case of *Colquhoun* v. *Seagram* (1896), 11 Man. 346, Killam, J., reviews the whole of the cases on the subject of pressure, and the effect of the judgment is that if there is pressure the knowledge of insolvency of the debtor, even if known to the creditor, will not vitiate the security.

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A further objection taken by Mr. *Galt* is that both the mortgage and the assignment of book-debts are void on the ground that the sanction of the shareholders was not obtained in proper form, and prior to the execution of the deeds.

There is a distinction well recognized between cases which are *ultra vires* in their inception whether done by the directors or the Company and therefore void, and those cases where the directors of the Company have power to do the act provided certain prescribed formalities are complied with. On the first head it is only necessary to cite the case of *Baroness Wenlock* v. *River Dee Co.* (1887), 36 Ch. D. 684, where the power of borrowing was limited, and the directors exceeded this power and their

act was confirmed by the whole of the stockholders. It was held that the borrowing being unauthorized, no confirmation could render it valid.

On the second class of cases which concern the internal management and economy of the Company formalities may be waived, and irregular as distinguished from void transactions may be confirmed. There are no doubt cases in which the mere non-compliance with formalities has been held fatal, especially in cases between shareholders and the Company when the question has arisen as to the liability of a shareholder. Such as *Sheffield Railway Co.* v. *Woodcock* (1841), 7 M. & W. 574; but in dealing with formalities where the members of the Company are concerned, if the act of the directors is one ordinarily within the scope of their powers, then the non-compliance with the prescribed formalities will not render the act void on the application of third parties: see *Ex parte Eagle Company* (1858), 4 K. & J. 549. Whatever rights the shareholders or the Company might have to effect this object, the evidence here shews that the Bank had notice that before the Company could borrow money under section 8 of the Companies Act, 1890, they were to obtain the consent of the shareholders representing two-thirds in value of the capital stock of the Company. The Bank's solicitors suggested or prepared a resolution to be submitted to the shareholders for the purpose of sanctioning the proposed mortgages, and this is clearly shewn by exhibit C. (2) a letter dated July 5th, 1897, to the President of the Company. The mortgage was executed on 23rd September, 1897. On 13th September, the directors passed a resolution sanctioning a mortgage to the Bank; but it was not until the 25th of October, that a special meeting of the shareholders was held when the directors' act was confirmed. At law a ratification is equivalent to a previous authority, and I think that if a ratification was given by the shareholders in proper form it would confirm the deed; and in the case of *Agar* v. *Athenaeum Life Assurance Society* (1858), 3 C.B.N.S. 725, the directors had power to borrow, but only with the consent of an extraordinary general meeting. The directors did borrow without such consent: the debentures were held binding on the Company.

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I think further, that the Bank were entitled to consider that after the care they had taken to prepare a resolution to be submitted to the shareholders for the purpose of confirming the proposed mortgage the necessary steps to obtain a confirmation had been complied with.

The appellants further contended that the assent of the shareholders was insufficient, because J. R. Myers, who held a large number of proxies, was not a shareholder; and section 19 of the Companies Act says that no person shall be appointed a proxy who is not a shareholder in the Company. The same principle applies here. The Bank were entitled to consider that the statutory requirements which governed the Company had been complied with, and persons dealing with directors *bona fide*, and without notice of an irregular exercise of their powers are not affected by the irregularity. *Royal British Bank* v. *Turquand* (1855), 5 El. & Bl. 248. There the directors gave the Bank a bond which had not been authorized by a resolution of the Company. It was held the Bank were not bound to ascertain whether the bond had been authorized. Chief Justice Jervis says, "Finding that the authority might be made complete by a resolution the person dealing with the Company would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

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For these reasons I think the appeal should be dismissed with costs.

WALKEM, J.: I concur.

IRVING, J.: The difficulties in this case are occasioned by reason of a trading Company incorporating itself under a statute inapplicable to trading companies. The case comes before us on appeal from MARTIN, J., who dismissed the plaintiffs' action as against the Bank and one John R. Myers, who was then, but is not now, a party to the action. The Brewing Company was incorporated on the 19th of November, 1896, under the B. C. Companies Act, 1890, and Amending Acts, with a capital of $50,000.00; $37,500.00 of which was subscribed and paid up and immediately expended in plant, etc. The first meeting of directors was held on 30th November, 1896.

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The defendants, the Bank of Montreal, were on and after February, 1897, the Brewing Company's Bank. The plaintiffs were simple contract creditors of the Company and became judgment creditors of the Company on the 28th of October, 1897. Their first judgment was for the sum of $5,634.98. They subsequently obtained other judgments amounting, at the date of the writ in this action, to $14,901.19.

Shortly after the Bank became the Company's bankers, the directors, on 19th February, 1897, passed a resolution that the Company should engage in the business of wines, liquors, cigars, etc., and that the President and Secretary-Treasurer be authorized to make purchases and such arrangements as they should deem advisable subject to the direction of the Board of Directors. At this time the Manager of the Bank thought they were "all right" but that they required more working capital to carry on their business. The Company were selling on credit, taking notes from their customers, these were discounted by the Bank and if not paid at maturity were charged up to the Company's account. In addition the Bank advanced moneys to them for short periods, pending the receipt by them of certain funds they promised would be forthcoming. On the 18th of May, 1897, the Bank began taking security. Owing to the depression in trade in June and July, the Company's liabilities seemed to have increased, and the Bank at this time began to press for security and in the latter month demanded a mortgage. The Company on their side promised to put the account into satisfactory shape by means of a mortgage debenture scheme which its directors thought they could float. See exhibit 22, dated 22nd July, 1897, meeting of directors held 9th August, 1897.

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During the month of August the Bank continued to carry the Company, and by the 13th of September, 1897, the liabilities to the Bank amounted to about $40,000.00. On the 23rd of September, 1897, the mortgage now sought to be set aside was executed. By section 8 of the Companies Act, 1890, as amended in 1892 and 1894, it is provided as follows:

"All companies incorporated . . . . under this Act shall have in addition to the powers conferred on them by section 5, the following powers, namely:

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"(*a.*) The power, subject to the provisions of this Act, to borrow money for the purpose of carrying out the objects of their respective incorporations.

"(*b.*) The power, subject to the provisions of this Act, to execute mortgages of their real and personal property, to issue debentures secured by mortgage or otherwise, to sign bills, notes, contracts and other evidences of, or securities for money borrowed by them for the purpose aforesaid, etc.

"These powers shall not be exercised, except with the consent of the shareholders representing two-thirds in value of the subscribed capital stock of the Company."

Now, Mr. *Galt's* main contention was that the directors, by virtue of this section had, in the absence of the consent of the shareholders, no power to borrow any money, and as there was no authority to borrow, there could be no debt, and no liability on the part of the Company, citing *Cunliffe Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 872; *Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354 and *Ex parte Watson* (1888), 21 Q.B.D. 301. This last case in my opinion is not in point, as in that case there were two separate and distinct entities, and the decision turned not on a question of borrowing, because there was no borrowing, but upon a gratuitous assumption by the incorporated company of a liability incurred by the unincorporated society. The two former cases do not bear out his contention in its entirety. On the contrary both of these cases are authorities for this principle that a company may in some cases be equitably liable to re-pay money advanced beyond its borrowing powers where it can be shewn that the money so advanced has been properly applied to the re-payment of debts properly incurred by the company, and the question here is in which category does this case fall? In *Cunliffe Brooks & Co.* v. *Blackburn Benefit Society* money was borrowed by the directors who were without borrowing powers, and with part of the money borrowed, certain payments were made to withdrawing members. These payments would have been proper enough if they had been made out of a special and definite fund as provided by the constitution for that purpose. But they were not, they were made out of a non-existing fund and only supplied by

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means of a loan. "Therefore," said Lord Selborne, L.C., in *Walton* v. *Edge* (1884), 10 App. Cas. 33 at p. 41, "in a case so arising (that is by the official liquidator representing all the contributories and also the creditors), all such payments were in a different category from those which might have been made in discharge of actual debts and liabilities of the society." In respect of moneys so applied it was held the Bank were entitled to recover.

In *Baroness Wenlock* v. *River Dee Co.*, *supra*, the plaintiffs in the Court of first instance obtained judgment for the whole amount claimed. Huddleston, B., being of the opinion that though the borrowing was *ultra vires* the Company had the benefit of the moneys and had applied them to the purposes of the Company. Before the Court of Appeal, the River Company admitted the plaintiff's claim (which according to the contention advanced by plaintiffs' counsel in this case was wholly bad) to the extent of $25,000.00 and to such further sums as the plaintiffs could shew had been applied in payment or in discharge of any debts or liabilities of the Company. Judgment was given accordingly, but the plaintiffs being dissatisfied appealed. The House of Lords affirmed the decision of the Court of Appeal.

In each of these cases then, and also in *Ex parte Watson*, per dictum of Wills, J., at p. 304, the principle of right of recoupment of moneys illegally borrowed, was, as to so much thereof as was applied in satisfaction of the Company's debts and liabilities, fully recognized.

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In *In re Wrexham, Mold and Connah's Quay Railway Co.* (1899), 1 Ch. 440, Rigby, L.J., speaks of the recognition of that rule as being but "bare justice" and Vaughan Williams, L.J., says, equity will treat such a borrowing, if borrowing it be, as *intra vires* if necessary. In the case before us the due application of the moneys to the Company's purposes was not called in question, and I therefore think that bare justice requires us to recognize this as a liability due from the Brewing Company to the Bank.

But section 8 Mr. *Galt* says "section 8 requires the sanction of the shareholders." *The Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327 and other authorities cited by the learned trial

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Judge, to which I would add *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1895), 1 Ch. 629 and *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93 and *In re Hampshire Land Co.* (1896), 2 Ch. 747, and affirm the proposition that the Manager of the Bank, when he began to lend at the instance of the President in February, 1897, had a right to assume that all those essentials had been carried out by the directors and the Company, and in my opinion, as this went on for weeks and months, he had a right to assume that this exercise of power by the directors, if not originally sanctioned by the shareholders, had been acquiesced in by them, *Evans* v. *Smallcombe* (1868), L.R. 3 H.L. 249. It is only in case the law imputes to the lender knowledge of these irregularities that the lender can not recover. There is nothing so far as the borrowing of the money is concerned, to shew that the Bank had this knowledge. Messrs. *Daly & Hamilton's* letter written on 5th July, refers to the giving of the mortgage, and not in any way to the subject of the borrowing of this money. I arrive then at the conclusion that there was an advance of moneys which were properly, I say properly because it is not questioned, applied to the Company's purposes for which the Company was equitably liable.

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The Bank were not the only creditors who began pressing for payment, several others were making inquiries. The plaintiffs, on the 28th of September, 1897, sent down Mr. Hearn to ascertain the condition of the Company's affairs. He was not told of the execution of the mortgage to the Bank, but whether intentionally or unintentionally, was given to understand that the directors by reason of section 8 found themselves unable to execute a mortgage. At this time the bill of sale and mortgage in favour of the Bank had been executed and at that time was being held, not as an escrow, but was being held by the Vice-President of the Company "pending the negotiations as to debentures." As to the sufficiency of the delivery by the Company notwithstanding the fact that it remained in the custody of the Vice-President of the Company, see *Zwicker* v. *Zwicker* (1899), 29 S.C.R. 527. The Vice-President on learning, on the 2nd of October, that the plaintiffs were about to take proceedings to

restrain the Company from giving a mortgage, handed the bill of sale over to the Bank's solicitors. A good deal was made of this in the argument before us as to fraudulent conveyance but the point is covered by the case of *W. Morris* v. *A. Morris* (1895), A.C. 625, where the respondent attacking a bill of sale as fraudulent, relied upon an alleged agreement by the bankrupt to inform the lender "if things were not looking so bright" so that he (the lender) could either register the bill of sale or take possession under it, and the Judicial Committee held that, even if the bankrupt volunteered, as he alleged he did, to give the lender information if his circumstances should become precarious it would not assist the respondent's case.

The letter from the Bank's solicitors when read in connection with Mr. *Nelson's* letters, shews what the mutual understanding was, namely, that Mr. *Nelson* should hold the bill of sale for ten days from the date of execution. This point too, is covered by the case I have just referred to, because as their Lordships remark, the question is not why the appellant, the lender, refrained from registering or postponed taking possession, but with what intent the assignment was made.

The next contention was that the mortgage was void under 13 Eliz., Cap. 5, Sec. 1; R.S.B.C. 1897, Cap. 86, Sec. 2, as being collusive within the meaning of that word as explained in *Edison General Electric Co.* v. *Westminster and Vancouver Tramway Co.* (1897), A.C. 193. I think this argument depends to a very great extent on the determination of the point I have just been dealing with. The statute was not intended to prevent any honest arrangement between debtor and creditor, though the result of that arrangement has been that creditors have been delayed or hindered. In all arrangements there must be a certain amount of negotiating, acting in concert, before the document embodying the arrangement is ready for execution. This negotiation is not prohibited by the Act. The Act strikes at collusion to the end, purpose and intent to defraud creditors. I think it is quite possible to read all the portions of evidence to which we have been referred under this head and feel that the negotiations were not collusive within the meaning of 13 Eliz., Cap. 5.

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This brings me to the question of evidence. To establish charges of fraud there must be full and satisfactory proof. The fraud must be proved beyond all reasonable doubt, and where it is once shewn that there is a liability, that there is good consideration for the mortgage, those who attack that mortgage have a difficult task before them, *Hickerson* v. *Parrington* (1891), 18 A.R. 635, and when the evidence is confined to the testimony of the persons who are, or are said to be, guilty of the alleged fraud, the task becomes more difficult. In connection with the collusion, we are referred to the letters of the 2nd and 5th of July, written by the Bank's solicitors. These letters are not, in my opinion improper. In these days of multi-copying, I do not attach to the enclosing to the procrastinating directors of a copy of the proposed minutes the importance Mr. *Galt* attaches to that fact.

The statute of 13 Eliz., Cap. 5, requires that there should be a fraudulent intent on the part of the grantee as well as of the grantor. It has in my opinion, no application in this case unless it is shewn that the Bank either directly or indirectly, made itself an instrument for the purpose of subsequently benefiting the Brewing Company. I venture to think that a fair inference to be drawn is—the Manager of the Bank was concerned with securing his $40,000.00 rather than with benefiting the Brewing Company. *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523, expresses all it is necessary to say on this point.

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It was also argued that the mortgage was void under the B.C. Fraudulent Preference of Creditors Act, R.S.B.C. 1897, Cap. 87, Sec. 2. This section is a copy of the Revised Statutes of Ontario, 1877, Cap. 118. There has been no subsequent legislation in this Province such as there was in Ontario by 47 Vict., Cap. 10 and 48 Vict., Cap. 26, and the amendments in Ontario and the decisions upon them shew that Cap. 118, our Cap. 87, is not as far reaching as creditors anxious to secure an even distribution of an insolvent estate could wish for. This was owing to the decision that the doctrine of pressure was to be regarded in interpreting the statute. In the first reported decision under this Act, *Anderson* v. *Shorey* (1885), 1 B.C., Pt. II., 327, MCCREIGHT, J., declined to express any opinion on this point, but in subsequent cases that doctrine has been recognized, and I think that at this

date what has been said by the Supreme Court of Canada in *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446, in relation to the construction of the Ontario and Manitoba Statutes, must be accepted as equally applicable to the British Columbia Act.

On the plaintiffs there is placed the onus of shewing a fraudulent intent—a voluntary desire on the part of the Company to prefer the Bank, and that intent was concurred in by the Bank. The evidence does not warrant me in coming to that conclusion.

*The Molson Bank* v. *Halter*, *supra*; *Stephens* v. *McArthur*, *supra*; *Gibbons* v. *McDonald* (1892), 20 S.C.R. 587; *Davies* v. *Gillard* (1891), 21 Ont. 431; (1892), 19 A.R. 432 and *Colquhoun* v. *Seagram* (1896), 11 Man. 339 establish this, that where there is a good consideration, a mortgage, comprising the whole of the debtor's property, will not be set aside notwithstanding that the mortgagor is in insolvent circumstances, to the knowledge of the mortgagee, and the effect of the mortgage is to defeat, delay and prejudice the creditors if there is pressure.

[The learned Judge here refers to the evidence and proceeds.]

This establishes that the demand for security was made by the Bank, that the Company postponed giving it for a considerable period and that when they did recognize that "if the Bank left them they were gone beyond question" they gave it.

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*Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366, was cited as an authority for the proposition that creditors are entitled to take advantage of the irregularities in the management of their loans. In that case Irvine was the purchaser of the interest of the Company in the land then being made liable to a charge, as such he could in action of foreclosure, raise any question as to the amount chargeable that the mortgagors could. That is a different case from this where unsecured creditors are attempting to question the indebtedness of the Company. In the result I agree with the decision of the learned trial Judge that the action fails.

*Appeal dismissed.*

Note:—An appeal from this judgment was dismissed by the Supreme Court of Canada on 19th February, 1901, and the Judicial Committee of the Privy Council refused leave to appeal.

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# *IN RE* NORTHERN COUNTIES INVESTMENT TRUST, LIMITED, AND THE CITY OF VANCOUVER.

*Municipal law—Compensation under section 133 of the Vancouver Incorporation Act, 1900—Award of—Procedure—Arbitrators—Practice.*

The right to compensation cannot be determined by arbitrators appointed under section 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation.

An award of such arbitrators cannot be enforced summarily under section 13 of the Arbitration Act.

Statement.

MOTION to set aside an award and summons to enforce same award argued together before IRVING, J. The facts appear fully in the judgment.

*Davis, K.C.*, for the summons.

*Hamersley, K.C.*, for the motion.

21st December, 1901.

Judgment.

IRVING, J.: On the 12th of July, 1900, the Trust Company caused the City to be served with a notice stating that they required the City to arbitrate the damage sustained by the Trust Company by reason of the exercise of the powers conferred upon the City in connection with the raising of the grade on Westminster Avenue in front of lot 22, block 2. In the notice it was alleged that the said lots had been injuriously affected by the exercise of the powers conferred on the City. On the 9th of August, the Trust Company appointed Mr. Cornish their arbitrator for "the purpose of assessing the damage alleged by the Trust Company to have been sustained" by them; on the 3rd of November, the City of Vancouver under its Corporate Seal appointed Mr. James Young its arbitrator for the purpose of assessing the damage if any, sustained by the Trust Company by reason of the alleged exercise of the powers conferred, etc.

The arbitrators met in January, 1901, and at the very first sitting, a question as to the powers or duties of the arbitrators was raised.

The City Solicitor says that he requested them to state a special case and that they adjourned to consider whether or not they would grant his request. Mr. McFarland the third arbitrator, says that statement is not accurate; that the City Solicitor asked that the question of liability of the City for raising the grade be determined before proceeding with the arbitration as to damages. However this may be, they did adjourn and they did take the opinion of counsel and they then proceeded to take the evidence, and some time after, on the 29th of January, they completed their award, and by their award found that the claimants were entitled to the sum of $372.50 for damages by reason of raising the grade of the Avenue and the sidewalk. The award carried costs.

On the 22nd of February, 1901, the Trust Company took out an originating summons returnable before me on the 6th of March, 1901, for leave to enforce the award in the same manner, as a judgment or order to the same effect, and for an order that the costs of this application and the order be taxed and paid.

On the 2nd of March, 1901, the City Solicitor gave notice of motion on behalf of the City of an application to set aside the award on the following grounds:

(1.) That the grievances alleged on the part of the Trust Company are not within the provisions of sub-section 5 of section 133 of the Vancouver Incorporation Act, 1900, and are not the subject of compensation under the said section.

Judgment.

(2.) That if the Trust Company had any cause of right to make a claim for compensation by reason of any works carried on by the City the right to make such claim had lapsed and became extinguished owing to the fact that the alleged work carried on by the City in the claim made by the said Trust Company had been done more than a year previously to any action being taken in the matter.

(3.) That the arbitrators were not properly and legally appointed and did not make their award in accordance with the provisions of the said Vancouver Incorporation Act in that behalf.

(4.) That they did not execute the award in the presence of each other and at the same time.

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(5.) That at the hearing of the evidence given before the arbitrators it was proved that no grade of the street had been given to or asked for by the said Trust Company or to or by any other person when the buildings were erected on the said lands. That the buildings had been erected without the parties building the same, first ascertaining what would be the permanent grade of the street. That it was well known from the nature of and the state the street was there in at the time the buildings were erected the grade of the said street would have to be made higher.

(6.) That the arbitrators gave damages to the Trust Company and against the Corporation in respect of certain other property not situate on or part of the land, *viz.*, lot 22, the subject-matter of the arbitration.

(7.) That the arbitrators should have confined their enquiry to the question as to how the said lot mentioned in the notice appointing them was affected by the alleged works of the Corporation and not included in their enquiry or in their decision any part or portion of property not situated on or being part of the said land the subject-matter of the enquiry and arbitration.

(8.) That the arbitrators refused to enquire into and did not as a fact take into consideration whether the value of the said land had been improved by the said works of the Corporation in raising the grade of the said street, but decided that it was no part of their duty or within the scope of the arbitration to ascertain if the value of the said land had been improved or not by the said works in arriving at a decision as to whether or not the said land had been injuriously affected or not by the said works.

Judgment.

(11.) That the amount awarded by the arbitrators is excessive and contrary to the evidence.

The motion to set aside the award and the summons to enforce the award, came on before me and were argued together on the 2nd day of May, 1901, and the old dispute having been raised as to what took place before the arbitrators, the further hearing was adjourned in order that Messrs. McFarland and Cornish could be cross-examined.

On the 17th of December, 1901, the matter was again brought forward when Mr. *Hamersley* raised the point that the claimants could not proceed by summons to enforce the award under sec-

tion 12 of the Arbitration Act; that their proper remedy was to take out a writ of summons.

By section 133 of the Vancouver Incorporation Act, 1900, the Council have power to provide, by resolution, for taking so much real property within the limits of the City as may be required for opening, retaining and improving streets, squares, etc., either by private agreement, amicable arrangement or by complying with the formalities in the sub-sections to the Act prescribed.

By sub-section 5 it is provided as follows: "The Council shall make to the owners or occupiers of or other persons interested in real property entered upon, taken or used by the Corporation in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including the cost of fencing when required) necessarily resulting from the exercise of such powers, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under the following sub-sections: . . . ."

Under sub-section 5 the City Solicitor contends that the appointment by the City of the arbitrator was an appointment merely to consider the amount of compensation payable by the City if, and only if, compensation ought to be paid. Whether any compensation was payable or not was not a matter for the arbitrators, they were only to determine the amount payable on the assumption that the Trust Company was entitled to compensation; in other words, to fix the *quantum* of compensation. The arbitrators having determined that amount, it would then become necessary for the claimants to establish in an action that there was a liability on the part of the City to pay the compensation to them.

Judgment.

I have examined the Land Clauses Consolidation Acts and several other Acts containing clauses relating to arbitration and I find under the Land Clauses Act, which is very similar to this Act, that it was the common practice to appoint arbitrators to determine the amount, if any, payable before the question of liability to pay was determined, and then when an action was brought to enforce the award, to raise the defence that the lands had not been injuriously affected, that is the contention that the City Solicitor claims, the City is now entitled to raise.

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Dealing now with the claimants' application to have the award made by arbitrators enforced. I agree with Mr. *Hamersley's* proposition, that the question for the arbitrators under sub-section 5 was only as to the amount due for compensation and this question they would determine on the assumption that the right to compensation can be maintained.

Compare the following cases under the Land Clauses Consolidation Act: *Read* v. *Victoria Station and Pimlico Railway Company* (1863), 1 H. & C. 826; *Beckett* v. *Midland Railway Company* (1866), L.R. 1 C.P. 241; *The Queen* v. *Vaughan* (1868), L.R. 4 Q.B. 190, and the following under other similar statutes: *Pearsall* v. *Brierley Hill Local Board* (1883), 11 Q.B.D. 735; (1884), 9 App. Cas. 595 and *East and West India Docks* v. *Gattke* (1851), 3 Mac. & G. 155.

Now it is quite clear from the affidavits that the City of Vancouver is anxious to have certain questions of law (*e.g.*, as to whether these lands were "injuriously affected" within the meaning of the Act) determined. Prior to the Arbitration Act, the City could have raised these questions by way of defence to the action which the claimant would have found necessary to bring, if he desired, to enforce the award. As to the form in which his defence should be pleaded, I refer to the two cases first above mentioned. But it is said that since the passage of the Arbitration Act it is different. Section 13 of the B.C. Arbitration Act provided that "any award or (*sic*) a submission may, by leave of the Court or a Judge be enforced in the same manner as a judgment to the same effect," but I think it is abundantly established by the authorities, that this method would be appropriate only when the right to the compensation is clear. It would be a mis-application of the power conferred by section 13, for a Court or Judge to give leave to the claimant to enforce the award when all that has been decided is the amount due and the question as to the right or title has not yet been determined.

Judgment.

As to the procedure to obtain a decision as to the right of the claimants to recover the amount assessed for compensation; I can deal with that more easily when I come to consider the counter-application made by the City.

By the notice of motion the City seeks to have the award set

aside, in argument however, Mr. *Hamersley* said he wished to have a special case stated under section 20 on the 1st, 2nd, 5th and 8th grounds mentioned in his notice. Had he made an application to the arbitrators to state a case they were bound to have complied with his request, but it seems to me that 1st, 2nd, 3rd, 4th and 5th grounds are rather defences to the action to enforce the award—than grounds for stating a case.

In view of the course I propose to follow, it will not be necessary to express any opinion upon that unfortunate dispute to which I have already alluded, except in dealing with the costs. Both parties agree that I have power now to refer the award back, and I think that the proper order for me to make is to remit the matter to the re-consideration of the arbitrators, and if there is then any matter which the parties desire to raise through their arbitrators, it can then be raised.

This course will, I think, clear the ground and enable the City to raise any of the points of law mentioned in their notice. As to the costs, the claimants are clearly not entitled to the order asked for by them in their summons and as the cross-application was rendered necessary to a very great extent, at any rate, by the unfortunate misunderstanding to which I have already referred, I think there should be no costs to either side.

Judgment.

*Order accordingly.*

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WARMINGTON
*v.*
PALMER

## WARMINGTON v. PALMER AND CHRISTIE.

*Negligence—Contributory—Defective machinery — Excessive damages—New trial.*

*Full Court—Practice—Argument—Appeal—Grounds of—Particulars.*

On an appeal from the judgment of IRVING, J., reported in 7 B.C. 414 the Full Court (MARTIN, J., dissenting) ordered a new trial on the grounds that the damages were excessive, that the plaintiff by his recklessness had contributed to the accident and that there was no evidence to support the finding that the plant was defective.

Points not argued although included in the notice of appeal will be considered as abandoned.

Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet and when "misdirection" is alleged particulars should be stated.

APPEAL from the judgment of IRVING, J., reported in 7 B.C. 414. The argument took place at Vancouver in July, 1901, before MCCOLL, C.J., WALKEM and MARTIN, JJ.

*L. G. McPhillips, K.C.*, for appellants (as to common law portion of the case:) The action is at common law and also under the Employers' Liability Act, the amount claimed being $3,000.00, but after the verdict the Judge ordered an amendment to $4,000.00 to conform to the verdict. The answer to question 10 is only a general finding not shewing the cause of injury, and from the other answers it is impossible to say what was the real cause of the accident. It is the duty of the jury to fix on the proximate cause after first having been charged by the Judge as to what the proximate cause might be: see *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193, 197 as to inferences by Judge and jury and the functions of each; *Wright* v. *Midland Railway Co.* (1884), 51 L.T.N.S. 544. See also *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 S.C.R. 478 and *The Canada Paint Co.* v. *Trainor* (1898), 28 S.C.R. 352; the position here is the same as there are five acts pointed out, for some of which defendants might be liable, but for others not, and how can the Court say which is the exact one? He

Argument.

cited also *Carnahan* v. *Robert Simpson Co.* (1900), 32 Ont. 328 and *Stamer* v. *Hall Mines* (1899), 6 B.C. 579.

It is the duty of the master to furnish safe machinery, but such duty can be delegated to other persons, and if we delegate such duty all we have to do is to select without personal negligence, proper and competent persons to supervise, and to furnish them with the means of providing machinery or materials, and if we do so, we are not responsible for the negligence of such persons: *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; 19 Camp. R.C. 132 and 150; *Priestley* v. *Fowler* (1837), 3 M. & W. 1; 19 Camp. R.C. 102; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H.L. 266; 19 Camp. R.C. 107; *Turrant* v. *Webb* (1856), 25 L.J., C.P. 261; *Smith* v. *Howard* (1870), 22 L.T.N.S. 130; *Wilson* v. *Hume et al* (1880), 30 U.C.C.P. 542; *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B.C. 561 at p. 570. The findings shew that Macready, Vyles and Prendergast were competent persons.

We are not bound to provide the best and most modern appliances, but only such as are reasonably fit. If what Vyles was using had been properly handled there would have been no accident. The proximate cause of the accident was the negligence of a fellow servant (Vyles) who was away from his post—having left his post it was immaterial whether the brake was controlled by a catch or a block: *Walsh* v. *Whiteley* (1888), 21 Q.B.D. 371, at pp. 378-9; *Moore* v. *Gimson* (1889), 58 L.J., Q.B. 169.

Argument.

On the findings there is nothing to shew personal negligence in the defendants, *i.e.*, that they were aware of defects: *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S.C.R. 110.

The plaintiff is not entitled to a new trial because the proximate cause is the negligence of a fellow servant, and because the plaintiff's counsel refused to allow the necessary question (*i.e.*, proximate cause) to be put to the jury: *Seaton* v. *Burnand* (1900), A.C. 135 at pp. 142-3; *Star Kidney Pad Co. et al* v. *Greenwood* (1884), 5 Ont. 28; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 38.

*Wilson, K.C.*, on the same side (as to Employers' Liability Act:) There was no evidence to justify question 6 being left to the jury. Vyles had no duties of superintendence. The work-

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men had adopted a system of going down by request to Vyles only disregarding the signals and the top-man. The plaintiff was guilty of contributory negligence. The findings are inconclusive and do not bring the case within the Act. He cited *The Bernina* (1887), 12 P.D. 61; (1888), 13 App. Cas. 1 and *Ferguson* v. *Galt Public School Board* (1900), 27 A.R. 480.

*Davis, K.C.* (*C. B. Macneill*, with him), for respondent: Some points* in the notice of appeal have not been argued.

[The Chief Justice: The Court should not be expected to consider and should not consider any points not argued by counsel even though included in the notice of appeal and counsel should exhaust his case in opening and will not be allowed except under very special circumstances to raise new points in reply.

WALKEM and MARTIN, JJ., concurred and stated that points raised in the notice of appeal and not argued should be deemed to be abandoned.]

*Wilson:* It was not alleged that the machine in question was originally defective. The statute limits the damages to $2,000.00. There was misdirection.

*Davis:* We have asked for particulars of the misdirection and have not got them.

*Wilson:* The practice in England does not require the former particularity where misdirection or non-direction is complained of and every appeal being by r. 671 a re-hearing it is not necessary.

Argument.

*Per curiam:* Our rule 671 is different from the English rule, the sentence at the end "Such notice shall also specify the grounds of appeal," is additional and it would be idle to require grounds to be specified without their being so particularized that the opposite party should know beforehand what he has to meet; the exact instance of misdirection complained of should have been stated. Grounds of appeal not mentioned in the notice will not in future be entertained unless special leave has been given to raise them.

*Davis:* We can hold damages to $3,275.00 under the Act and the balance at common law. The machine was originally defective as it was sold without the catch or brake complained of.

* Two of the grounds in the notice of appeal referred to were excessive damages and misdirection.

The machinery should have had such an appliance as would have held it safely in the absence of the engineer. He cited *Clark* v. *Chambers* (1878), 3 Q.B.D. 330; Ruegg's Employers' Liability, 163, 168; *Daniel* v. *Metropolitan Railway Co.* (1868), L.R. 3 C. P. 216; *Godwin* v. *Newcombe* (1901), 1 O.L.R. 530; *Williams* v. *Birmingham Battery and Metal Co.* (1899), 2 Q.B. 342; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 153; *Osborne* v. *Jackson* (1883), 11 Q.B.D. 619.

*Wilson*, in reply, cited *Wilson* v. *Boulter* (1899), 26 A.R. 184; *Whatley* v. *Holloway* (1890), 6 T.L.R. 353; *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; *Thomas* v. *Quartermaine* (1887), 18 Q.B. D. 685 and *Griffiths* v. *Gidlow* (1858), 3 H. & N. 640.

On the 16th November the Court ordered a new trial, MARTIN, J., dissenting, then delivering a written opinion and subsequently the following opinion was handed down by

WALKEM, J.: After a careful examination of the evidence in this case, which is somewhat voluminous, the learned Chief Justice and I have come to the conclusion that there should be a new trial:

First, because the damages of $4,000.00 are excessive, and such as no reasonable men ought to have awarded. They are $1,000.00 more than the plaintiff claimed in his writ, and, as it appears to us, the amount is a preposterous compensation for a spell of dizziness from which the plaintiff would seem to have suffered for some time, owing to the accident which he met with. No medical evidence was produced to enable the Court below to properly appreciate the extent of his alleged injury. Beyond dizziness, he complained of nothing. He was, no doubt, put to some trifling extra expense in moving about the neighbourhood of Vancouver or New Westminster, by direction of his physician, for a change of scene.

Judgment of WALKEM, J.

Secondly, we consider that his conduct in stepping into the bucket at the top of the shaft without giving the proper signal, and with his back turned towards the engineer, who was supposed to have, but had not, as it happened, the brake in hand that controlled the descent of the bucket, was inexcusably reckless.

Thirdly, as to the question of ineffective plant, there is no evidence to justify the finding of the jury that the wooden block

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that served as a check on the brake that controlled the hoisting, and, hence, the lowering, gear in the shaft, slipped, as it were automatically, from its place on the floor of the premises, and, thereby, let the running gear, so to speak, run loose. We think that the engineer unwittingly displaced the block with his foot. If he did so, the defendant would be liable, as the engineer was in a position of superintendence. The bucket into which the plaintiff stepped was a heavy one. Now, in view of the fact that the engineer, owing to a warning from his engine that the running gear was in motion, was able to reach the shaft, which was several feet away, in time—and it must have been done in a moment—to check the naturally swift descent of the bucket before it could reach the bottom of the shaft, it seems to us that he was nearer the brake than his evidence tends to shew, and that he must, as we have said, have had something to do with the unexplained displacement of the check-block. The carelessness, however, of the plaintiff, already alluded to, as well as the fact that he neglected, before stepping into the bucket, to observe the code of signals that was posted up in the mine and intended, as far as possible, to ensure his safety, as well as that of the workmen generally, leads us to the conclusion that he was solely responsible for the injury that happened to him. It would seem that all the workmen ignored the rules and signals, as if by common consent: but to impose any liability on the employer for a breach of any of them, as occurred in this case, seems to us to be unjust.

Judgment of WALKEM J.

The costs of the new trial should abide the event.

MARTIN, J.: This case, in my opinion, really turns on question and answer No. 6. It was strenuously argued that (1.) there was no evidence to justify that question being left to the jury; and (2.) that it plainly appeared that the proximate cause of the accident was the negligence of the engineer, Vyles, in leaving his engine.

Judgment of MARTIN, J.

From the evidence it appears that unless the brake was applied to the drum the bucket would descend to the bottom of the shaft by its own weight, so it follows that when the plaintiff stepped into the bucket at the top of the shaft the brake was

then held in place against the drum by the block of wood; it could only have been so held because the engineer at that time was admittedly working at the injector, some 15 or 20 feet from the engine and drum. Under such circumstances it would be clearly open to the jury to infer that the block of wood which held the brake had been so carelessly thrust under the weight at the end of the brake that the weight of a man in the bucket caused it to slip or turn over (as it might very easily do if not squarely placed under the brake weight) thereby releasing the brake, causing the drum to revolve, and dropping the plaintiff and bucket down the shaft. If the jury took this view of the accident, as they very well might, I cannot see why question 6 was not a proper one to leave to them. It is true, as urged, that the facts are substantially admitted, but that does not prevent the jury from reasonably drawing different inferences from the same facts—*Wilson* v. *Boulter* (1899), 26 A.R. 184. It is of course conceded that the hoisting engine should have a proper brake to keep the drum from revolving in the absence of the engineer, but it is contended that the block of wood was a sufficient appliance for that purpose, and that if it was properly applied it would effect that object just as well as the catches deemed necessary by the jury. It is conceded that the employer is not required to adopt all new improvements, but he must furnish such plant and machinery as a reasonable man having taken reasonable precautions might reasonably expect to be capable of acting efficiently and safely—*Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; *Wood* v. *Canadian Pacific Railway Co.* (1899), 7 B.C. 561; 30 S.C.R. 110; *Sim* v. *Dominion Fish Co.* (1901), 2 Ont. 69.

Judgment of MARTIN, J.

As regards the efficiency and safety of any appliance under consideration, that is a question which must be decided in relation to the particular circumstances. A clumsy contrivance carefully used by a careful man may never cause an accident, but it is still clumsy and cannot from the nature of things be, in ordinary and everyday use, as safe or as efficient as a simple and handy appliance for accomplishing the same object. It comes, then, to a question of degree as applied to different facts, and who so competent to decide that question as a special jury?

FULL COURT At Vancouver. 1901. Nov. 16.

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Judgment of MARTIN, J.

Personally, I have no doubt that the accident would not have happened if the catch had been there whatever the engineer did. My understanding of questions and answers 3, 6, 10 and 12 is that the accident was caused by the defendants negligently furnishing a hoisting engine which was originally defective, and contributory negligence has been negatived. Though at first this case seemed to present unusual difficulty yet a close consideration of it satisfies me that it is really a simple one, and can readily be established at common law.

I have said nothing about the system of signals because no one appears to have taken it seriously. The appeal should be dismissed with costs.

*New trial ordered.*

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FULL COURT At Victoria. 1901. March 20.

KETTLE RIVER MINES v. BLEASDELL

## KETTLE RIVER MINES, LIMITED v. BLEASDELL *ET AL.*

*Full Court—Appeal—Security for costs—Practice.*

An order for security for costs of an appeal to the Full Court should provide for a stay of proceedings until security is given.

Remarks by IRVING and MARTIN, JJ., as to the practice.

APPEAL from the judgment of WALKEM, J., reported in 7 B.C. 507. The appeal was called on before MCCOLL, C.J., IRVING and MARTIN, JJ., at Victoria, on 20th March, 1901. when

*Galt*, for the respondent, said no security had been put up and asked that the appeal be struck out of the list.

Argument.

*Duff, K.C.*, for appellant: The Court opened on the 18th of March and the order for security was only made on the 16th—it did not provide for a stay of proceedings.

*Per curiam:* The order should have contained a stay of proceedings.

The order as finally settled provided that proceedings in the appeal be stayed until security was furnished and unless security was furnished one week before the first day of the next regular

sittings of the Full Court at Victoria the appeal stand dismissed.

FULL COURT At Victoria.

1901.

Subsequently written judgments were handed down as follows:

March 20.

IRVING, J.: This appeal was set down for hearing before this Court on the 18th instant. On the 16th, the respondent obtained, in Chambers, an order for security for costs of the appeal. The order did not contain the usual and proper provision for the stay of the appeal until such security was furnished. The result is that it appears before us and we are asked to dismiss the appeal.

KETTLE RIVER MINES v. BLEASDELL

The proper course to be followed in the matter of giving security for the costs of an appeal is to take out the order staying the appeal until security is given, and notice thereof given to solicitor for appellant. The practice is not to fix a time in the order, but if the security is not given within a reasonable time an order of dismissal can be applied for. See *Washburn and Moen Manufacturing Company* v. *Patterson* (1885), 29 Ch. D. 48.

Judgment of IRVING, J.

The Chief Justice concurs in this statement of the practice.

MARTIN, J.: So far as it goes I agree with the judgment of my brother IRVING.

It would be well, however, to supplement it so far as to remedy that defect in the present practice to which our attention was particularly called by Mr. *Gult, viz.:* that in view of the great distances some counsel have to travel to attend this Court, they should know, as soon as possible, in order to avoid unnecessary delay and expense, whether or not the appeals in which they are retained are to be heard at that Court for which notice has been given. This seems a most reasonable request; appellants should not be left with the power, by merely doing nothing, to throw respondents over till the next sittings, and no good reason exists why they should not be required to enter their appeals for that Court for which they have given notice after giving security, when ordered. If the appeal has not been so entered, or if it should happen that it has been entered before security has been ordered and security has not been furnished as later directed, then the respondent should move to quash the appeal. As pointed out in *Haley* v. *McLaren* (1900), 7 B.C. 184, the application should be made to a Judge in Chambers if this Court is not sitting at the time.

Judgment of MARTIN, J.

DRAKE, J. In Chambers.

1901.

NOV. 30.

BOYLE v. VICTORIA YUKON TRADING CO.

BOYLE v. VICTORIA YUKON TRADING CO., LTD.

*Practice—Special indorsement—Foreign judgment—Order XIV.*

In an action on a foreign judgment the statement of claim indorsed on the writ did not allege specifically against whom the judgment was recovered.

*Held, per* DRAKE, J., that the writ was not specially indorsed.

SUMMONS for judgment under order XIV. The statement of claim indorsed on the plaintiff's writ was as follows:

Statement.

"The plaintiff's claim is against the defendants for the sum of $930.50, being the amount of debt and costs recovered by the plaintiffs under a certain judgment dated the 11th day of July, 1901, in the Territorial Court of the Yukon Territory."

The summons came before DRAKE, J., on 30th November, 1901, when

Argument.

*J. H. Lawson, Jr.*, for defendants took the objection that the writ was not specially indorsed as it did not shew against whom the judgment was recovered.

*Griffin*, for plaintiff.

His Lordship sustained the objection and dismissed the summons with costs.

## BOGGS v. THE BENNETT LAKE AND KLONDIKE NAVIGATION COMPANY, LIMITED.

DRAKE, J. (In Chambers.)

1900.

Oct. 3.

FULL COURT At Vancouver.

1901.

March 8.

BOGGS v. BENNETT LAKE

*Discovery—Examination for—Assignment—Interest of assignor—Nominal plaintiff.*

In an action on an assignment the defence alleged that plaintiff was only a nominal plaintiff and no consideration had been given for the assignment, and plaintiff on his examination for discovery objected to answer questions relating to the consideration and to the interest of the assignors.

*Held*, by the Full Court, affirming DRAKE, J., that the questions should be answered.

APPEAL by plaintiff from an order made by DRAKE, J., on 3rd October, 1900, whereby it was ordered that the plaintiff should answer certain questions on his examination for discovery. The plaintiff by the indorsement on the writ claimed "the sum of $4,171.65, being the sum of $1,471.65 due from the defendants for the balance of the price of liquor belonging to Francis M. Rattenbury and A. J. C. Galletley, and sold by the defendants on their account and at their request; and being the sum of $2,700.00 due from the defendants for the price of 270 gallons of liquor belonging to the said Francis M. Rattenbury and A. J. C. Galletley which was delivered to the defendants to be sold for them, but was not accounted for by the defendants; which debt and claims have been absolutely assigned to the plaintiff by the said Francis M. Rattenbury and A. J. C. Galletley."

Statement.

The defendant Company denied the plaintiff's claim and the assignment and alleged the assignment was without consideration, and that in bringing the action the plaintiff was only the agent of Rattenbury and Galletley; it was further alleged that Rattenbury and Galletley were respectively directors of the defendant Company during the time the alleged debt was incurred, and they were accountable to the Company for all profits made on the said liquor, and in the alternative payment before assignment.

DRAKE, J. (In Chambers.)
1900.
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The plaintiff was examined for discovery and declined to answer the following questions:

(15.) Are you to own the proceeds of that suit if you win? (17.) Has Mr. Rattenbury or Mr. Galletley got any interest in the result of this suit? (18.) Now, was any money whatever paid for the transfer? (22.) You claim then you own this deed absolutely? (23.) When you and Mr. Rattenbury consulted together about this claim, tell me what took place. When you and Mr. Rattenbury talked about this claim, and about taking it over, what actually took place between you? (26.) Did you see the accounts with Mr. Rattenbury, or anybody else, connected with this case? (29.) Did you instruct the solicitor as to the bringing of this action? (32.) If you lose this suit do you expect to pay the costs? (34.) Are you any more than a formal plaintiff acting for and as agent for Rattenbury and Galletley, or one or both of them? (35.) Were you not told by Mr. Rattenbury or Mr. Galletley or by one of them that they did not want their names to appear in this suit? (36.) Had you any conversation on this subject with Mr. Rattenbury or Mr. Galletley?

Statement.

Defendant applied for an order compelling plaintiff to answer the said questions and on the summons coming on before DRAKE, J., His Lordship delivered the following judgment:

3rd October, 1900.

The plaintiff brings this action as assignee of Rattenbury and Galletley for balance of price of liquor sold by the defendants on their account, and for liquor delivered to defendants, but not accounted for.

The defendants deny the plaintiff's claim, and the assignment, and allege the assignment was without consideration and that in bringing the action the plaintiff was only the agent of Rattenbury and Galletley.

Judgment.

They further allege that Rattenbury and Galletley were respectively directors of the defendant Company during the time the alleged debt was incurred, and that they are accountable to defendants for all profits made on the said liquor, and in the alternative payment before assignment.

The plaintiff, on these pleadings, was examined for discovery

and declined to answer questions relating to the consideration he gave for the assignment, and as to any interest which Rattenbury and Galletley retained in the subject-matter of the assignment.

I think the plaintiff must answer questions 15, 17, 18, 22 and 23 as they are material to the issue raised as to the plaintiff's agency, and consideration for the assignment.

There is nothing in sub-section 17, section 16 of the Supreme Court Act, R.S.B.C. 1897, that makes the consideration given for an assignment of a chose in action a necessary part of the assignment, but an assignment is subject to all equities which existed, and which would have been entitled to priority if the Act had not been passed. If, therefore, an assignment is made for a nominal consideration, or for a valuable consideration for that matter, it is still subject to existing equities. The defendants allege an equity existing in them as regards this alleged claim, and they are entitled to full discovery.

Question 26 is objected to as being in part cross-examination on the affidavit of documents. I do not so consider it. The question relates to the plaintiff's claim as indorsed on his writ, which relates to two different accounts, $1,471.00, for goods sold by the defendants for Rattenbury and Galletley, and $2,700.00 for goods to be sold and not accounted for. It therefore becomes of importance to know whether any accounts were shewn to the plaintiff.

Question 24 is objected to and is covered by the affidavit of documents.

Judgment.

I sustain the objection to 29 as to instructions given to the plaintiff's solicitor.

Question 32 is answered by the previous question and answer.*

Questions 34, 35 and 36 should be answered as they refer to the issue raised by the defendants that the plaintiff was only acting as the agent of Rattenbury and Galletley. The plaintiff must attend and answer at his own costs, and the defendants are entitled to the costs of their application in any event.

The plaintiff appealed to the Full Court and the appeal was

* (31.) Did you become responsible for the payment of the costs of this suit? No.

DRAKE, J. (In Chambers.)
1900.
Oct. 3.

argued before McColl, C.J., Irving and Martin, JJ., at Vancouver, on 23rd November, 1900.

*Duff*, for appellant.

*Peters, Q.C.*, for respondent.

FULL COURT At Vancouver.
1901.
March 8.

On 8th March, 1901, the Court gave judgment affirming the judgment appealed from, and dismissed the appeal with costs.

*Appeal dismissed.*

BOGGS *v.* BENNETT LAKE

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McColl, C.J.
1901.
June 21.

## KING v. THE LAW SOCIETY OF BRITISH COLUMBIA.

*Barrister and solicitor—University graduate—Legal Professions Act, Sec. 37, Sub-Sec. 5.*

KING *v.* LAW SOCIETY

To come within the exception in sub-section 5 of section 37 of the Legal Professions Act, the applicant must have had his term of study or service shortened because he was a graduate.

ORDER *nisi* calling upon the Law Society to shew cause why a writ of *mandamus* should not be issued directed to the Law Society commanding it to enter the name of the plaintiff on its books as an applicant entitled to be called and admitted on his paying the prescribed fee and passing the necessary examination.

Statement.

The plaintiff matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by that University on 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on 2nd April, 1895, he was called and admitted there. Subsequent to his call and admission plaintiff was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and

admission is ordinarily four years, but in case of a college graduate it is three years.

McColl, C.J.
1901.
June 21.
King v. Law Society

In February, 1901, plaintiff applied to the Law Society of British Columbia to be entered on the books of the Society as an applicant for call and admission. The Benchers of the Law Society considered that as the ordinary term of service in Nova Scotia was four years and as the plaintiff was not a graduate at the time he commenced to study law he did not come within the exception in sub-section 5 of section 37 of the Act and would have to study and serve a sufficient time to complete the full term of five years.

The application was argued on 21st June, 1901, before McColl, C.J.

*Stuart Livingston,* for the applicant
*A. D. Taylor,* for the Law Society.

McColl, C.J.: I have no doubt that the exception in sub-section 5 of section 37 refers to the term sufficient in the other places or Provinces and makes a less term than five years the equivalent of the latter when such lesser term is attained because of the person being a graduate of a University.

Judgment.

The time when Mr. King graduated precludes the circumstance from having shortened the time in his case.

The application is refused. It is not a case for costs.

FULL COURT
At Vancouver.

1901.

## WAKE v. THE CANADIAN PACIFIC LUMBER COMPANY, LIMITED.

Nov. 7.

*Mechanic's lien—Woodman's lien—Action for wages—Pursuing both remedies —Estoppel.*

WAKE
*v.*
C. P. L. Co.

Where a workman has recovered part of his wages by seizure and sale in a joint action with other workmen against his employer under the Woodman's Lien for Wages Act, he is estopped from proceeding under section 27 of the Mechanics' Lien Act for the balance of his wages.

APPEAL by defendants from the judgment of BOLE, Co. J. The plaintiff, a logger, was employed by one Green, who had a contract with the defendants to cut logs on their land, and brought this action under the Mechanics' Lien Act for $74.44 for wages.

Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against Green under the Woodman's Lien for Wages Act for the gross amount of their wages. In that action Green and the Company were defendants, but the action was discontinued against the Company as they released all claim to the logs seized by the Sheriff. The following is the judgment of

Statement.

27th April, 1901.

BOLE, Co. J.: The action herein is brought to recover $74.44, being wages due him by one C. C. Green, who had entered into a contract with the defendant Company to cut and supply therewith logs off land the property of the Company.

Section 26 of the Mechanics' Lien Act provides that "every person making or entering into any contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining timber or logs, by which it is requisite and necessary to engage and employ workmen and labourers in the obtaining, supplying and furnishing such logs or timber as aforesaid, shall, before making any payment . . . . under such contract, engagement or agreement, of any sum of money, or by kind, require such person to whom payment is to be made to

Judgment of BOLE, CO. J.

produce and furnish a pay-roll or sheet of the wages and of the amount due and owing and of the payment thereof, which pay-roll may be in the form of Schedule C annexed to this Act, or if not paid, the amount of wages or pay due and owing to all the workmen or labourers employed or engaged on or under such contract, engagement or agreement at the time said logs or timber is delivered or taken in charge for, or by, or on behalf of, the person so making such payment and receiving the timber or logs."

Section 27 provides any person making any such payment and not requiring production of pay roll or sheet as mentioned in section 26 shall be liable at suit of workmen for amount of pay or wages due him under such contract, engagement or agreement.

Judgment of BOLE, CO. J.

The evidence to my mind shewed that all the conditions contemplated by the statute had been fulfilled, further it appears to me that in this case at least the fact that the defendants owned the land and the timber with respect to which the logging contract was entered into is under the circumstances no bar to the plaintiff's statutory right to recover. Judgment will therefore be entered for plaintiff with costs.

The defendants appealed to the Full Court and the appeal was argued at Vancouver on 8th July, 1901, before McColl, C.J., Walkem and Martin, JJ.

*Harris*, for appellant: In plaintiff's action against Green some of the logs were sold under execution and part of the judgment realized—in that action his individual claim was merged in the joint judgment.

Argument.

*Bowser, K.C.*, for respondent: Under the Woodman's Lien for Wages Act we had to prove our claim against Green before we could enforce our lien, and the only way in which we could sell defendants' (not Green's) logs was by means of the former action. On the sale we only realized eight cents on the dollar, and we now resort to our statutory right, an action against the owners.

On 7th November, the judgment of the Court, that the appeal was allowed with costs, was pronounced by the Chief Justice. The following judgment was given by

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MARTIN, J.: So far as findings of fact are concerned I can see no reason for interfering with the judgment of the learned trial Judge.

But it is objected as a matter of law, that the plaintiff having before the commencement of the action obtained with sixteen other co-plaintiffs a joint judgment against their employer, Green, under sections 7, 9 and 32 of the Woodman's Lien for Wages Act, for the gross amount of their wages, $990.79 and costs, cannot now individually obtain a second judgment against the present defendant for a portion of the gross amount for which judgment has already been recovered.

The alleged liability of the defendant is not a debt, but a statutory penalty under section 27 of the Mechanics' Lien Act—*Dillon* v. *Sinclair* (1900), 7 B.C. 328. It would be surprising if two judgments could be recovered by the same plaintiff against two wholly distinct persons for the same debt. And it is much more surprising if two separate judgments for the same claim could be recovered against two strangers (for that is really what they are to each other in a legal sense), one as and for a debt (wages), and the other as and for a penalty. That would be novel enough, but here the situation is further complicated by the fact that the individual who now sues has already merged his claim with that of sixteen others, and recovered the said joint judgment and realized a small proportion thereof.

Judgment of MARTIN, J.

It is urged on behalf of the plaintiff that he had to take the prior proceedings and merge his claim with the joint judgment in order to obtain the benefits of the workmen's lien under said section 7, and that he is simply pursuing two distinct statutory remedies. But there must be a clear and positive enactment before two distinct judgments for the same claim can be recovered by distinct plaintiffs against distinct defendants.

Further, in view of said joint judgment how can it be said, as required by section 27, what is "the amount of pay so due and owing" by Green to the plaintiff?

However unfortunate it is that the labourers have lost or will lose most of their wages, it would be still more unfortunate if, when they pursue a statutory remedy which imposes a heavy penalty upon persons who do not even employ them, the statute

should be strained to add to the existing burden of responsibility already borne by such third persons.

The appeal should be allowed with costs.

*Appeal allowed.*

FULL COURT At Vancouver.

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## *IN RE* MUNICIPAL CLAUSES ACT AND J. O. DUNSMUIR.

WALKEM, J.

1898.

Aug. 6.

RE MUNICIPAL CLAUSES ACT AND J. O. DUNSMUIR

*Municipal law—Land and improvements—Assessment of—Standard of valuation—R.S.B.C. 1897, Cap. 144, Sec. 113.*

The measure of value for purposes of taxation prescribed by section 113 of the Municipal Clauses Act is the actual cash selling value and not the cost.

APPEAL by Joan Olive Dunsmuir from a decision of the Court of Revision as to the assessment of certain lots and improvements in the City of Victoria, owned by her. The appeal was argued on 4th August, 1898, before WALKEM, J.

*Bradburn*, for appellant.

*Mason*, for the City, *contra*.

6th August, 1898.

WALKEM, J.: This is an appeal from the decision of the Court of Revision with respect to the assessment of the above lots, and also the improvements on them. Two witnesses have been examined—Mr. Ridgway Wilson, architect, on behalf of the appellant, Mrs. Dunsmuir, and Mr. Northcott, the city assessor, on behalf of the Corporation of Victoria. I see no reason for interfering with the assessment upon the lots, as it has been made in accordance with the provisions of section 113 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144. That section reads as follows:

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" For the purposes of taxation, land and improvements within

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a municipality shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor; but land and improvements shall be assessed separately.

"This section shall not apply to real property held by any railway company."

The standard of valuation is thus to be the actual cash value as "appraised in payment of a just debt from a solvent debtor." Mr. Northcott stated that he found it impossible to apply this rule or standard to Mrs. Dunsmuir's residence, as it was a very costly building which no one here, as far as he thought, would, on that account, accept in payment of a debt. From information which he had obtained, he found that the structure had cost at least $185,000.00, and in view of this fact he had considered that a valuation for assessment purposes at $83,000.00 would be a fair one. But a valuation on the basis of the cost of a structure is not permitted. Mr. Wilson's evidence is to the effect that in his belief the actual cash valuation of the appellant's improvements as they would be "appraised in payment of a just debt from a solvent debtor"—for I repeated these words to him from the statute—would be $45,000.00. In these improvements he includes the dwelling-house, stables, lodge, and front and other walls on the grounds. I must, therefore, direct the assessment of $83,000.00 to be reduced to the sum of $45,000.00 named by Mr. Wilson. I make no order as to costs.

Judgment.

*Judgment accordingly.*

## VICTORIA v. BOWES.

DRAKE, J.

1901.

July 12.

VICTORIA v. BOWES

*Taxes—Land and improvements belonging to Dominion Government—Occupant of—Assessment—Municipal Clauses Act, Sec. 168, Sub-Sec. 4 (a).*

Defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion Government, and was assessed under section 168, sub-section 4 (*a.*) of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1,605 and 1,607, block 1; measurement 23 x 66; Government St.; land $12,650.00; improvements $920.00; total $13,570.00."

*Held*, by DRAKE, J., dismissing an action to recover taxes (1.) That defendant was an occupant of part of the improvements only, and not of the land.

(2.) The assessment was invalid because the lands and improvements were insufficiently described.

(3.) The Act provides no procedure for such an assessment.

(4.) Where an assessment is illegal 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.

ACTION by the Corporation of the City of Victoria to recover $275.30 for taxes imposed 30th August, 1900, in respect of parts of lots 1,605 and 1,607, block 1, in the City of Victoria. The defendant occupied as a drug store a part of the ground floor of the old post office building, which belonged to the Dominion Government. By the statement of claim it was alleged that by the assessment roll for 1900, the defendant was assessed in respect of the said lots, the value of the land being $12,650.00 and the improvements $920.00, the defendant being a tenant of the Dominion of Canada in right of the Crown. The plaintiffs put in evidence the assessment roll, notice of the tax being assessed and proof of non-payment of the amount assessed and rested their case there. The assessment roll described the property thus: "Parts of lots 1,605 and 1,607, block 1; measurement 23 x 66; Government St.; land $12,650.00; improvements $920.00; total $13,570.00;" and the assessment notice notified defendant that the assessment was under the provisions of section 168, sub-section 4 (*a.*) of the Municipal Clauses Act, and that it was not

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intended to seek to make the property itself liable for the taxes.

At the trial on 3rd July, 1901, before DRAKE, J., the defendant moved for judgment on the pleadings on the grounds that no cause of action was disclosed; that he was not liable to be assessed for land and improvements belonging to the Crown; that if so liable, the assessment roll did not follow the requirements of the Municipal Clauses Act, as it did not define the property assessed with sufficient particularity to enable the defendant to know in respect of what land or improvements the tax was claimed.

*Bradburn*, for plaintiffs.

*Alexis Martin* (*Fell*, with him), for defendant.

DRAKE, J. [after setting out the facts proceeded:] The Crown whether represented by the Provincial Government or by the Dominion Government is not liable to taxation under section 125 of the B. N. A. Act.

The taxing powers of the municipality are stated in section 113 to be over land and improvements which are to be assessed separately. By section 114 the assessor is to prepare a list of persons having taxable property in the municipality, shewing the extent and value or amount thereof; and the persons to be placed on the assessment roll are the owners and no one else. The Act does not provide for tenants or occupants being placed on the list at all; and by section 117 notice is to be given to each person taxable shewing the land and improvements assessed. The value at which each lot or sub-division of the person's land, real property or improvements has been estimated and assessed; after revision of the assessment roll, a collector's roll is to be prepared also shewing the name of the person assessed, the heading rate or tax under which the assessment is made and tax chargeable, and the land or improvements the person is assessed and taxed for, the value at which each piece, lot or sub-division of the person's land or improvements is assessed, and the rate of taxation and the amount of tax due on each. Under these sections the person to be assessed and placed on the assessment roll is the owner of the land or improvements. The plaintiffs rely on section 168, sub-section 4, which exempts certain property,

Judgment.

amongst others, all property vested in or held by His Majesty, or vested in any public body, or body corporate, officer, or person, in trust for His Majesty, and also all property vested in His Majesty for any tribe of Indians, and sub-section (*a*.)

"Where any property mentioned in the preceding clause is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, and the property itself shall not be liable."

The defendant here is the tenant or occupier of a room or part of the ground floor of a building belonging to the Crown. He is not an occupier of the land on which the building is erected. The words "the occupant shall be assessed in respect thereof" in my opinion are limited to the property he actually occupies, which is a portion of the improvements erected on the land. The improvements have to be assessed separately, and are so treated throughout the Act. On reference to the Interpretation clause, land does not include improvements. Improvements mean buildings, machinery and fixtures annexed to a building. Real property includes both land and improvements. Such being the case the occupant of a room or part of a building is an occupant of part of the improvement only, and not of the land. Therefore the assessment, which is as follows: "Parts of lots 1,605 and 1,607, block 1; measurement 23x66; Government St.; land $12,605.00; improvements $920.00; total $13,570.00," is wrong and invalid.

Judgment.

Now with regard to the question whether the tax on improvements has been validly imposed so as to bind the occupant. The plaintiffs as before stated rely on section 168, sub-section 4 and (*a*.) What is the occupant to be assessed for? Is he to be assessed as owner? If so, he is in fact assessed for Crown lands which are exempt. If he is to be assessed as occupier there are no provisions in the Act to meet the case. This section is taken from Cap. 143 of the Revised Statutes of Ontario, where a different mode of assessment and greatly extended powers of taxation are in force. All property, real and personal, is liable to taxation. A tenant as well as a freeholder appears on the roll, and a tenant may deduct from his rent all taxes paid by him: see *Dove* v. *Dove* (1868), 18 U.C.C.P. 424. Under the Act I have to consider, the only tax imposed is on

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land and improvements. Although Crown land cannot be sold for taxes, yet if the tenant is made liable for the land tax this is in fact making the Crown pay taxes as it has to be considered in the rent. There is no provision in the Act to insert an occupant on the assessment roll in respect of the land tax except this sub-section 4 (*a*.) In the case of *The Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352, where land was leased by the Crown, the municipality sued the owners of the land for taxes for the period the land was in occupation of the Crown, and failed. That is the converse of this case, if the owners of the land were not liable while the property was used by the Crown, the tenants of the Crown cannot be liable as there can be no tax imposed on Crown property, and unless the property of the Crown is inserted in the roll there is no proper assessment. The case of the *Mersey Docks Board* v. *Cameron* (1864), 11 H.L. Cas. 443 does not apply, it lays down that tenants of Crown property paying rent are rateable like other occupiers. They are not rated on the value of the land held by them, but on the value of their interest, which is based on their rental. Here the occupier is not taxed on his interest, but in respect of the entire value of the land and improvements as if he were the owner.

The Provincial Legislature has no power to deal with the rights of the Crown represented by the Dominion Government; it may possibly affect Crown rights as represented by the Provincial Government under certain circumstances, but the latter question does not arise here.

Judgment.

Another question was strongly argued, and that was that under any circumstances the property was so vaguely described that it was not possible to say what particular piece of land was in fact intended to be assessed. The property in question consists of three lots on which a two-story building, formerly used as a post office is erected. The defendant is the occupier of part of the ground floor, and three others are occupying other portions of the ground floor; and the assessment roll thus describes the property: "Parts of lots 1,605 and 1,607, block 1; measurement 23x66; Government St." Sections 117 and 141 require the notice of assessment to contain the value at which each piece or lot or sub-division or improvements has been estimated and

assessed, and the rate of taxation and the amount of tax due on each. Here we find the lots are assessed as part of two lots, measurement 23 x 66, how much of one and how much of the other is not stated—no description of the improvements assessed. This does not comply with the statute.

The roll further contains this notice: "That the above property being within the limits of the municipality you are assessed in respect thereof as lessee from the Crown, such land and improvements being occupied by you otherwise than in an official capacity. And further take notice that you are assessed under clause (*a.*) to sub-section 4 of section 168 of the Municipal Clauses Act, and that it is not intended to make the property itself liable for payment of the taxes hereby assessed."

It was contended that as the property could not be sold it was not of importance that the description did not strictly comply with the Act. I do not agree. The person assessed is by the Act entitled to know how much of each lot he is assessed for, and what particular part of the improvements he is charged with, because he has a right of appeal, and how can this be exercised if he cannot designate the piece of property, the assessment whereof he objects to? The Act does not provide for assessment of houses in a street known by a number or other definition, but compels the assessor to deal with lots or parts of lots as originally laid out. This might be the subject of amendment, and would greatly facilitate the duties of assessor and collector. There is, however, another point which was urged by the plaintiffs' counsel: that the defendant not having appealed was bound by the revised roll. This point has received consideration in several cases, and the result is that if the assessment is legal the remedy is by appeal, if illegal, in such case the party is entitled to resist without resorting to the remedy of appeal. The appeal only deals with reducing the assessment and altering the roll where it shews the party assessed is not then the legal owner: *Scragg* v. *The City of London* (1867), 26 U.C.Q.B. 263 and *Coquitlam* v. *Hoy* (1899), 6 B.C. 546.

Judgment.

On consideration of the whole facts, I give judgment for the defendant with costs.

*Judgment for defendant.*

IRVING, J.

1901.

Oct. 17.

ROYAL BANK OF CANADA v. HARRIS.

*Costs—When action might have been brought in County Court.*

*Discovery—Examination of officer of corporation—Cross-examination on depositions—Reading depositions at trial.*

ROYAL BANK OF CANADA v. HARRIS

The costs of an action in the Supreme Court, which might have been brought in the County Court, are not necessarily taxable on the County Court scale.

On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:

*Held*, that the deposition was admissible at the trial.

TRIAL before IRVING, J., at Nelson, on 17th October, 1901, of an action on two promissory notes for $500.00 and $630.00 respectively, made by the defendant in favour of one Clark, and hypothecated by Clark with the plaintiffs as collateral security for advances made to Clark. The balance remaining unpaid at the commencement of this action, of the Bank's loan to Clark amounted to $474.00, but the Bank sued for the face value of the notes. It appeared that the notes were given originally in payment of a gambling debt, and the defendant alleged that the Bank took them with notice of that fact.

Statement.

*Galliher* and *E. A. Crease*, for plaintiffs, asked for judgment for $474.00, with interest and protest fees.

*S. S. Taylor, K.C.*, for defendant: The plaintiff took these notes only as collateral security, and they cannot therefore be said to be holders in due course, so as to give them a better title than Clark would have. Then the facts shew that the plaintiffs took the notes with knowledge that they were given for a gambling debt. In any event, being given for a gambling debt, the notes are absolutely void, and no title can pass: *Re Summerfeldt* v. *Worts* (1886), 12 Ont. 48; Maclaren on Bills, 225.

Argument.

IRVING, J.: The notes were taken by the Bank in good faith, without notice and for value. The plaintiffs are holders in due course, and are therefore entitled to recover to the extent of their interest in the notes.

*Taylor:* The plaintiffs sue as holders for the full value of the notes. They now appear to have only a limited interest in them, amounting to $474.00; they should only therefore be allowed County Court costs.

IRVING, J.: The rule as to allowing County Court costs only, in cases where the action might have been brought in the County Court, is not of universal application. I think this was a proper case to have brought in the Supreme Court. Judgment for plaintiffs for $486.70 (being principal, interest and protest fees) and Supreme Court costs.

Judgment.

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During the trial counsel for defendant called the plaintiffs' manager as a witness, and upon the latter making a statement in the witness box at variance with what had been stated by him on his examination for discovery, he proposed to cross-examine on the conflicting statements.

Counsel for the plaintiffs objected that the examination for discovery could not be used at the trial for any purpose, citing *Leitch* v. *Grand Trunk Railway Co.* (1890), 13 P.R. 369, as the plaintiffs had taken no part in the examination.

His Lordship allowed the cross-examination.

Before closing the case for the defendant, *Taylor* tendered the depositions of the plaintiffs' manager taken on his examination for discovery as part of the defendant's case.

*Galliher,* objected to their admission.

The objection was overruled and the depositions were received.

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IRVING, J.

1901.

Oct. 24.

## LE ROI MINING COMPANY, LIMITED v. ROSSLAND MINERS UNION, No. 38, WESTERN FEDERATION OF MINERS *ET AL.*

LE ROI v. ROSSLAND MINERS UNION

*Trade Union—Watching and besetting—Conspiracy—Section 523 of the Cr. Code—Interlocutory injunction.*

Injunction granted in the terms of the order made by Farwell, J., in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426.

THIS was a motion for injunction to restrain the defendants and their members, servants, agents and others acting by their authority from watching or besetting the Canadian Pacific Railway Company's station at Rossland, and the stations, tracks and crossings of the said railway in the Province of British Columbia; and the Red Mountain Railway Company's station at Rossland, and all the stations, tracks and crossings of the said railway, or the works of the plaintiffs or any of them, or the approaches thereto, or the places of residence or any place where they may happen to be, of any workmen employed by or proposing to work for the plaintiffs, for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and from procuring any persons who have or may enter into contracts with the plaintiffs to commit a breach of such contracts.

Statement.

The plaintiffs were the owners of the Le Roi and Black Bear mineral claims and on and before the 11th day of July, 1901, were mining, developing and operating what is commonly known as the Le Roi mine.

The defendants, the Rossland Miners Union, No. 38, Western Federation of Miners and the Western Federation of Miners, Rossland branch, are each an organized body of workmen having headquarters at the City of Rossland. The other defendants, the Carpenters and Joiners Union, No. 1, are a fraternal and benevolent society, incorporated under the provisions of the Benevolent Societies Act of British Columbia, and the Black-

smiths and Helpers Union of Rossland, is an organized body of workmen having its headquarters at the City of Rossland and affiliated with the Rossland Miners Union, No. 38. The other defendants were executive officers and members of the said respective unions.

The plaintiffs in their statement of claim alleged that on or about the 11th of July, 1901, the defendants, the unions, through their executive officers, with the intention of injuring the plaintiffs in their business and thereby seeking to compel the plaintiffs to accept certain terms demanded by the executive officers of the said unions and to conduct their business in accordance with the requirements of the unions, wrongfully and without lawful excuse and against the constitution and by-laws of the said union, combined and conspired together with their co-defendants and other members of the said unions to call out all the men working for and employed by the plaintiffs in and about the Le Roi mine irrespectively of the said men being members of the said unions or otherwise; and in furtherance and execution of the said combination and conspiracy the defendants wrongfully and without legal authority declared a strike against the Le Roi mine and thereby persuaded or otherwise intimidated and induced all the workmen employed by the plaintiffs in and about the Le Roi mine to quit work, which the said workmen did, and by reason whereof the plaintiffs were compelled to close down their said mine and cease their business operations and thereby suffered great damage; that previous to the said 11th July, 1901, and the declaration of the strike, the plaintiffs had entered into various contracts with certain persons for the breaking down and mining of ore and for sinking and drifting and the performance of other underground work in the said Le Roi mine, and for the performance of other work on the plaintiffs' said property, and the persons with whom the said contracts had been made were willing and anxious to carry out the same but the defendants having ascertained these facts thereupon with the intention of injuring the plaintiffs in their business and thereby compelling the plaintiffs to accept the terms of the union, etc., wrongfully and without lawful excuse combined or conspired together for the purpose of persuading or otherwise intimidating such

Statement.

IRVING, J.

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LE ROI v. ROSSLAND MINERS UNION

workmen to throw up their contracts and to refuse to carry out the same, and did so induce the said workmen to throw up their contracts and refuse to carry out the same whereby the plaintiffs suffered damage.

The plaintiffs further alleged in their statement of claim that the defendants in furtherance and execution of the said combination and conspiracy, wrongfully and without legal authority combined and conspired together to watch and beset, or cause to be watched and beset the Le Roi mine and all approaches thereto and roads leading thereto and therefrom, and other places where workmen who were proceeding to their work or were working in and at the said Le Roi mine might happen to be, for the purpose of persuading or otherwise intimidating and inducing such workmen not to work, or to leave off working for the plaintiffs and going out on strike; that after the plaintiffs had been compelled to close down their mine for the reasons aforesaid the plaintiffs made every lawful effort to procure men for the purpose of carrying on and completing said contracts and other work about the said mine, and would have succeeded in procuring the services of men who expressed themselves as willing and anxious to enter into contracts with the plaintiffs, etc., but the defendants having ascertained these facts, thereupon with the intention of injuring the plaintiffs in their business, etc., wrongfully and without lawful excuse, combined or conspired to watch and beset, or cause to be watched and beset the said Le Roi mine and premises of the plaintiffs and all approaches thereto, etc., for the purpose of persuading or otherwise intimidating and inducing such workmen not to work, or to leave off working for the plaintiffs; that the defendants having ascertained that the plaintiffs were getting workmen from other places to Rossland to fill the places vacated by the men on strike, thereupon, with the intention of injuring the plaintiffs in their business, etc., wrongfully and without lawful excuse, combined or conspired together to watch and beset, or cause to be watched and beset, railway stations and other places where workmen who arrived in Rossland, as aforesaid, or other non-union men employed or about to be employed by the plaintiffs might happen to be, and the approaches thereto respectively for the purpose of persuad-

Statement.

ing, intimidating and inducing such workmen not to work or to leave off working for the plaintiffs; that the defendants in furtherance and execution of said combination and conspiracy, wrongfully and without legal authority did, or caused to be done, several overt acts for the purpose of persuading or otherwise inducing workmen coming from other places to Rossland, or other non-union workmen, working or intending to work for the plaintiffs, and did in fact persuade many of such workmen to leave Rossland or refuse or cease to work for the plaintiffs.

*Daly, K.C.*, for the plaintiffs, contended that the affidavits read established that there had been a watching or besetting by the defendants in this case within section 523 of the Criminal Code, which section is to the same effect as section 7 of the Imperial Conspiracy, and Protection of Property Act, 1875, and that the injunction asked for was upon facts almost similar to those upon which an injunction had been granted by Stirling, J., in the case of *Charnock* v. *Court* (1899), 2 Ch. 35 and *Walters* v. *Green*, *idem*, 696. He also referred to the following cases: *J. Lyons & Sons* v. *Wilkins* (1896), 1 Ch. 811; (1899), 1 Ch. 255; *Lumley* v. *Gye* (1853), 2 El. & Bl. 216; *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; *Temperton* v. *Russell* (1893), 1 Q.B. 715; *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892), A.C. 25; *Allen* v. *Flood* (1898), A.C. 1; *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426 and *Quinn* v. *Leathem* (1901), A.C. 495. Argument.

*S. S. Taylor, K.C., contra*, relied upon *Allen* v. *Flood* (1898), A.C. 1.

His Lordship granted the injunction in the terms of the order made by Farwell, J., in the *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426, as follows:

"It is ordered that the defendants other than Angus Macdonald, E. C. Rose, James Twaddle, Roderick Fraser and William O'Brien, their members, servants, agents and others acting by their authority, be restrained, until the trial of this action or until further order, from watching or besetting, or causing to be watched or beset, the Canadian Pacific Railway Company's station at Rossland, and the stations, tracks and crossings of the

IRVING, J.

1901.

Oct. 24.

LE ROI v. ROSSLAND MINERS UNION

said railway in the Province of British Columbia, and the Red Mountain Railway Company's station at Rossland, and all the stations, tracks and crossings of the said railway, or the works of the plaintiffs or any of them, or the approaches thereto, or the places of residence or any place where they may happen to be, of any workmen employed by or proposing to work for the plaintiffs, for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and from procuring any persons who have or may enter into contracts with the plaintiffs to commit a breach of such contracts.

"Costs of this application reserved for the trial Judge."

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McCOLL, C.J.

1901.

Feb. 22.

WAR EAGLE v. B. C. SOUTHERN RAILWAY CO.

## *IN RE* WATER CLAUSES CONSOLIDATION ACT, 1897.

## WAR EAGLE CONSOLIDATED MINING AND DEVELOPMENT CO., LTD. *ET AL* v. B. C. SOUTHERN RAILWAY CO. *ET AL.*

*Water record—Applications for (a.) by mining companies, to Gold Commissioner, (b.) by industrial company to Land Commissioner—Notice of later application to prior applicant—Water notice—Posting "in office"—What is—Evidence on water applications (a.) when contested, (b.) when uncontested—Water Clauses Consolidation Act, 1897.*

Where an application for a record of water for mining purposes is pending before a Gold Commissioner, an application for a record of the same water for domestic, mechanical and industrial purposes should not be adjudicated upon by an Assistant Commissioner of Lands and Works without express notice to the applicants before the Gold Commissioner.

A water notice posted on a board usually used for such notices, in a hall leading to the rooms occupied by the Commissioner and his staff, is posted in the office of the Commissioner within the meaning of section 9 of the Water Clauses Consolidation Act.

Where an application is not contested the Commissioner need not take evidence, but where it is contested he should have the evidence taken in shorthand.

PETITION by way of appeal from a decision of John A. Turner, Assistant Commissioner of Lands and Works at Nelson,

whereby he granted on 12th November, 1900, to the Railway Company 400 miner's inches of water out of Murphy Creek.

On 6th August, 1900, the War Eagle and Centre Star Companies obtained from the Gold Commissioner at Rossland written permission to apply for record of water from Murphy Creek and Rock Creek, and they thereupon made application for the same by posting the requisite notices of their application returnable before the said Gold Commissioner, on 10th September, 1900. Before the return of the application the petitioners learned that the Corporation of the City of Rossland (holders of a prior record) and the British America Corporation were interested therein, and at their request the applications were adjourned until 13th September, when a further adjournment took place until 10th October. On 26th September, the solicitors for the Railway Company, the City of Rossland, the War Eagle and Centre Star Companies and others held a conference, when the subject of pending applications for water records was discussed and all parties expressed the view that some equitable arrangement should be come to whereby each party interested could secure its reasonable requirements. For statement of proceedings at this meeting see *post* p. 377. All parties met again on 10th October, before the Gold Commissioner, when the petitioners' applications were adjourned until the 16th of November. On 8th October, the Railway Company, obtained from the Assistant Commissioner of Lands and Works at Nelson, leave to apply for a record of 400 inches of water out of Murphy Creek, and thereupon posted the usual notices. No notice was served on or given to the War Eagle or Centre Star Companies, and the notice posted "in the office" of the Assistant Commissioner at Nelson was posted on a notice board in the hall leading to the room or rooms occupied by him and his staff. On 12th November, pursuant to the notices, the Railway Company applied to the Assistant Commissioner, and the grant appealed against was made. The record stated that the water was to be used for domestic, mechanical and industrial purposes, in connection with the smelter and other plant and appliances belonging to the Company at the Town of Trail, and for purposes incidental thereto. At the same time the Railway Company applied for and obtained

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records of 400 inches of water out of Stoney Creek and Trail Creek.

Paragraphs 16 and 17 of the appellants' petition were as follows:

"(16.) Your petitioners allege, and the fact is, that on the hearing of the said application at Nelson no evidence was furnished by or on behalf of the respondent Railway Company; (1.) As to the volume of unrecorded water in said Murphy Creek available for diversion; (2.) As to the amount of water reasonably required by the respondent Company for the purposes of their applications; (3.) Or that your petitioners, who were to the knowledge of the respondent Company and Corporation parties interested in the said application, had notice of the terms of such application or of the date thereof, or of the time on which it was made.

"(17.) The points of law relied upon by the appellants were as follows: (1.) The furnishing of evidence upon each of the matters mentioned in paragraph No. 16 hereof was required by the Water Clauses Consolidation Act, 1897, Secs. 13, 14 and 18, and was as regards each matter a condition precedent to be observed by the respondents before the said record could lawfully be granted; (2.) That by reason of the absence of such evidence the respondent Commissioner had no jurisdiction to grant the record; (3.) That it was the duty of the respondent Company to adduce such evidence, and having failed to do so, the record ought to be cancelled; (4.) That the proceedings before the respondent Commissioner failed to shew the amount of water required by the respondent Company, and yet they have obtained grants of an enormous amount of water comprising all, and more than all, the available water in or near Rossland, and the said record should be, for this reason also, cancelled; (5.) The conduct of the respondent Railway Company and the respondent Corporation in applying for and consenting to the said record without notice to your petitioners was, under the circumstances, a gross breach of faith, and for this reason also, the record, upon equitable grounds, should be cancelled."

Statement.

The appeal was argued at Rossland, on 22nd February, 1901, before McCOLL, C.J.

*Galt*, for the War Eagle and Centre Star Companies (appellants.)
*Davis, K.C.*, and *MacNeill, K.C.*, for the Railway Company (respondents.)
*Abbott*, for the City of Rossland (respondents.)
*Daly, K.C.*, for the Le Roi Company.*

At the conclusion of the argument His Lordship delivered judgment orally as follows:

McColl, C.J.: As I have no doubt what I ought to do in the matter of this appeal, and as it is of the utmost importance as I understand it, to the parties, that a final determination of their rights should be had, as soon as possible, I shall give my judgment now. On the hearing of this appeal, it was formally admitted that the appellants have the necessary status to bring the appeal, and that their application for a grant or record, was pending at Rossland from the 6th day of August last until the granting of the record complained of and now appealed against. And further, that Mr. *Galt's* statement as to the facts taken down by the stenographer, with reference to this matter, is correct. For the appellants, Mr. *Galt* forcibly urged that the notice posted up on the notice board in the hall leading to the room, or one of

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Note:—The statement made by Mr. *Galt* was as follows:

"In reference to paragraph No. 9 of the petition, I may mention that the conference took place in accordance with the terms of a letter received by me from Mr. *J. L. G. Abbott* and dated the 24th day of September, 1901. This letter was written on behalf of the City of Rossland. [Mr. *Galt* here read the letter referred to.] Now, what took place at that meeting, was this, and my learned friend Mr. *Abbott* will correct me if I make any misstatement in reference to it. I myself had been out with the party who posted the notices for the War Eagle and Centre Star Companies, and assisted in posting two of the notices fifteen miles from here. I was satisfied from looking over the streams themselves that there was ample water for everyone. I made that statement to the gentlemen present at that meeting, and thought that if we could only arrive at some equitable arrangement instead of fighting over the water, it would be better for all parties concerned and for the City of Rossland, that there was nothing for us to have a fight over if we could arrive at an understanding. Of course that statement can be verified. It was the opinion of every one of us who were there then at that meeting, and the only reason that we did not adopt some line

* Let in as subsequent applicants by order of Martin, J.—see *ante* p. 17.

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the rooms, occupied by the Assistant Commissioner and his staff, was not posted in accordance with the requirement of the Act, not having been posted up in the room or one of the rooms. The word "office" as used in the Act in its ordinary sense, simply means a place where the public business devolving upon the Assistant Commissioner, is transacted. It cannot therefore be confined to any one particular room or rooms in which the Assistant Commissioner himself or his staff may be found during the office hours of the day. Assuming that he himself had been accustomed to use a portion of the hall for the reception of the public at stated times for the transaction of some kind of business, there can be no doubt that such use would make that portion of the hallway, a part of his "office" within the meaning of the Act. It appears to me perfectly clear that all portions of the building publicly and definitely set apart and used by the public, for the transaction of business would necessarily form part of the "office" within the meaning of the Act. Now, what has happened here? The board in question has always been publicly recognized and used for the purpose of posting up the notices in question and is the only place, and the Assistant Commissioner himself would necessarily use such portion of the

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of action by which we could equitably arrange for a distribution of the water was that Mr. *Daly*, who represented the Le Roi Company, was unable to be present and therefore it was suggested that the meeting should be adjourned over until Mr. *Daly* was able to come, and this was agreed to.

"Mr. *Davis:* Who represented the British Columbia Southern Railway Company? Mr. *Galt:* Mr. J. A. Macdonald.

"Mr. *Davis:* Do you state that he made such an agreement as that? Mr. *Galt:* I do not state that there was any absolute agreement, it seemed to be satisfactory to everybody.

"Mr. *Davis:* Did Mr. Macdonald do anything binding the British Columbia Southern Company? Mr. *Galt:* Only to appear in the same friendly attitude that all parties assumed on that occasion. Then in two or three weeks someone undertook to go over to Nelson and make an application there, without notifying any of us. We did not take any further steps because we had the prior application and we thought the matter would stand simply as it was.

"Mr. *Davis:* Did the British Columbia Southern apply for any adjournment? Mr. *Galt:* Not that I am sure of."

building, and use this board for the purpose of perusing these notices when it would be necessary to do so, and this being the case, it seems to me perfectly clear that I cannot give effect to this objection.

Mr. *Galt* further urges that he should have been specifically notified of the time and place when the proceedings before the Commissioner at Nelson were to be carried on. This is a question of some difficulty, but in my opinion, the Act does make this necessary. Section 13 of the Act applies to every application which is to be made either to the Assistant Commissioner of Lands and Works, or to the Gold Commissioner, and it says that upon the application for the record, the Commissioner or other person, must regard existing rights and records of land and mine owners and also as to "pending applications." Now, Mr. *Davis* very forcibly contended that section 18, sub-section 2 which does in terms, provide for notice to parties in interest, cannot possibly have reference to the record in question, the proceedings to obtain which were taken under sections 13 and 44 of the Act. I do not at present think that this is a proper construction of the Act, but at all events it seems to me that if the Commissioner is to have regard to the persons mentioned specifically in section 13, this means that they are to be entitled to appear before him on the application, and that they are singled out from the general public in regard to whom, the posting up of the notice is sufficient, and that they must in some way be afforded the opportunity of urging any rights they have or may think they have, before the Commissioner, without which it is unintelligible to me, how he could possibly give proper regard to them. This being so, if Mr. *Davis'* contention is not correct, and I cannot say that I have a settled opinion either way, but without more consideration, I think that this affords no reason for the Commissioner deciding the matter behind their backs. The difficulty has arisen of course from the circumstance that these two Commissioners have conflicting power and that there is no provision made in the Act for them to keep each other informed as to applications pending before them. There is no doubt in this case that the applicants knew of the pending application of the appellants when they continued the proceedings for their record, and I

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think it is a fair inference from the evidence that the Commissioner at Nelson was ignorant of such application, but whether so or not it does not materially affect the matter as I view it.

I think I ought to refer the matter of the records back again to the Commissioner at Nelson for the purpose of enabling him to consider the alleged rights and interests of all other persons, parties now before the Court on the present appeal, upon due notice to them of the time and place, when and where the proceedings will be carried on, with power to him to alter or vary the orders or records he has made in any way necessary to meet the equities as they may appear upon a fresh consideration of the case, as justice may require it.

With reference to the point urged by Mr. *Galt* that the Commissioner should have taken evidence, I do not think that this is necessary where the application is not contested, as for all that appears the Commissioner, by personal examination of the place or other means, may have satisfied himself as to the propriety of granting the record applied for.

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I may add that I think in a contested matter the Commissioner ought to have the evidence ever before him, taken in shorthand, and that any person interested is entitled to have a copy of the evidence furnished to him upon payment of the reasonable charges therefor, and also to have a written statement of the reasons, if any, for the decision of the Gold Commissioner, or Commissioner, for otherwise it is entirely impracticable when the matter comes before the Court of Appeal, to deal intelligently with it.

The further hearing of any matter arising out of or being incidental to this application, including costs of all parties who are or might be in the same position, possibly contingently depending upon the result of a fresh consideration of this matter by the Gold Commissioner, or Commissioner, will stand over to be brought before any Judge who is competent to deal with it, as soon as possible.

*Judgment accordingly.*

## *IN RE* WATER CLAUSES CONSOLIDATION ACT, 1897.

## WAR EAGLE CONSOLIDATED MINING AND DEVELOPMENT CO., LTD. *ET AL* v. B. C. SOUTHERN RAILWAY CO. *ET AL.*

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*Water Clauses Consolidation Act—Water record—Pending applications—Duty of officer.*

Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final result of the prior application before another official is known.

PETITION by way of appeal from a decision of John A. Turner, Assistant Commissioner of Lands and Works at Nelson, granting to the Railway Company a record of 400 miner's inches of water out of Murphy Creek. The decision appealed against was rendered by the Assistant Commissioner on 27th March, 1901, and confirmed the previous record made by him on 12th November, 1900. For a full statement of the facts and proceedings see *ante* p. 374. Statement.

The appeal was argued before MARTIN, J., on 28th May, 1901, and on 1st June His Lordship delivered his judgment as follows:

1st June, 1901.

MARTIN, J.: In regard to the first objection, that the Assistant Commissioner had no jurisdiction to deal with the matter because the "volume of unrecorded water available for diversion" had not been proved, all I have to say is that in paragraph eleven of the petition it is stated in effect, that there was no unrecorded water available at all, so consequently the Assistant Commissioner proceeded under section 18, sub-section 3, and granted an *interim* record. Though it is true that the final paragraph of section 18, sub-section 1, provides that the procedure on an application for a grant of recorded water shall be the same as that on an application for unrecorded water under Judgment of MARTIN, J.

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section 13, yet I see nothing in the language of that sub-section which would prevent the adoption of the course herein taken were it not otherwise objectionable.

But section 13 requires the adjudicating official under either section to have regard to "pending applications," and at the hearing before the Assistant Commissioner now complained of the appellants appeared and objected to his disposing of the application of the respondent Company until the application of the appellants under section 11 then pending before another independent official, the Gold Commissioner, had been finally disposed of on the appeal from his decision set down for hearing before this Court. As a reason for the postponement of the matter pending said appeal it was proved that the prior application of the present appellants for 175 inches embraced nearly all the water in Murphy Creek, the average flow being about 206 inches during the dry season.

I confess I do not understand why the Assistant Commissioner deemed it necessary to dispose of the matter without regard to the pending application of the appellants. There is, to my mind, nothing in the order or judgments of the learned Chief Justice which contemplates such a course, and it would appear to be most seemly where two different officials are exercising their distinct functions in regard to water rights, that the official who is determining the junior application should stay his hand till the final result of the senior application before another official in regard to the same water be known, except of course when it clearly appears that the volume of water is sufficient to satisfy all applicants.

Judgment of MARTIN, J.

It follows from the judgment I have just delivered in the case of the *Centre Star Mining Co.* v. *B. C. Southern Railway Co.** to which I refer, that the rights of the appellants have been prejudicially affected by the adjudication or decision complained of, and that adjudication is consequently declared to have been prematurely and improvidently made and is hereby set aside and the record complained of cancelled. The matter is referred back to the Assistant Commissioner for re-hearing and re-adjudication.

The respondent Company will pay the costs of this appeal.

* Since reported *ante* p. 214.

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The Railway Company appealed to the Full Court, and the appeal was argued at Vancouver on 29th June, 1901, before McColl, C.J., Walkem and Irving, JJ.

*Davis, K.C.*, for appellant.
*Galt, contra.*

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On 20th November, 1901, judgment was given dismissing the appeal; the following written judgment was handed down by

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Irving, J.: This is the appeal from Mr. Justice Martin, who cancelled his certificate issued by Mr. Commissioner Turner under the Water Clauses Consolidation Act on the 1st day of June.

In my opinion the decision of the learned Judge appealed from, is correct. I do not think that the framers of the Act ever contemplated that the officer applied to, be he Gold Commissioner or Land Commissioner, for a record of water under section 13, should shut his eyes to the fact that applications were being made to the official representing the other department. Both sections 13 and 14 point to this conclusion, and I see no way of giving the full effect to section 16 if the contention of the appellants is acceded to.

Judgment of Irving, J.

*Appeal dismissed.*

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## RAMMELMEYER *ET AL* v. CURTIS *ET AL*: POWERS v. CURTIS *ET AL*.

DRAKE, J.
1900.
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*Mineral claim—Location before former location abandoned—Whether right acquired thereby—Staking—Evidence of.*
*Trial—Certificate of work obtained day before—Not admissible in evidence.*

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v.
CURTIS

POWERS
v.
CURTIS

The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898 and 1899. In December, 1899, the ground covered by the original Parrot claim was re-located as the Defiance No. 1 Fraction by the defendants' predecessor in title.

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*Held*, in adverse proceedings, that so much of the Parrot claim as was overlapped by the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location.

At the trial plaintiffs attacked the validity of defendants' location, and defendants sought to put in evidence a certificate of work issued the day before.

*Held* not admissible, as it was obvious that such certificate was to be used to cure irregularities.

ACTIONS of adverse claim tried together at Rossland, before DRAKE, J., in May, 1900. In the first action the writ was issued on 23rd February, 1900, and in the second action on 27th February, 1900. The plaintiffs by their statement of claim asked for a declaration that the Townsite and Latest Out claims were valid and subsisting locations and that the Defiance No. 1 Fraction claim was an invalid and illegal location so far as it embraced or included any part of the Townsite and Latest Out claims. The defendants in their statement of defence, delivered 12th April, 1900, attacked the location of the Townsite and Latest Out claims, and pleaded that they were not located upon unoccupied or waste lands of the Crown, but upon a valid and subsisting location known as the Parrot claim, and that so far as they overlapped the Parrot claim they were null and void; and by counter-claim they claimed a declaration that the Defiance No. 1 Fraction was a valid claim and that the Townsite so far as it overlapped their claim was an invalid and illegal location. In their reply the plaintiffs alleged amongst other things that the Parrot and Defiance No. 1 Fraction were not properly staked, and that no mineral in place was found on either of them. The remaining facts appear in the judgment.

Statement.

*MacNeill, Q.C.*, and *W. S. Deacon*, for plaintiffs.

*Abbott*, for defendants.

1st June, 1900.

DRAKE, J.: These are adverse actions in consequence of the defendants having given notice of application for certificate of improvements for the Defiance No. 1 Fraction, and were tried together. I will deal with the Rammelmeyer case first.

Judgment.

The Parrot mineral claim was located on the 9th day of February, 1895, and recorded on the 16th of the same month. The

Townsite was located on the 9th of March, 1895, and recorded on the 18th of March of the same year. The Parrot was *prima facie* a properly recorded claim, and the chain of title was in all respects complete down to the 16th of February, 1899, when the record ran out, and certificates of work were issued for 1896, 1897 and 1898.

The Townsite was *prima facie* a properly recorded claim, and the title was proved in the plaintiff, and certificates of work from 1896, down to July, 1900. The free miner's certificate in respect of the various holders of both these claims was duly proved by the Mining Recorder. Under the circumstances the Townsite claim is a valid claim with the exception of the piece of land which over-lapped the Parrot.

The Parrot claim was disputed on the ground that it was not properly located, and that no mineral was found in place. Stuzzi, a witness called by the defendant, saw the posts of the Parrot in 1895, and passed the No. 1 post daily for some months in doing assessment work on the Fool Hen. A fire ran through this ground in 1896, and destroyed all the posts, but in my opinion the evidence offered is sufficient under section 147 to indicate that prior to the fire the claim was properly located, and the place where the No. 1 and No. 2 posts had been was pointed out to Mr. Young by Stuzzi, a Provincial land surveyor, who made the plan. I therefore find as a fact that the Parrot was a lawful claim at the time the Townsite was located and recorded.

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The Parrot claim having expired, the ground was open for re-location, and K. L. Burnett on the 20th of April, 1899, re-located the ground as Parrot No. 2, and abandoned the same on the 2nd of December, 1899, and obtained permission to re-locate the Parrot on the 2nd of December, 1899, under the name of Defiance Fractional claim. This claim was located the 3rd of December, and abandoned on the 6th of December, and re-located as Defiance No. 1 Fraction by leave of the Gold Commissioner. This location of Parrot No. 2 has led to some difficulty with regard to the posts, as there is no clear evidence as to the exact position of the posts of Parrot No. 2, and although Parrot No. 2 is not in existence as a claim yet it is probable that the posts or

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some of them remain, and they have been the cause of some confusion.

The Defiance No. 1 Fraction was recorded on the 19th of December, 1899, and the contention is that it was unoccupied ground, having been part of the abandoned Parrot claim. On the other hand the owners of Townsite claim consider that they are entitled to the area of land in dispute, because it was covered by their original location, and the fact that the Parrot claim lapsed placed the Townsite claim in the same position as if it had never existed. I do not assent to this proposition. The Townsite claim had no rights whatever over the Parrot land at the date of their record, and the boundary of the Parrot must be treated as the boundary of the Townsite, and when the Parrot claim lapsed the ground reverted to the Crown and not to the Townsite. The plaintiffs then attack the validity of the location of the Defiance No. 1 Fraction, putting the defendants to the proof of all the statutory preliminaries. The defendants sought to put in evidence a certificate of work issued the day previous to the trial. It was obvious that they sought to set up this certificate as a shield against any irregularities in their proceedings. I refused to admit it under the circumstances and the defendants must therefore rely on their location and record.

According to the record this claim was located by Kenneth L. Burnett, on the 17th of December, 1899, and described as follows: "Bounded on the south by the Fool Hen and Golden Horn, and on the east by the Golden Horn, Spitzee Fr. *et al.*" Burnett was a free miner. The evidence as regards the posting is that of R. E. Young, who states that he laid out Defiance No. 1 Fraction, not that he placed the posts or notices, he says the posts were there and notices visible. He further says he made the survey on 23rd November, and finished it on the 4th of December. This survey therefore was made before the claim was located, and it was on this survey that the certificate of work which was sought to be put in was applied for. I fail to see how this evidence assists the defendants as to correctness of the Defiance No. 1 Fraction posts. They were not put up till the 17th of December, if at all. The defendants' attention was directly challenged to the posting of this claim and the notices required to be placed

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thereon by the plaintiffs' reply and defence to the counter-claim. No evidence was produced as to the posting of the Defiance No. 1 Fraction, and under section 11 of Cap. 33, 1898, as each party has to give affirmative evidence of title to the ground in dispute, and as I find that the Townsite has no claim to that portion of the ground which over-lapped the Parrot, and as I find that the evidence adduced in proof of the proper staking of the Defiance Fraction No. 1 is insufficient, there will be judgment accordingly, without costs.

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In this case the plaintiff is owner through a chain of title of the Latest Out mineral claim, which was located on the 7th of March, 1895, and recorded on the 19th of March, in the same month subsequent to that of the Parrot claim.

This claim was located two days prior to the Townsite mineral claim, and certificates of work from 30th July, 1895, to the 19th of March, 1900, were produced.

Free miners' certificates of all the parties concerned were proved. A portion of the ground over-lapped the Fool Hen, but this is not in question as the Fool Hen is a Crown granted claim.

A further portion of the ground over-lapped the Parrot which was recorded on the 16th of February, 1895. Therefore as regards the Parrot, the Latest Out was a subsequent location, and as I have found that the Parrot was a properly recorded claim the Latest Out can make no claim to the ground covered by the Parrot. When that claim lapsed the land became unoccupied Crown land. Such being the case this piece of land was taken up by the Defiance No. 1 Fraction. The evidence as to this fraction adduced in the prior action of *Rammelmeyer* v. *Curtis* was admitted in this action, it also fails on the same ground. I therefore find that the plaintiff has no claim to the ground formerly covered by the Parrot, and the defendant Curtis has failed to substantiate the title to the Defiance No. 1 Fraction. In this case also judgment will be that neither party has established his claim to the ground in question, and there will be no costs of either action in accordance with the statute.

Judgment.

FULL COURT
At Vancouver.

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IN RE FLORIDA MINING CO.

## *IN RE* THE FLORIDA MINING COMPANY, LIMITED.

*Winding up—Order for whether final or interlocutory—Appeal—Security—Demand for after expiration of time for furnishing—Waiver—Companies Winding-up Act, 1898, Secs. 27 and 33.*

A winding-up order is a final order.

The respondent in an appeal from a winding-up order, after the time limited by sub-section 3 of section 27 of the Companies Winding-up Act, 1898, for furnishing security had expired, demanded security for the costs of the appeal:—

*Held*, by the Full Court (reversing IRVING, J.), that respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time.

APPEALS to the Full Court. On 26th February, 1901, a winding-up order was made by IRVING, J., under the provisions of the Companies Winding-up Act, 1898. The petition for the winding up was opposed by the Company and W. A. Davies, a creditor. On 4th March, notice of appeal was served on the petitioner's solicitors who, being not aware that the Companies Winding-up Act, 1898, contained a special provision regarding security on appeals, on or about 9th March, demanded that the appellants within ten days give security in the sum of $150.00 for the costs of the petitioner on the appeal. This demand was given by inadvertence and in accordance with the practice on ordinary appeals to the Full Court. On 12th March, the appellants' solicitors, who were also unaware of the said provisions as to security, wrote in reply to respondent's solicitors, that the order was interlocutory and that according to *Rogers* v. *Reed* (1900), 7 B.C. 79, the amount of security would be only $75.00, which they would pay into Court if satisfactory. On 14th March, respondent's solicitors, having discovered the said provisions as to security, wrote withdrawing their demand, and on 18th March, they took out a summons to dismiss the appeal on the ground that the appellants did not within eight days make a deposit or give security to the satisfaction of a Judge that they would prosecute the appeal and pay such damages and costs as might be

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awarded to the respondent, as required by section 27 of the Act.

The appellants on the same day took out a summons to fix the amount of security, or in the alternative, to extend the time for giving security and to fix the amount thereof.

Both summonses came on before IRVING, J., on 26th March. The first summons was allowed and the appeal dismissed with costs. The second summons was dismissed with costs. The Company and Davies appealed from both orders and the appeals came on together for argument at Vancouver, on 26th and 28th June, 1901, before MCCOLL, C.J., WALKEM and MARTIN, JJ.

*S. S. Taylor, K.C.*, for appellants, stated the facts and contended that there had been a waiver by the respondent of the requirements of the Act as to security, citing *Re Oro Fino Mines, Limited* (1900), 7 B.C. 388. A winding-up order is not a final order, but interlocutory. He cited *Salaman* v. *Warner* (1891), 1 Q.B. 736 and *In re Riddell* (1888), 20 Q.B.D. 512.

[The Chief Justice: The winding-up order finally determined the status of the Company—as to whether it should cease to exist or not, and that was the only question that could be raised.]

The Court were of opinion that a winding-up order was a final order, and as to waiver they called on

*Davis, K.C.*, for respondent: The demand was withdrawed. The *Oro Fino* decision was under the Dominion Act and the circumstances were different. Under section 27 security must be given for "such damages and costs as may be awarded the respondent," but our demand only asked for security for costs and there is no suggestion that any security has been asked for or given for damages or for the due prosecution of the appeal.

Argument.

[WALKEM, J., raised the question of the jurisdiction of a single Judge to make the order dismissing the appeal.]

As to the question that "Court" in sub-section 3 of section 27, Cap. 14, B.C. Stat. 1898, means Full Court. It means the Supreme Court—see the interpretation clause, Sec. 3, Sub-Sec. 1. He referred to R.S. Ont. 1887, Cap. 183, Sec. 27: *Re Union Fire Insurance Co.* (1882), 7 A.R. 783: *In re The D. A. Jones Company* (1892), 19 A.R. 63.

*Taylor*, as to waiver, cited *Park Gate Iron Co.* v. *Coates* (1870),

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L.R. 5 C.P. 634; *Francis* v. *Dowdeswell* (1874), L.R. 9 C.P. 423 at p. 430; *Ex parte Johnson* (1870), 5 Chy. App. 741; *Mayer* v. *Harding* (1867), L.R. 2 Q.B. 410; *Andrews* v. *Elliott* (1856), 25 L.J., Q.B. 336.

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As to the second appeal he asked that it be allowed, that the time be extended under section 33 of the Act and that the amount of security be fixed.

*Davis:* There was no waiver and there is no power to extend the time. He referred to *Re Union Fire Insurance Co., supra, Retemeyer* v. *Obermuller* (1837), 2 Moore, P.C. 93. The demand for security was not made till after the time, *i.e.*, the eight days for giving it had elapsed; had it been served before the other side might urge that they had been misled; but after, it was impossible to correct the error as the appeal was dead and there was nothing to waive. He cited Archbold's Q.B.Pr. 13th Ed., 1,195; *In re Oliver and Scott's Arbitration* (1889), 43 Ch. D. 310; Annual Prac. (1901), p. 879; *Ives & Barker* v. *Willans* (1894), 2 Ch. 478; *Noble* v. *Blanchard* (1899), 7 B.C. 62.

Argument.

*Taylor*, in reply: No default can be waived till it occurs.

*Cur. adv. vult.*

On 7th November, 1901, judgment was given allowing both appeals with costs, the judgment of the Court being handed down by

MARTIN, J.: So far as the meaning of the word "Court" in sub-section 3 is concerned, that question is, in my opinion, settled by the interpretation section 3, which states (1.) that it "shall mean the Supreme Court; and one Judge or Local Judge may at any time exercise all the powers conferred by this Act upon the Court." In support of this view it may be noted that the expression "Full Court" is used in sub-sections 1 and 4, and there would be no object in expressly giving to the Full Court the power to dismiss (because the Court appealed to would inherently have such power), unless it were intended by express language to limit that power to the Appellate Court as is done in the corresponding sections 75 and 77 of the Dominion Winding-Up Act.

Judgment.

Then as to the second point—was there a waiver of the requirements of sub-section 2 as to giving security?

A similar question arose in the case of *The Oro Fino Mines, Limited* (1900), 7 B.C. 388, under almost identical provisions of the Dominion Winding-Up Act, Sec. 74, Sub-Sec. 4, which declares that "no such appeal shall be entertained unless the appellant has . . . . within the said time (14 days) made a deposit or given sufficient security, according to the practice of the Court that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent." This section, it will be noted, requires "sufficient" security to be given: the word "security" merely is used in the Provincial Statute. In the *Oro Fino* case "sufficient security" was not given within the appointed time "according to the practice of the Court," because only $75.00 were deposited in time, whereas the practice requires twice that amount to be given in the case of a final order, which we at the opening of the argument herein unanimously held a winding-up order to be—*Rogers* v. *Reed* (1900), 7 B.C. 79.

But in the *Oro Fino* case it was held that a default which by a literal construction of the statute was a bar to our jurisdiction, could be and had been waived by an application to increase the insufficient security to the proper amount and despite the fact that the proper amount was not actually furnished till eight days after the expiration of the time limited by statute.

On the facts herein, there was, I am satisfied, in effect a waiver of the default in procedure, as contemplated by section 33: both parties overlooked, as appears by the evidence, the provision of sub-section 2 as to the eight days time, and I am quite unable to distinguish this "default" in principle from our said recent decision in the *Oro Fino Mines*, in which case the mistake and waiver were as to the amount of security (which, as has been seen, the statute expressly required to be "sufficient") while here the mistake and waiver were as to time. If the contention of the respondent, pushed to its logical conclusion, be sound, this Court erred in the judgment it gave in the *Oro Fino* case, but a recent decision of the Supreme Court of Canada, reported since the argument, answers several of the objections that were taken against the appeal, and supports our prior views. I refer to the case of *Lord* v. *The Queen* (1901), 31 S.C.R. 165, wherein at pp. 169-70, the learned Chief Justice says:

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"Had there been no authority on the question presented I should have thought it clear that there was no want of jurisdiction in the Court of Queen's Bench to entertain this appeal. The delay imposed is like all other delays in procedure, imposed principally for the benefit of the party, though in a sense it may be said that public policy which requires the prompt despatch of causes, has also influenced the Legislature. However this may be, it has always been considered competent to the parties conventionally to enlarge the delays for appearing, pleading, the hearing of causes and such like proceedings, though these are prescribed for the same purpose as the limit of the time for appealing. Indeed public policy which favours the compromise of litigation requires that this should be so. But beyond this, in matters of much greater importance than procedure and in which the rights of the parties are involved, they are permitted to enlarge the delays fixed by the law. Thus prescription, even acquired, can be renounced. Again, the defence of *res judicata* may be waived by agreement of the parties. And in many other cases it is competent to the parties to renounce their strict rights. I am at a loss, therefore, to see why any difference should be made as regards the time for appealing."

Judgment.

The curative section 33, giving large powers of amendment, and corresponding to sections 86 and 87 of the Dominion Act, also declares that "no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended or disregarded under the rules and practice of the Court." This Court has power under section 86 of the Supreme Court Act to enlarge or abridge the time for doing any act or taking any proceeding provided for in that Act, and that notwithstanding the expiration of the time prescribed therefor. Reading then sections 33 and 86 together with sub-section 48 of the Interpretation Act, R.S.B.C. 1897, Cap. 1, and with section 94 of the Supreme Court Act, I am of opinion that in any event the default herein is one that can and under the circumstances of the unfortunate mutual oversight should, in the interests of justice, be "disregarded under the rules and practice of the Court." No "default" can be disregarded or waived till after it happens: to put a narrower construction on the section would wipe

it out. I am of the opinion that there was a waiver and that consequently this first appeal should be allowed with costs. It flows from this that the second appeal should likewise be allowed, extending the time.

*Appeals allowed.*

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## FAWCETT *ET AL* v. CANADIAN PACIFIC RAILWAY COMPANY.

IRVING, J. 1901. Feb. 12.

FULL COURT At Vancouver. July 8.

FAWCETT v. C. P. R.

*Master and servant—Servant's duty—Contributory negligence—Non-suit—Jury—Employers' Liability Act.*

F., a conductor and brakeman in the employ of the defendant Company while turning the brake wheel fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—

*Held*, affirming IRVING, J., in an action by F's personal representatives, to recover damages in respect of his death, that it was F's own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury.

ACTION by personal representatives of Alfred Percival Fawcett, who on 20th October, 1899, while in the employ of the defendant Company as a brakeman and conductor on its line of railway between Nelson and Robson, was thrown from the train and sustained injuries from which he died the next day. While shunting at Robson the deceased was standing on the end of a car using the hand brake, when the wheel of the brake came off; he lost his balance and fell under the car and was run over. The plaintiffs claimed damages under the Families Compensation Act and in the alternative under the Employers' Liability Act. Statement.

The action was tried at Nelson on 11th and 12th February, 1901, before IRVING, J., who withdrew the case from the jury

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and directed judgment to be entered for defendant, and gave the following reasons:

12th February, 1901.

At the conclusion of the plaintiffs' case the defendants moved for a non-suit. I think I must grant it on the ground, not of contributory negligence, which is a question for the jury to determine, but because the plaintiffs have not made out a cause of action. As stated by Brett, M.R., in *Wakelin* v. *London and South Western Railway Co.* (1896), 1 Q.B. 190:

"It is not a cause of action according to the law of England that the death of the deceased person was caused by the negligence of the railway company in the sense that their negligence was a cause of his death. In an action for personal injuries through negligence, although it is shewn that there was negligence of the defendants which was a cause of the accident, and without which it could not have happened, yet, if the plaintiff himself was also guilty of negligence or want of reasonable care which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and the defendants there is no cause of action. The cause of action is, that, as between the plaintiff and the defendant, the accident or injury to the plaintiff was caused solely by the negligence of the defendant," that is to say, it must be shewn that the negligence of the defendants was the sole cause.

Judgment of IRVING, J.

Now, in this case the plaintiff according to the rules of the railway, was required to "carefully examine couplings, wheels and the running gear of all cars in their train" (rule 83), and by rule 93, "to see that their cars are in good order" before the leaving of the train. This, to my mind, compelled him to examine the wheels, shoes of the brakes, brake beams, etc., and ultimately the brake wheel itself to see that it was in good working order, that is with safety to the person using it. The cause of the accident is not in dispute. It was that the brake wheel was insecurely attached to the brake mast. There may have been negligence on the part of the Company, but there was negligence also on the part of the conductor, Fawcett, who was killed. He neglected to do that which was prescribed by the Company should be done for the security of himself, of the brakeman who might have to

handle that brake and possibly of the passengers who might be riding on the train. The case is very much like that of *Truman* v. *Rudolph* (1895), 22 A.R. 250, where a master brewer sued his employer under the Workmen's Compensation Act for an injury resulting from falling from a defective ladder which it was his duty to inspect. In that case the master brewer saw the defect and instructed a subordinate to repair it, but neglected to see that the repairs were carried out, and Mr. Justice Osler in delivering judgment in the Court of Appeal, says, at p. 254: "The defective condition of the ladder was owing, as this evidence shews, to the unfortunate plaintiff's own neglect, not in the sense of contributory negligence, but neglect in not seeing that the ladder was put in a properly secure condition. He was the person whose duty it was to see that this was done, and his own neglect was what led to the injury." A judgment of non-suit was there approved.

Judgment of IRVING, J.

For this reason I withdraw the case from the jury and direct judgment to be entered for the defendants with costs.

The plaintiffs appealed and the appeal came on for argument at Vancouver, on 28th June, 1901, before McCOLL, C.J., WALKEM and MARTIN, JJ.

Argument.

*Wilson, K.C.* (*Lennie*, with him), for appellant: The case should not have been withdrawn from the jury, and we ask for a new trial. Before contributory negligence can be established the defence must connect Fawcett with the rules and shew that he did not examine the brake wheel. The nut never had been on the brake mast. The car only came into the yard about ten minutes before the train left, the night was dark, and besides, the car had been inspected by the proper official at Nelson, so the question of reasonable excuse was a proper one for the jury. We deny contributory negligence, and, if any, only an inference which should go to the jury. He cited *Truman* v. *Rudolph* (1895), 22 A.R. 253-4; *Williams* v. *Birmingham Battery and Metal Co.* (1899), 2 Q.B. 338; *Haight* v. *Wortman and Ward Manufacturing Co.* (1894), 24 Ont. 618; *Radley* v. *London and North-Western Railway Co.* (1876), 1 App. Cas. 754; Ruegg,

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160; *Scriver* v. *Lowe* (1901), 37 C.L.J. 77; *Vogel* v. *Grand Trunk Railway Co.* (1883), 2 Ont. 197; *Wakelin* v. *London and South-Western Railway Co.* (1886), 12 App. Cas. 41 and (1896), 1 Q.B. 189, where the judgments in the Court of Appeal are given: see the difference between the judgments of Brett, M.R., and Bowen, L.J., and see pp. 52-3 on appeal. Our cause of action arises by statute the moment there is a defect.

*Davis, K.C.*, for respondent: There was no case to go to the jury and it was properly withdrawn. He referred to *Webster* v. *Foley* (1892), 21 S.C.R. 580; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,169; *Morrow* v. *Canadian Pacific Railway Co.* (1894), 21 A.R. 149 and *Phillips* v. *Grand Trunk Railway of Canada* (1901), 1 O.L.R. 28.

*Wilson*, in reply.

*Cur. adv. vult.*

Judgment.

On 8th July, the Court gave judgment affirming the judgment appealed from, and dismissed the appeal with costs.

*Appeal dismissed.*

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## WATERLAND v. CITY OF GREENWOOD.

*Verdict—Indefinite—May be construed from the circumstances of the case.*
*Jury—Discharge—Re-calling and amending verdict—Effect of.*
*New trial—Parties bound by conduct of trial—Non-direction.*

In an action for damages caused by water being backed up on to plaintiff's premises, the jury did not answer the questions put, but found that certain grading of a street caused the damage, but did not state that the grading was done by the defendants, and judgment was entered for plaintiff on the verdict:—

*Held*, on appeal, that from the circumstances of the case, it was evident that the jury found that the grading was done by the defendant.

After judgment was pronounced and the jury was discharged, at the direction of the Court the jury was re-called and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly:—

*Held*, that whatever was done after the discharge of the jury was a nullity.

Where counsel at the trial abstains from asking the Judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point.

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ACTION for damages. The plaintiff was the owner of the Miners Hotel in Greenwood, and for damages done by water overflowing and flooding his land and hotel, he sued the defendant Corporation, alleging that it had diverted the stream known as Boundary Creek and placed an obstruction across the original watercourse in such a negligent and improper way as to prevent the water escaping, with the result that in the Spring of 1900, the water backed up, overflowed and flooded his land and hotel, and prevented him from carrying on his hotel business. The obstruction or dam complained of was caused by the construction and grading of Deadwood Street by the Corporation.

By the statement of defence the Corporation denied negligence, and pleaded that the said waters, if penned back at all, were penned back by reason of grading and building done by one Fletcher, on the alleyway and lands belonging to him and adjoining Deadwood Street.

The action was tried at Nelson, on 26th, 27th and 29th October, 1900, before WALKEM, J., with a jury. The following questions were left to the jury:

"(1.) Did the construction and grading of Deadwood Street across Boundary Creek cause the damage alleged to have been done to the plaintiff?

"(2.) If the defendant Corporation caused the damage, what amount is the plaintiff entitled to?"

Statement.

And when the jury returned, the foreman announced the verdict as follows: "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary Creek caused the plaintiff damage in the sum of $3,000.00, particulars of which are as follows: house $800.00; wood $150.00; cigars $500.00; stock in cellar $800.00; loss of trade $750.00; total $3,000.00."

The jury was then discharged, and on counsel for plaintiff moving for judgment, His Lordship made an order for judgment. Counsel for defendant was not present, but during the same afternoon he appeared before the Court and objected that judgment should not have been entered upon the finding as the verdict was indefinite, and fixed no responsibility on defendant, and

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at the direction of the Court the jury was re-called, when His Lordship read the verdict and asked the jury, "Now, the construction and grading by whom?" And the foreman replied, "I notice that as you read it there that is not what we intended. It was the construction and grading of Deadwood Street by the defendants."

His Lordship read the verdict as amended and asked the members of the jury individually if they agreed to the change, in reply to which each of the jurors said "yes," and judgment was then directed to be entered for the plaintiff with costs.

The defendant Corporation appealed and the appeal was argued at Vancouver, on 12th and 13th November, 1901, before DRAKE, IRVING and MARTIN, JJ.

*Bodwell, K.C.*, for appellant: If the verdict needed amendment the Judge had no jurisdiction to re-call the jury, and there must have been something ambiguous in the verdict, or the Judge would not have called the jury back and adopted their amended verdict. It was impossible to enter up the judgment on the original verdict or it would have been done, and it can't be entered on the one given by the jury after being discharged.

The Court called on

*Davis, K.C.* (*W. A. Macdonald, K.C.*, with him), for respondent: What happened after the discharge of the jury is all immaterial. We are prepared to stand by the original finding.

Argument.

*Per curiam:* Whatever was done after the jury was discharged had no effect on the trial.

*Bodwell:* There were construction and grading of Deadwood Street by other people as well as by defendants, and the original verdict did not fix any liability on defendants. There were misdirection and non-direction. The Corporation had a right to grade and can only be liable for negligence. He cited *C. P. R.* v. *Parke* (1897), 6 B.C. 6 and (1899), A.C. 535, where cases are collected.

As to the point that objection should have been taken to the Judge's charge he cited *B. C. Iron Works* v. *Buse* (1894), 4 B.C. 419, 422; in this Province there is a special provision requiring "a proper and complete direction to the jury upon the law and

as to the evidence, etc.": see R.S.B.C. 1897, Cap. 107, Sec. 67 and r. 436. The damages are excessive, and nothing should be allowed for loss of trade or custom as too remote.

*Davis:* The answer of the jury really follows the wording of the two questions, but rolls them up into one answer. At the end of the trial the sole question in dispute was whether the damage was done by the filling in of the alleyway or by the grading of Deadwood Street. Defendants are bound by the course of the trial. He referred to *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; *Turner* v. *Burns* (1893), 24 Ont. 28 at p. 37; *Martin* v. *Great Northern Railway Co.* (1855), 24 L.J., C.P. 209.

The damages for loss of custom are really general damages, not special damages: see *McGarvey* v. *The Corporation of Strathroy* (1885), 10 A.R. 631 at p. 635; *Evans* v. *Harries* (1856), 1 H. & N. 251; *Ratcliffe* v. *Evans* (1892), 2 Q.B. 524 and *Riding* v. *Smith* (1876), 1 Ex. D. 91.

*Bodwell*, in reply: The Judge should have submitted the question as to whether or not the Corporation did the work negligently, and explained the meaning of negligence.

Argument.

During the argument the following cases were also referred to: *Stamer* v. *Hall Mines* (1899), 6 B.C. 579; *Seaton* v. *Burnand* (1900), A.C. 139, 145; *Wolley* v. *Lowenberg* (1894), 3 B.C. 416 and (1895), 25 S.C.R. 51; *Bray* v. *Ford* (1896), A.C. 44; *The Queen* v. *Theriault* (1894), 2 C.C.C. 444; *Nevill* v. *Fine Art and General Insurance Co.* (1897), A.C. 68; *Croft* v. *Peterborough* (1854), 5 U.C.C.P. 41; *Patterson* v. *Victoria* (1899), A.C. 615 and *Lawrence* v. *Great Northern Railway Co.* (1851), 20 L.J., Q.B. 293.

*Cur. adv. vult.*

On 15th November, judgment was given dismissing the appeal with costs, and the following judgments were handed down:

IRVING, J.: The trial of the action took place before Mr. Justice WALKEM with a jury, and judgment was entered by him in favour of the plaintiff for $3,000.00 damages.

The action was against the Corporation for diverting a stream and for placing an obstruction across the original water course in such a negligent and improper way as to prevent the water escaping.

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At the trial the defence resolved itself into this one point—whether the damage sustained by the plaintiff, was caused by the dam erected by the defendants, or by certain work immediately adjoining the defendants' dam, which had been erected by one Fletcher. On this point there was evidence on which the jury could have concluded either way. The learned Judge left to the jury the following questions:

(1.) Did the construction and grading of Deadwood Street cause the damage alleged to have been done to the plaintiff?

(2.) If the defendant Corporation caused the damage, what amount is the plaintiff entitled to?

He did not ask them whether the defendants were guilty of negligence in erecting the dam, and the defendants now submit that they are entitled to a new trial on the ground of this non-direction. I think not. It was laid down in *Nevill* v. *Fine Art and General Insurance Co.* (1897), A.C. 68 that it was the duty of counsel if they wished to preserve their right to a new trial, to ask the Judge to direct the jury on a particular point, and if they neglected to avail themselves of the opportunity then before them of so doing, they must be taken as acquiescing in the course proposed by the Judge. This practice is well established and although we were much pressed with the necessity of having a full decision from the jury on every point, we believe that the Provincial Statute has not altered the law, and the practice must be adhered to. In this particular case, I can well understand the learned counsel deciding not to put that question to the jury, because there could only be one answer to the inquiry.

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As to the other point—the learned Judge after stating the questions upon which he desired the jury's opinion, said: "You will understand gentlemen, that if the Fletcher building caused the damage, then the Corporation did not cause it."

The jury retired and after an interval of an hour and three-quarters returned, when the foreman stated: "We have not answered exactly in the form of the questions (reading from the written verdict as follows): We find the construction and grading of the street across Boundary Creek caused the plaintiff damage in the sum of $3,000.00."

The jury was then discharged. From the frame of questions

and answers and having regard to the language used in the course of the charge I cannot come to any other conclusion than that the jury found that it was by the construction and grading by *the defendants* that the injury to the plaintiff was caused. The Judge apparently thought so too, because he immediately made an order for judgment in favour of the plaintiff, with costs.

During the same afternoon in some way or other, the question seems to have been raised, as to whether the language of the finding was sufficiently explicit, as it did not state, in words, that the grading and construction of the street by *the defendants*, had caused the injury. The learned Judge thought proper to re-call the jurors, although they had been discharged. They appeared before him next morning, when he inquired of them by whom had the construction and grading, referred to in their verdict, been performed, to which the foreman replied, "it was the construction and grading of Deadwood Street by the defendants." The learned Judge also thought it necessary to ask each of the jurymen whether that was his opinion, and being answered in the affirmative, on motion of the plaintiff again ordered judgment for the plaintiff.

Judgment of IRVING, J.

This proceeding it was argued, was so irregular that the verdict could not stand, but in view of the fact that the first set of answers by the jury justified the judgment, I do not see how the defendants can be prejudiced by what took place afterwards. If the jury had returned answers varying in any way from their first answers, or if the first answers had not been sufficient to support the judgment actually entered, the result would probably have been different. The appeal will be dismissed with costs.

MARTIN, J.: Though objections are now raised, I am of the opinion that the parties are bound by the course of the trial, *Patterson* v. *Victoria* (1899), A.C. 615, and that the verdict of the jury as originally returned is sufficient upon which to enter judgment in favour of the plaintiff.

Judgment of MARTIN, J.

So far as damages are concerned, I see no good reason for interfering with them. The case cited by the respondent's counsel seems to fully cover the point as to the loss of custom.

*Appeal dismissed.*

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BRIGGS v. NEWSWANDER

## BRIGGS v. NEWSWANDER *ET AL.*

*Contract—Illusory—Promise to form company and allot reasonable amount of stock to be amicably determined.*

Where on a sale of mineral claims the purchaser promises and agrees to form a company to take over the claims and that the vendor shall have in such company a reasonable amount of stock, to be amicably determined between them, and then refuses to form a company, the vendor has no right of action, as the agreement is illusory.

APPEAL from judgment of IRVING, J., pronounced 19th February, 1901, dismissing the plaintiff's action.

The plaintiff was a prospector living in Kaslo, and was formerly a lawyer practising in Minnesota, U.S.A. The defendant, Newswander, was a jeweller of Kaslo, and the other two defendants lived in France. The plaintiff, on 2nd July, 1899, located the Two Kids and Monarch mineral claims and duly recorded them, both claims being in the Ainsworth Mining Division of West Kootenay. The defendants were the owners of the Cork and Dublin claims located over the same ground on 9th December, 1899, and duly recorded. The Two Kids and Monarch claims covered the same ground as the Ben Hur and Essex claims, which were located in 1894, and in March, 1900, His Honour Judge FORIN, in a County Court action, wherein the present plaintiff was plaintiff, and one Conruyt was defendant, held that the Ben Hur and Essex were valid and existing claims up to 10th August, 1899, and 12th November, 1899, respectively. The defendants, in April, 1900, advertised notice of intention to apply for certificate of improvements in respect of the Cork and Dublin claims, and the plaintiff was desirous of adversing. The plaintiff and the defendant, Newswander, then entered into two agreements as follows, the first being under seal and the second not under seal:

Statement.

"B1. This agreement made the 12th day of June, one thousand nine hundred, between Robinson P. Briggs, of the City of

Kaslo, free miner, of the first part, and Samuel Newswander, of the said City of Kaslo, merchant, of the second part.

"Whereas, the party of the first part is the owner of the mineral claims hereinafter mentioned, and has agreed to sell the same to the party of the second part:

"Now this indenture witnesseth that the party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to purchase the mineral claims Monarch, Two Kids and Victor, situate on the South Fork of Kaslo Creek, being re-locations of the ground formerly located in the name of Essex and Ben Hur mineral claims at and for the price or sum of $500.00, payable as follows: $100.00 on account of purchase money to be paid on the execution of this agreement, and the balance of the said purchase money to be paid within one month from the date hereof.

"Should the ground covered by the said mineral claims prove on development to be valuable, and a joint stock company be formed by the party of the second part or his associates, the party of the second part may allot or procure to be allotted to the party of the first part such amount of the shares in the said company as to the party of the second part may seem meet, but it is distinctly understood that the party of the first part shall have no right of action to demand allotment of shares as aforesaid, and it shall be entirely optional on the part of the party of the second part whether or not he allot to the party of the first part any shares therein.

Statement.

"The party of the second part shall be entitled at the time of payment of the balance of said purchase money to conveyance of said mineral claims free from all incumbrance, except against the mineral claims Two Girls, Cork and Dublin.

"Time is to be considered of the essence of this agreement.

"In witness whereof the parties hereto have hereunto set their hands and seals."

"B2. Know all men by these presents that I, Samuel Newswander, of the City of Kaslo, B.C., free miner's license No. B27,068, issued at Kaslo, B.C., May 30, 1900, in consideration of the transfer of the title to me of the full interests in the Monarch

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mineral claim and the Two Kids mineral claim, by Robinson P. Briggs, of Kaslo, B.C., free miner's license No. B27,208, issued at Kaslo, B.C., May 30th, 1900, promise and agree that a corporation shall be immediately and legally formed to do business under the laws of British Columbia to take over the above-named mineral claims, and that the said Robinson P. Briggs shall have a reasonable amount of the stock of said corporation according to the value thereof, and it is hereby agreed that no action shall be instituted by the said Briggs to defraud the said Newswander of the title to said claims, and that the number of shares shall be amicably determined between the parties hereto

"Dated at Kaslo, B.C., June 12th, 1900, made in duplicate."

It was admitted that defendant Newswander in entering into the said agreements was acting for his co-defendants as well as for himself. The $500.00 mentioned in the agreement was paid to plaintiff; the Two Kids and Monarch were allowed to lapse for want of certificates of work; no company was formed, but defendants went on with work on the Cork and Dublin claims.

Plaintiff commenced an action in November, 1900, claiming an interest in the Cork and Dublin claims, an injunction and damages.

The action was tried before IRVING, J., who found:

"Now the matter about the time the contract was entered into stood this way: the plaintiff's claims were about to run out and the time for adversing the defendants' claims was about to expire —the parties met together and had one agreement drawn up— B1. By that agreement it was altogether optional, in express terms, whether the defendants should give the plaintiff anything or nothing. A conversation took place in which different sums were mentioned, first one sum and then another sum. No definite agreement seems to have been reached. The parties then put into writing the second agreement—B2; then the documents were both signed and exchanged, the one for the other. Both parties looked upon these documents as of equal force, and I assume they are of equal force, and that the second contract is binding. The point then is, is the plaintiff entitled to any interest in the claims or is he entitled to demand in a Court of Law any shares in a company about to be incorporated?"

Judgment of IRVING, J.

(His Lordship then in reference to illusory and vague contracts referred to *Davies* v. *Davies* (1887), 36 Ch. D. 359 and *In re Vince: Ex parte Baxter* (1892), 2 Q.B. 478 and proceeded):

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"I know of no standard by which the Court can say what is a reasonable amount of shares to be given. Under the circumstances I think that I shall have to dismiss the action; but as I do not think that the defendants behaved properly in the case I shall do so without costs."

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At Vancouver.
July 8.
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The plaintiff appealed to the Full Court, and on 26th June, 1901, the appeal was argued at Vancouver, before McColl, C.J., Walkem and Martin, JJ.

*S. S. Taylor, K.C.*, for appellant.
*Davis, K.C.*, for respondents.

In addition to the cases mentioned above, the following authorities were cited by counsel:

*Croasdaile* v. *Hall* (1895), 3 B.C. 384; *De Cosmos* v. *The Queen* (1883), 1 B.C. (Pt. 2) p. 26; *Peacock* v. *Peacock* (1809), 2 Camp. 45; *Wells* v. *Petty* (1897), 5 B.C. 353; *Taylor* v. *Brewer* (1813), 1 M. & S. 290, considered in *Reg.* v. *Doutre* (1882), 6 S.C.R. 342; *Scott* v. *The Corporation of Liverpool* (1856), 25 L.J., Ch. 227; *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Leroy* v. *Smith* (1901), 8 B.C. 293; *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232.

Argument.

*Cur. adv. vult.*

On 8th July, the Court gave judgment affirming the judgment appealed from, and dismissed the appeal with costs. The following written judgment was handed down by

Martin, J.: It might be that if the construction of the agreement depended solely upon the words "the said B. shall have a reasonable amount of the stock," etc., that a conclusion favourable to the plaintiff could be arrived at. But the manner in which the number of shares is to be allotted is provided by the agreement, which declares that it "shall be amicably determined between the parties hereto." The difficulty arises from the fact that no such determination can be come to, and under such circumstances,

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the parties having selected their own forum, it is difficult to see upon what ground the Court can interfere. No authority has been cited which would justify this Court substituting itself for that "amicable" tribunal of interested parties which the agreement empowers to determine the vexed point; nor is there any legal machinery which can be resorted to to compel the parties to act in concert. The cases cited by plaintiff's counsel do not go to the length necessary to support the contention advanced, and no valid reason appears for departing from the view taken by the learned trial Judge. In addition to the authorities cited it may be noted that this case bears a general similarity as to the principle involved, to *Montreal Gas Co.* v. *Vasey* (1900), A.C. 595. The appeal should be dismissed with costs.

*Appeal dismissed.*

Note:—This judgment has since been reversed by the Supreme Court of Canada.

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FULL COURT At Victoria.

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STYLES v. THE CORPORATION OF THE CITY OF VICTORIA.

*Municipal Corporation—By-law closing road—Alderman interested—Road running beyond limits of city—Power to close—Municipal Clauses Act, 1897, Sec. 50, Sub-Sec. 127.*

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The roads mentioned in sub-section 127 of section 50 of the Municipal Clauses Act, which may be closed by by-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries.

Statement.

APPEAL from the judgment of DRAKE, J., pronounced 22nd August, 1899, quashing a by-law passed 10th July, 1899, by the defendant Corporation, entitled the Craigflower Road Closing By-law, the application to quash being brought before the Court under a rule *nisi*, granted by DRAKE, J.

The operative part of the by-law was as follows:

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"So much of the Craigflower Road as runs through blocks N and P, Victoria West, being a portion of section thirty-one, Esquimalt District, is hereby stopped up and closed to public traffic, and Catherine Street, Langford Street and Russell Street are substituted therefor."

The applicant, Styles, an expressman, in an affidavit stated that he was a ratepayer and interested in the by-law in that he had for the past eleven years used the road in question in passing thereon with horses and vehicles at least twice a day; that the closing up of the said portion of the road increased the distance to be covered in proceeding to the city or driving out to the outlying districts from the city; that the Craigflower Road was a trunk road and public highway extending without the boundary of the City of Victoria into the districts of Victoria, Esquimalt, Goldstream and Sooke, and was used as the principal road by the people of the said districts in proceeding to and going from Victoria.

It was also stated on affidavit filed on behalf of the applicant that the said by-law was passed to serve the private interests of the property owners through whose property the road ran, and the area of whose lots would be increased by the closing of the road, and one of whom was John Kinsman, an Alderman at the time of the passing of the by-law, and a signer of a petition presented on 2nd May, 1899, to the Mayor and Aldermen of Victoria, praying that the said portion of the said road be closed.

Statement.

On behalf of the Corporation it was on affidavit alleged amongst other things, that the by-law was passed *bona fide* and in the interest of the public; and that the increased distance mentioned in the applicant's affidavit was 333 feet, and no more.

It also appeared on affidavit that the said John Kinsman on all occasions when the by-law was before the Council, left his seat in the Council and took no part in the proceedings.

On the application, the following judgment was given by

22nd August, 1899.

DRAKE, J.: This is an application to quash a by-law passed 10th July, 1899, to stop up a portion of Craigflower Road. This road was made by the Hudson's Bay Company prior to 1859, and is the main road into Esquimalt, Metchosin and Sooke Districts.

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The fee existed in the Hudson's Bay Company up to the time their charter was revoked, and from that time down to the present the fee presumably vested in the Provincial Government.

This road was kept up at the Government expense until 1892, when the limits of Victoria Municipality were extended, and down to the time this by-law was passed, has been the main road into the before mentioned districts.

The land through which a portion of this road runs was known as lot 127, section 31, Esquimalt District, and was originally purchased by Robert J. Russell, who still owns other portions of the said lot.

Part of the land through which the road intended to be stopped up runs, was sold by Mr. Russell to one Jeremiah Nagle over thirty years ago. Nagle laid out the land thus bought into town lots, utterly ignoring this road. His lots are laid out across the road and are now known as Victoria West.

The purchasers of these lots, who must be presumed to have known of the existence of the road, are now agitating to have the road closed, and the Corporation have accordingly substituted some of the streets appearing on Nagle's map in lieu of this road, namely, Russell, Catherine and Langford Streets; the substituted streets are, it is alleged, not so convenient, and are longer, and have two or more sharp angles instead of the straight street theretofore existing. It is further alleged by those opposing the change that it is not in the public interest and is made in order to enable those who originally purchased lots through which the road ran to obtain the road allowance which they did not originally buy.

Judgment of DRAKE, J.

The main question, however, which was argued, was as to the power of the Corporation to do what they claimed to have done. Section 50, sub-section 127 of the Municipal Clauses Act, it is contended, is sufficient authority for the by-law. That section gives power to alter, divert or stop up roads, streets, squares, alleys, lanes, bridges, or other public communications within the boundaries of the municipality. The term highway is not used although that term is used in sub-sections 107, 141, 152 and 156, and the term road is used in sub-sections 107, 119, 129, 130, 131 and 132, the Legislature it must be presumed had a reason for

making this distinction. A highway is a road, but a road is not necessarily a highway. If the term road alone had been used in these sub-sections I should have considered it included highways, but possibly the words "or other public communication" will include highways. It is remarkable that in the power thus given to municipal corporations no provision is made to protect the interests of the public or parties outside the city, whose rights may be prejudicially affected. Mr. *McPhillips* contended that as there was no power expressly given to the municipality to close highways, being trunk roads communicating with the country districts, such a power could not be presumed, because statutes authorizing interference with public rights are always strictly construed. The language used lends force to this contention, as the words "within the boundaries of municipality" may mean roads whose *termini* are both within the municipality, and the majority of the roads in the city have their *termini* within the municipal boundaries, or it may mean any roads which come from elsewhere into the municipality, one *terminus* of which would be under municipal control. The trunk roads leading into a municipality are generally few in number, and of great importance to the districts through which they run. Mr. Justice Rose in *Hewison* v. *Corporation of Pembroke* (1884), 6 Ont. 171, refers to this view of the case, but the case itself was decided on other grounds; his language is no doubt appropriate to the present contention, he says, referring to the Act then under consideration (and the language there used is more extended than the one I have to decide) that the County Council has power to stop up roads running or being within one or more townships, but unless that section gave power to stop up a continuous road running through more than one county, no express language can be found giving such power. it would seem anomalous that a section of the road running from Kingston to London could be closed or diverted by a Township Council. This is very much the case here, a main road running from the country districts will be stopped up and diverted by this by-law. The Act does not give in express words any such authority, and unless there is either express authority or authority by necessary implication, which I do not see here, the Council cannot act as they have done.

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The point is singularly bare of authority, neither of the learned counsel could point to any case where such a point had been decided. It was mentioned but not decided in *Regina* v. *Corporation of Perth* (1884), 6 Ont. 195 at p. 204. In my opinion the powers given by sub-section 127 do not extend to stopping up such a road as this. The by-law must be quashed with costs.

The Corporation appealed, and the appeal was argued at Victoria on 5th September, 1899, before the Full Court, consisting of McCOLL, C.J., IRVING and MARTIN, JJ.

*W. J. Taylor, Q.C.*, and *Bradburn*, for the appeal.
*A. E. McPhillips*, and *Higgins, contra.*

11th September, 1899.

McCOLL, C.J.: The main objection taken to the by-law was that the Corporation could not lawfully close any part of a road not being wholly situate within the limits of the city.

It is admitted that the municipality has always controlled, maintained and dealt with so much of the road in question as lies within the city in precisely the same way as in the case of all other roads in the city. This being so, I see no reason why the roadway within the city's boundaries is not to be considered a public road of the municipality and within its jurisdiction, as fully and completely as any other road or street of the municipality, merely because the public highway along the road extends beyond the city.

Judgment of McCOLL, C.J.

Whatever significance might otherwise be thought to attach to the changes in the use of the words "highway" and "road," throughout the Municipal Act, the language of sub-section 127 seems to me to be too wide and general to be restricted by such an inference.

The Land Act when saying (section 77) that "all roads other than private roads shall be deemed common and public highways," in my opinion, only declared what was the law.

For the respondent, reliance was placed upon decisions of the Ontario Courts. These, however, relate to various kinds of roads which do not exist in this Province, such, for instance, as county roads, and depend on statutory provisions in force in that Province.

If the effect of the by-law was to deny the public or any one access to and from the city along the highways extending beyond it, the by-law would have been liable to be quashed upon the principles discussed by a specially constituted Divisional Court in the case of *Kruse* v. *Johnson* (1898), 2 Q.B. 91, but the present question is at most merely one of convenience which was for the Corporation to determine.

The only other objection was that the Council acted solely in the interest of certain persons, and not of the public generally. I see no evidence of want of good faith.

It is certainly not against the by-law that the wishes of the persons referred to were not wholly disregarded. The appeal should be allowed with costs.

IRVING, J.: The determination of this appeal depends upon the construction of sub-section 127 of section 50 of the Municipal Clauses Act, 1897, which provides that in every municipality the Council may, from time to time, make, alter and repeal by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:

"For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications within the boundaries of the municipality or the jurisdiction of the Council, and for entering upon, expropriating, breaking up, taking, or using any real property in any way necessary or convenient for the said purposes without the consent of the owners of the real property, subject to the restrictions contained in sections 239, 240 and 241 of this Act."



Acting under the powers conferred by the Provincial Parliament in this sub-section, the Corporation passed a by-law entitled "The Craigflower Road Closing By-law," which enacted "that so much of the Craigflower Road as runs through lots N and P, Victoria West, is hereby stopped up and closed to public traffic, and Catherine Street, Langford Street and Russell Street are substituted therefor." The contention on the part of the opponents of the by-law is that, though the by-law would have been

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lawful if the road in question had been situate wholly within the city limits, that is, if each of its *termini* had been situate within the city limits, the powers conferred by statute are inapplicable to a road which has only one of its *termini* situate within the municipal boundaries, and the Craigflower Road is not a road within the meaning of sub-section 127. In the first place it is proper to point out that in the absence of any general legislation turning these matters over to the municipal authorities, it would have been necessary for the city to have applied to Parliament to do what they have attempted to do under the by-law in question. The road being a highway, the rights of the public, not merely the ratepayers of Victoria, but the public of British Columbia, are involved. The streets of a city are open to all the inhabitants of the Province, who have the same rights of user as the ratepayers themselves; and it is not a matter of course that the persons affected by the opening or closing of a particular street, even though wholly situate within the city limits, must be municipal electors. The Legislature knew this, but they also knew that those persons who were not municipal electors, would take but little interest in the repair and preservation of the streets and roads. On the principle of local self-government they entrusted the municipal authorities with the power to make by-laws dealing with roads within their respective municipal limits. These powers are conferred by sub-section 127 and following sub-sections. They are large and general. They deal with public streets and roads of all classes, as well the main arteries of the town as the more retired streets. They authorize the Corporation to stop them up entirely, or to widen or improve them; to establish others, and to divert those already established; in short, the Provincial Parliament has handed over to the Municipal Parliament complete management of all the streets within the municipal boundaries, and the question is, is the statute applicable to the Craigflower Road? Is Craigflower Road a road or other public communication "within the boundaries of this municipality?" It is clear that a thoroughfare, or highway, or road, or street cannot be a road within the meaning of this sub-section for one purpose and not for another purpose. If a road is a public communication "within the boundaries of a munici-

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pality" for the purpose of being preserved, improved, repaired, that same road must also be a public communication "within the boundaries of the municipality" for the purpose of being stopped up or diverted if the Council should think proper. The Provincial Parliament has made no distinction as to what roads, or what public communications come within the meaning of this sub-section 127. All that they have said is that the Council may deal with all public communications "within the boundaries of the municipality, or within the jurisdiction of the Council." They have drawn no distinction between roads extending beyond the city limits and those wholly within the city limits. Now, if any person were talking about the condition of the streets of Victoria would they mean only those streets which had both their *termini* within the city limits?

The main argument advanced by Mr. *McPhillips* was that this road, or highway, was a main avenue of traffic connecting the city with an important country district, situate beyond the municipal limits, and that therefore the road was not a road, or other public communication, within, that is wholly within, the boundaries of the municipality, and consequently could not be closed. If that contention is sound, then the same argument would apply to a great many roads in Victoria. For example, Cadboro Bay Road and its continuation Fort Street; the Saanich Road and its continuation Douglas and Government Streets; the Esquimalt Road and Store Street its continuation. All these roads would be excluded from the Act. So also would every road which commences or ends one foot outside of the city limits.

Judgment of IRVING, J.

I think it is only necessary to state what would be the effect of the statute if read in the way contended for by Mr. *McPhillips*, to satisfy everybody that that is not the true meaning of the Act. Sub-section 127 which is intended to turn over to the municipal authorities the complete administration of the roads within their municipal limits, would only turn over to them, according to the contention of the opponents of this by-law, those roads which were wholly situate within the municipal limits; in other words, it would take from the city the management and control of the most important thoroughfares and leave them to deal only with the streets of lesser importance; and they whose duty and

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interest it is to keep the main avenues of trade in order, would not be at liberty to expend a dollar on them.

In the course of the argument it was said that this was a highway, and reliance was placed on the fact that the sub-section mentioned roads, streets, etc., but not highways. I fail to see the importance of this omission.

A highway is a way (whether on land or water) along or over which the public generally has a right to pass.

If it is on land it may be a foot-path, or bridle-path, or drift-way on a high-road. In each case according to the right of passage, if for foot passengers only, a foot-path; if for riders, a bridle-path; if for cattle, a drift-way; or, if for horses, carriages and carts, then a high-road. If it is on water, either at sea or on a river, it is called simply a "highway." A highway and a public road are the same thing, or rather every public road is a highway. A street is a roadway with buildings on each side, more or less continuous (per Lord Selborne in *Robinson* v. *Local Board of Barton-Eccles* (1883), 8 App. Cas. 798 at p. 801.) In sub-section 127, the Legislature used language including highways, and any argument depending on the distinction between highways and public roads, in my opinion, wholly fails.

Judgment of IRVING, J.

The fact is that the opponents of this by-law are dissatisfied with the discretion the Council have shewn in exercising their powers. The Law Courts is not the place to settle such questions. The Provincial Parliament has left those matters to the Municipal Parliament, assuming, no doubt, that it would exercise the powers committed to it reasonably and justly. If in any particular case the Corporation, in exercising its powers, should act unreasonably or unjustly, then that particular case is a matter for appeal by the persons injured—or supposed to be—to the Aldermen, as trustees of the public interest, and as guardians of the rights of citizens, over whom they are the constituted authorities.

The Act seems to me to be perfectly plain. I do not see what more apt language could be used, and I am unable to see upon what grounds the by-law could be quashed.

With reference to the eighth ground, that one of the Aldermen of the Municipal Council of the City of Victoria, namely, John

Kinsman, was interested in the passage of the said by-law, and was one of the petitioners therefor, and his private interests had been advanced by its passage, I desire to say one word. I have examined the affidavits touching this part with care, and in my opinion, Mr. Kinsman's actions were in every respect perfectly proper and becoming.

The appeal should be allowed with costs, and the order quashing the by-law set aside.

MARTIN, J.: It is with some hesitation that I have arrived at the conclusion that this appeal should be allowed, for I feel there is much to be said in favour of the arguments advanced by Mr. *McPhillips*, and the view taken by Mr. Justice DRAKE. The circumstances are unusual, and from the evidence before us there is nothing to shew that any other highway leading into the City of Victoria is in the same class. I have experienced difficulty in satisfying myself that the language of the section, though wide, is comprehensive enough to include the present case, but it would appear to do so despite the fact that such a result could hardly have been contemplated by the Legislature.



As to the alleged unreasonableness of the by-law that point would appear to be answered by *Kruse* v. *Johnson* (1898), 2 Q.B. 91, followed in *White* v. *Morley* (1899), 2 Q.B. 34 at pp. 37-9.

At a more convenient time I may treat the matter further, but at present content myself with saying that I concur with the learned Chief Justice.

*Appeal allowed.*

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## *IN RE* COLUMBIA AND WESTERN RAILWAY COMPANY AND THE RAILWAY ACTS.



*Railway Company—Branch lines—Warrant of possession—Procedure.*

The Columbia and Western Railway Company was incorporated in 1896, by the Provincial Legislature, one of the powers given it being to build branch lines, and on 13th June, 1898, by an Act of the Dominion Parliament its objects were declared to be works for the general advantage

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of Canada and thereafter to be subject to the legislative authority of the Dominion Parliament and to the provisions of the Railway Act:—

*Held*, on an application for a warrant of possession, that the Company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act.

APPLICATION by the Columbia and Western Railway Company for a warrant of possession. The facts appear in the judgment.

*Davis, K.C.*, for the applicants.

*A. H. MacNeill, K.C., contra.*

18th April, 1901.

IRVING, J.: The applicants were incorporated by the British Columbia Statutes of 1896, Cap. 54, and declared to be a work for the general advantage of Canada by Dominion Statute, Cap. 61 of 1898.

Their right to make this application must be determined on the construction of section 2 of Cap. 61, which is as follows:

"Nothing herein contained shall be construed in any way to affect or render inoperative any of the provisions of the said Act of incorporation which authorized the Company to undertake, own and operate the said works as aforesaid; but hereafter the said works shall be subject to the legislative authority of the Parliament of Canada and to the provisions of the Railway Act."

Judgment.

The last part of this section seems to me to govern the right of the Company to acquire lands after 13th June, 1898, with the result that although the Company was by section 16 of the Provincial Act, 1896, Cap. 54, entitled to build branch lines, the power to acquire lands for those branch lines must be exercised in accordance with section 121 of the Dominion Railway Act. It is admitted that the applicants have not complied with the provisions of this section. I must refuse the application.

Apparently I have no power to make any order as to costs.

*Application refused.*

## FEIGENBAUM v. JACKSON AND McDONELL.

DRAKE, J.

1901.

April 29.

*Ancient lights—Right to—How acquired—Unity of possession—Prescription Act.*

A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend.

In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to shew uninterrupted use for twenty years, and then the burden is shifted to the defendant to shew such facts as negative the presumption of ancient lights.

Remarks as to the time from which the twenty years prescription began to run.

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ACTION in which plaintiff claimed an injunction commanding defendants to pull down and remove a building which diminished the access of light to the windows of plaintiff's building. The plaintiff also claimed damages. The facts appear sufficiently in the judgment.

Statement.

The trial took place at Victoria before DRAKE, J., on 23rd and 24th April, 1901.

*A. E. McPhillips, K.C.*, for plaintiff.

*Bradburn*, for defendants.

29th April, 1901.

DRAKE, J.: The facts undisputed are as follows: One Matthiesen was owner of the north half of lot 161, Victoria, and lessee with privilege of purchase of the south half of the said lot. In 1862, he erected an hotel on the property. This building covered the whole frontage of the lot, and a wing was carried back along the north line of the said lot about thirty feet wide. The south line of the building was within two feet of the centre line of the lot, and contained some eighteen windows. The plaintiff's predecessors in title obtained the freehold of the north half of the lot and building on the 21st of January, 1867, and the defendants' predecessors in title obtained the fee of the south half of the said lot on 20th April, 1867.

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There does not appear to have been any walling up between the north and south halves of the building in the interior; access to the plaintiff's part was obtained by an entrance from the street, and access to the defendants' building was obtained by an entrance made on their portion of the building after the sale by Matthiesen to them.

The plaintiff's husband went into occupation of his part of the building, using it as a lodging house until the year 1876, when he was absent until 1879. In that year the plaintiff returned, and remained in residence until 1881, when she placed the property in the hands of agents to let and receive the rents.

These agents let the ground floor to one set of tenants and the upper stories were let to others.

There is no evidence of any formal lease having been granted to any of these tenants, and the presumption is they occupied as monthly tenants, that being the general custom of the city. Some years ago the lower portion of the building was converted into a music hall, called the Delmonico, and the portion belonging to the defendants' predecessors in title into a theatre, called the Savoy.

Some time during the plaintiff's personal occupation, the date of which is uncertain, a wooden lean-to was erected on the south half of the lot, and used as an addition to the brick building.

Judgment.

This was some twelve or thirteen feet high, and the windows on the ground floor of the plaintiff's wing were blocked in consequence. In 1890, the wooden building was pulled down, and a brick erection took its place, which remained until 1899, when that was torn down, and the building which is now complained of took its place. From these facts it is clear that the plaintiff has gained no prescriptive right to light and air to the ground floor of her building. The photograph produced in evidence shewing the actual position of the wall as it existed before the building in question was erected, makes it clear that these ground floor windows were obstructed, and, in fact, the plaintiff admits by her counsel that she has no cause of action in this respect. What she does complain of is that the defendants have erected a new building in 1899, which blocks up the windows on the first

floor, and materially interferes with the windows on the second floor.

In actions of this class the burden of proof, in the first place, is on the plaintiff to shew uninterrupted user for twenty years; as soon as this is done, the burden of proof is shifted to the defendant to shew such facts as negative the plaintiff's presumption of ancient lights.

Here, there is undisputed testimony that the tenants who were in possession of the plaintiff's building from the year 1881 down to the year 1895, were also in occupation of the south half of the building. As tenants of the owners of that building they used the whole building for hotel and lodging house purposes, paying separate rents to the separate owners. The effect of this joint occupation is that during the period of its existence time did not run in favour of the plaintiff to enable her to claim a title by prescription. There was a unity of occupation by the tenants occupying the whole lot, and no one can claim an easement out of his own property.

The case of *Ladyman* v. *Grave* (1871), 6 Chy. App. 763, is very much on all fours with this case. The head-note says that the right of access and use of light to a house cannot be acquired by the lapse of time during which the owner of the house, or his occupying tenant is also occupier of the land over which the right would extend; and in that case the Lord Chancellor deals with the argument that a tenant can do nothing which could injure his landlord's interest, and points out that there is no right of any description in the landlord to light until the statutory time has arrived which gives him an interest over his neighbour's land; but until that time the Legislature gives no right to damnify your neighbour's property by preventing him doing what he pleases with it. And he goes on to point out that the owner has no right when he has leased the land for twenty years to take steps to arrest the growing right of his neighbour; and he will be completely barred of his right although he had no power of interfering with it. Although the plaintiff's right to an easement over the defendant's land has been suspended owing to her tenants having also become tenants of the defendants' land, she has no remedy. In fact, she has no right at all until

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the lapse of twenty years, and as I think it has been clearly shewn that there has been a joint occupancy of the land in question, therefore the plaintiff has not shewn a prescriptive title to light for her building.

The plaintiff grounds her action, first, on a presumed grant, of which there is no evidence; and the fact that the ground floor rooms were obstructed by the wooden lean-to erected on the defendants' half lot is evidence that there was no such grant, and is against the presumption that any such ever existed. In *Tapling* v. *Jones* (1865), 11 H.L. Cas. 290, it was held that the right to an ancient light depends on positive enactment, and therefore ought not to be based on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. The other ground stated is prescription.

The first point to be decided is, from what period did the twenty years' prescription commence to run. It did not begin when Matthiesen was owner of the whole ground, because, as owner, he could not claim an easement against himself. In my opinion, the period began when Matthiesen sold the south half of the lot to the defendants' predecessor in title, but if it should commence when the plaintiff became owner, there is only a difference of three months, which does not affect the rights of the parties.

Judgment.

Such being the case, the plaintiff was in possession from 1868 to 1881—a period of thirteen years. From 1881 to 1895, the tenants were in joint occupancy, and from that time until the building in question was erected, makes four years. Under the Prescription Act there must be no interruption to the enjoyment of the full period of twenty years; here there has been a suspension of the right during the unity of possession, and adding the two periods together they only amount to seventeen years.

The further argument adduced by the plaintiff's counsel was that even if there was a joint occupation of the building on the whole lot by the plaintiff's tenants, there was no direct evidence that the unbuilt-on ground at the rear of the building was ever used by these tenants. It is not shewn that there was any ground unbuilt on. The plaintiff's case rests on the fact that the defendants have carried the walls of the building, which re-

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placed the original wooden structure, up to such a height as to prejudice the plaintiff's right to light and air. These tenants were in possession of this building, and of the ground on which it stood, and therefore there was no such independent possession as would enable the plaintiff to claim an easement over the ground in question. In my opinion, the plaintiff has failed to shew an independent occupation of the house in question as enables her to set up the Prescription Act against the defendants. The action will therefore be dismissed with costs.

*Action dismissed.*

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## MURPHY v. STAR EXPLORING AND MINING COMPANY.

FULL COURT At Victoria.
1901.
Jan. 21.
MURPHY v. STAR MINING CO.

*Mining law—Adverse claim—Extension of time for filing affidavit and plan—Judge in Chambers—Practice—Mineral Act, Sec. 37.*

An order to extend the time for filing the affidavit and plan required by section 37 of the Mineral Act must be made by the Court and cannot be made by a Judge in Chambers.

*Noble* v. *Blanchard* (1899), 7 B.C. 62, not followed as to this point, MCCOLL, C.J., dissenting.

APPEAL from an order of DRAKE, J., made 14th November, 1900.

This was an adverse action under the Mineral Act, the writ being issued on December 2nd, 1899, to which the defendants duly appeared. No affidavit or plan as required by section 37 of the Mineral Act as amended by section 9 of the Mineral Act Amendment Act, 1898, having been filed within the required time, the plaintiff, on application to IRVING, J., got an order, dated February 21st, 1900, extending the time until May 15th, 1900. This order not having been complied with, nor any statement of claim having been delivered, the defendants took out a summons to dismiss for want of prosecution, which summons came on to be heard before DRAKE, J., in Chambers on November 14th, 1900.

Statement.

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On the return of the summons, DRAKE, J., refused to dismiss the action and made an order further extending the time for filing the affidavit and plan until 14th May, 1901.

The defendant Company appealed to the Full Court on the ground that the learned Judge had no jurisdiction to make the order. The appeal was argued at Victoria, on 21st January, 1901, before MCCOLL, C.J., WALKEM, IRVING and MARTIN, JJ.

Argument.

*Hunter, Q.C.*, for appellant: Under the statute the time can only be extended by special order of the Court and so can't be extended by an order of a Judge in Chambers: see *Baker* v. *Oakes* (1877), 2 Q.B.D. 171. Assuming the time could be extended by a Judge in Chambers, the learned Judge here had no power to make such an order on our summons which asked that the action be dismissed. The Judge must be set in motion in the proper way. He cited *In re Cape Breton Company* (1881), 19 Ch. D. 77; *Salter* v. *Salter* (1896), P. 293 and the Yearly Practice (1901), 504.

The Court called on

*Alexis Martin*, for respondent: He relied on *Noble* v. *Blanchard* (1899), 7 B.C. 62.

Judgment.

*Per curiam*: *Noble* v. *Blanchard* (1899), 7 B.C. 62 must not be taken as deciding that an order to extend the time for filing the affidavit and plan required by section 37 of the Mineral Act may be made by a Judge in Chambers. Such an order can be made only by the Court. The appeal is allowed, but without costs, as counsel for the respondent may have been misled by the report of *Noble* v. *Blanchard*.

*Appeal allowed, McColl, C.J., dissenting.*

## SUNG v. LUNG.

FULL COURT
At Vancouver.

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v.
LUNG

*Appeal—Extension of time—Jurisdiction—Security for costs—Application for —No waiver of right to object that appeal not brought in time.*

The Court has no jurisdiction to extend the time limited by section 76 of the Supreme Court Act as amended by B.C. Stat. 1899, Cap. 20, for giving notice of appeal.

A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time.

APPEAL from the judgment of McColl, C.J. The action was tried in the Supreme Court, on 1st June, 1900, and judgment dismissing plaintiff's action was pronounced on 10th August, 1900, and the judgment was entered on 17th September, 1900. Notice of appeal was served on 9th January, 1901, being after the expiration of the three months' limit of time for appealing as provided by the Supreme Court Act, Sec. 76, as amended by Cap. 20, B.C. Stat. 1899. After receiving the notice of appeal the respondent applied for and obtained security for the costs of the appeal. Statement.

The appeal came on at Vancouver, on 9th March, 1901, before Walkem, Drake and Martin, JJ., when

*A. D. Taylor*, for respondent, took the preliminary objection that the Court could not entertain the appeal as the time for giving notice of appeal had expired before notice was given. Where the time for appealing has expired the Court has no jurisdiction to extend the time for giving notice.

*Jenns*, for appellant: Respondent by applying for and obtaining security for costs has waived his right now to object. He cited *Pierce* v. *Palmer* (1887), 12 P.R. 308; *Fry* v. *Moore* (1889), 23 Q.B.D. 395; *Willding* v. *Bean* (1891), 1 Q.B. 100; *Whiffen* v. *Malling* (1892), 1 Q.B. 362 at p. 370. Argument.

[Martin, J.: This Court has already twice held, in *Carrol* v. *Canadian Pacific Railway Co.*, 4th November, 1897, and in *Clabon* v. *Lawry*, 20th January, 1898, that the giving of notice

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of appeal in proper time is necessary to confer jurisdiction.]

*Per curiam:* The objection is sustained and the appeal struck out with costs.

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Note:—The point in reference to extending the time for appealing was before the Full Court (HUNTER, C.J., DRAKE and MARTIN, JJ.) on 3rd July, 1902, in *Belcher* v. *McDonald*, an appeal from the Territorial Court of the Yukon, and the Court was unanimous in holding that when once the time for appealing has expired it has no jurisdiction to extend. The report of *Banks* v. *Woodworth* (1900), 7 B.C. 385, is ambiguous. In that case notice of appeal had been given in time, and the application was to extend the time for entering the appeal, and the time was extended on the ground that the appeal books had not arrived from Dawson. See also *Koksilah Quarry Co.* v. *The Queen* (1897), 5 B.C. 600.

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June 5.

## *IN RE* PROVINCIAL ELECTIONS ACT, AND *IN RE* O'DRISCOLL v. WRIGHT.

*Elections Act, Provincial—Voters' list—Collector—Prohibition—Summons or motion—R.S.B.C. 1897, Cap. 67 and B.C. Stat. 1899, Cap. 25.*

After the Collector of votes under the Provincial Elections Act (1897) as amended in 1899, has placed on the Register of Voters the names of persons objected to, an application for prohibition on the ground that the Collector proceeded without jurisdiction is too late.

*Semble*, in any event prohibition is not the proper remedy.

*Quære*, whether the Crown Office Rules have any application in civil matters.

IN RE PROVINCIAL ELECTIONS ACT AND IN RE O'DRISCOLL v. WRIGHT

MOTION to prohibit Harry Wright, Collector of votes for the Nelson Riding of West Kootenay Electoral District, from entering upon the Register of Voters certain names which had been objected to.

The affidavit of Mr. *R. M. Macdonald* stated that he filed the objections as solicitor for the objectors, and that he was present

at the Court of Revision on 7th May, when no evidence was taken or heard in reference to the objections.

The affidavit of the Collector stated that Mr. *Macdonald* was present on 7th May in Court and addressed an argument to him on the objections, but at the same time claimed that he was not appearing on behalf of anyone; that all the persons whose names were objected to appeared by their counsel, Mr. *S. S. Taylor*, and asked for a hearing, contending that the objections were not as provided for by the Act and consequently not valid, and that after hearing Mr. *Taylor's* argument he stated that the objections were in form invalid and must be thrown out and the names entered on the Register of Voters; and that before service of any proceedings he had entered the names in the Register of Voters.

The motion was argued before DRAKE, J., in whose judgment the facts appear.

17th May, 1900.

DRAKE, J.: Mr. *Taylor* for the defendant, the Collector of votes, takes certain preliminary objections to the proceedings which have to be considered:

First he says these proceedings ought to have been by Chamber summons and not by motion; r. 41 of the Crown Office Rules is to this effect. Mr. *Macdonald* points out that r. 1,000 of the Supreme Court Rules says the application for prohibition may be made on affidavit subject to the general rules as to motions and evidence on motions; the two sets of rules are in this respect rather contradictory and require correction. I do not think it necessary to decide which set of rules has precedence, because Order LXX. is incorporated with the Crown Office Rules, which gives power to the Court to disregard acts of non-compliance and enables the Court to amend irregular proceedings.

Judgment of DRAKE, J.

I shall therefore treat these proceedings as if they had been initiated by summons in lieu of motion, the applicants not having been misled by the difference between the two sets of rules.

Another objection is that the affidavit alleging want of jurisdiction is founded on belief; the want of jurisdiction is a

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question of law, and it is quite sufficient if the deponent alleges his belief that there is an absence of jurisdiction.

Another objection is that the notices of objections are wrong as being addressed to the officer by his wrong description, he is addressed as Mr. Wright, Collector of votes for Nelson Riding of West Kootenay Electoral District, whereas Mr. *Taylor* says that his proper designation is Collector of votes of Nelson Riding of West Kootenay in the West Kootenay Electoral District. The notice properly described the officer, and is the description which he himself used when he advertised the statutory notice in the Gazette of the holding of the Court of Revision. I consider the notice is properly and sufficiently addressed, the object and intention of the Act is that the proper officer shall receive the notice of objection, which is the case here, and there is no statutory authority for holding that he has any other designation than the one he uses.

The facts as appear by the affidavits are as follows:

On the 30th of April and 1st May, 1900, objections in writing were handed in to Mr. Wright, Collector of votes in and for the Nelson Riding of West Kootenay in West Kootenay Electoral District. These objections number several hundred; all the objections are in the same form. Though the names of the objectors vary, three cases were brought up and one was argued as decisive of all the rest.

Judgment of DRAKE, J.

The matter first came up before me on motion on the 8th day of May, and after a partial hearing was adjourned at Mr. *Taylor's* request on the undertaking of Mr. *Taylor*, counsel for the Collector of votes, that Wright should proceed no further with the settlement of the list until the matter was disposed of.

After the above undertaking was given, namely, 10th May, an affidavit was filed by Harry Wright, in which he alleged that at the Court of Revision held by him on the 7th of May he had considered the objections under instructions from the Attorney-General, and as the objectors did not appear and the objections did not appear to him to be legal objections he threw them out and entered the names on the Register of Voters prior to being served with notice of proceedings. I refer to this matter as I consider that I am entitled to rely on Mr. *Taylor's* undertaking

that the names should not be placed on the list pending these proceedings; the Collector was present when the undertaking was given; no intimation was given that the list had been completed, if such was the case in fact.

The Collector's duties are defined by section 11 of the Elections Act, Cap. 67 of the Revised Statutes as amended by Cap. 25 of 1899. After the name of another person has been inserted for two weeks in the list of persons claiming to vote, without any written objection thereto as thereinafter provided, the Collector is to enter such name in the Register of Voters for the Riding or Polling Division.

According to the evidence, the Collector posted up on the 18th or 19th of April the list of persons claiming to be entered on the list of voters, this was in pursuance of sub-section (*d.*), section 11.

The objections were lodged in writing, some on the 30th of April, and some on the 1st of May, with the Collector of votes within the two weeks required by the Act.

On the first Monday in May the Collector is to hold a Court of Revision, of which two months' notice has to be given in the Gazette, and at that Court the Collector is to hear and determine any and all objections against the retention of any names on the Register of Voters.

Judgment of DRAKE, J.

This Court appears to be a District Court held for the purpose of deciding on objections as to the retention of any voters on the existing list, and not for the purpose of hearing objections against the insertion in the list of the names of those who had not previously been placed in the list of voters.

With regard to the latter class of objections the statute is very specific as to notice the persons objected to should receive and as to the time when such objections should be considered by the Collector as a Court of Revision.

Sub-section (*d.*) thus defines the Collector's duties on receiving notice of objection. He is to forward a notice to the person objected to either through the Post Office or in such manner as he should deem advisable, but he has to name the time and place in the notice given when the objections will be heard, and such

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notice shall be posted not less than thirty days before the time fixed for the hearing of such claim and objection.

The objections were lodged with the Collector as before stated on the 30th of April, and could not possibly be considered until the lapse of thirty days, after the Collector's notice to the persons objected to; instead of giving the thirty days' notice he purported to dispose of all these objections on the 7th of May.

It is a condition precedent to the Collector's jurisdiction to hear and determine objections of this character that thirty days at least shall elapse after the Collector has given notice to the person objected to. The Collector does not state in his affidavit that any notice at all was given to the persons objected to, and the presumption is that no notice was given. He therefore acted without any jurisdiction.

Mr. *Taylor* contended that the notice is for the benefit of the persons objected to, and they were not bound to wait thirty days for the Court; on the other hand, the objector was entitled to rely on the statute as his guide, and he thereby knew that no Court could be held until at least thirty days after he had filed his objections. Mr. *Taylor* further contended that the remedy by prohibition was not the proper course because the Collector had sat as a Court of Revision and was *functus officio*, and that after judgment, however wrong such judgment might be, it could not be corrected by prohibition. This view is not supported by authority; it was held in *Farquharson* v. *Morgan* (1894), 1 Q.B. 552, when a total absence of jurisdiction was apparent on the face of the proceedings, the Court was bound to grant a prohibition, although the applicant had acquiesced in the proceedings.

Judgment of DRAKE, J.

Prohibition is a writ of right, but is not issued as of course, there must be clear want of jurisdiction; the want or excess of jurisdiction is clearly shewn here. If a Judge decided without hearing evidence, or if he assumes jurisdiction by a wrong decision, the Court will interfere: see *Brown* v. *Cocking* (1868), L. R. 3 Q.B. 672, and *Elston* v. *Rose* (1868), L.R. 4 Q.B. 4; and Brett, L.J., in *The Queen* v. *The Local Government Board* (1882), 10 Q.B.D. 321, laid down "that the Court should not be chary of exercising the power of prohibition at the present day,

and that whenever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

I think this is a proper case for the exercise of the power of the Court, and I direct a writ of prohibition to issue to restrain the inclusion of the objected names in the list of voters until these objections have been properly considered. As the parties may wish to appeal, I give leave to set the appeal down for hearing at the Court to be held at Vancouver on 28th May.

The Collector appealed, and the appeal was argued at Vancouver on 1st June, 1900, before WALKEM, IRVING and MARTIN, JJ.

*S. S. Taylor, Q.C.*, for appellants: When the Collector placed the names on the list at the Court of Revision his judicial duties ceased, his duties as to the certificate being ministerial only: *In re Robertson and City of Chatham* (1899), 26 A.R. 554 at p. 569.

The application for prohibition should have been made by summons and the Judge below had no power to amend: see Crown Office Rule 41; *In re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541 and *Smurthwaite* v. *Hannay* (1894), A.C. 494 at p. 501. Under section 25 of the Act they should have appealed: see Encyclopædia of the Laws of England, Article on Prohibition; High on Extraordinary Remedies, 771; *Barker* v. *Palmer* (1881), 8 Q.B.D. 9. The whole ground of the prohibition was that the voters whose names were objected to must have a thirty days' notice, but everyone of the 489 voters appeared by counsel at the Court of Revision and was ready for judgment —their right to notice was waived: see *The Company of Adventurers of England* v. *Joannette* (1894), 23 S.C.R. 419; *Honan* v. *The Bar of Montreal* (1899), 19 C.L.T. 377; *Pigeon* v. *The Recorder's Court and the City of Montreal* (1890), 17 S.C.R. 506, and *Molson* v. *Lamne* (1888), 15 S.C.R. 260.

Argument.

*Davis, Q.C.*, and *R. M. Macdonald*, for respondents: Prohibition will always lie where something remains to be done: see

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*Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 435; *Serjeant* v. *Dale* (1877), 2 Q.B.D. 558; *In re Robertson and City of Chatham* (1899), 26 A.R. 554 and *Farquharson* v. *Morgan* (1894), 1 Q.B. 552.

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We were misled by the undertaking and so was the Court—if they had said the names had been put on the list but not certified to, we would have taken other steps. The Crown Office Rules have no application in civil matters and the words "civil matters" were put in r. 41 by mistake. The parties objecting must have the statutory notice and both sides are to be heard. The Collector had no jurisdiction, as the thirty days had not elapsed, no notices were given, and no time was fixed for the hearing of the objections, and there was no hearing. He cited *Ex parte Story* (1852), 12 C.B. 776. The fact that appeal also lies does not prevent prohibition: see *Elston* v. *Rose* (1868), L.R. 4 Q.B. 4; *In re Thompson* v. *Hay* (1893), 20 A.R. 382 and Short & Mellor, 74.

*Taylor*, replied. *Cur. adv. vult.*

5th June, 1900.

Judgment of WALKEM, J.

WALKEM, J., was of the opinion that the appeal should be dismissed.

Judgment of IRVING, J.

IRVING, J.: I think the appeal should be allowed. Assuming that prohibition is the proper remedy, the application is too late. On the facts before us, it is clear that the Collector had placed the names on the list prior to being served with notice of these proceedings. As name after name was placed on the list his judicial duties, as to each such name, ceased. The affixing of his certificate was a clerical act for the prevention of which a writ of prohibition would not issue.

The Act seems to contemplate two different Courts—one, the first, is to decide whether the name shall go on the list—the second—or Court of Revision to decide as to the retention of the names already on the list. The certificate is to be placed at the foot of the list after the holding of the Court of Revision, and this fact makes it clear that the affixing of the certificate has nothing whatever to do with the adjudication by the first Court. In many cases there could easily be an interval of four or five

months between the adjudication in the first Court and the affixing of the certificate.

As to the argument founded on the undertaking given by the Collector's counsel, I have arrived at the conclusion that undertaking was honestly given under a mistaken idea of the true condition of affairs, but I do not see how it can affect our decision in a matter of a duty to be performed by a public officer. An artificial rule such as urged should be applied in this case is not applicable to the matter before us in which there are really no parties.

I have assumed that prohibition is the proper remedy, as the appeal has been argued before us as if it were, but I do not wish to be understood as acknowledging that it is a case for prohibition. I am inclined to think that it is not. See *In re Godson and the City of Toronto* (1889), 16 A.R. 452.

MARTIN, J.: I concur.

*Appeal allowed, Walkem, J., dissenting.*

# APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

ADAMS AND BURNS v. BANK OF MONTREAL, THE KOOTENAY BREWING, MALTING AND DISTILLING COMPANY, LIMITED LIABILITY, AND JOHN R. MYERS (p. 314).—Affirmed by Supreme Court of Canada, 19th February, 1901 (not reported), and the Judicial Committee of the Privy Council on 18th December, 1901, refused leave to appeal.

BRIGGS v. NEWSWANDER *et al* (p. 402).—Reversed by Supreme Court of Canada, 15th May, 1902. See 38 C.L.J. 498; 22 C.L.T. 277.

CLEARY *et al* v. BOSCOWITZ (p. 225).—Affirmed by Supreme Court of Canada, 15th May, 1902. See 38 C.L.J. 497; 22 C.L.T. 278.

DRYSDALE v. UNION STEAMSHIP CO. (p. 228).—Reversed by Supreme Court of Canada, 15th May, 1902. See 38 C.L.J. 496; 22 C.L.T. 278.

DUVAL v. MAXWELL: BURRARD ELECTION CASE (p. 65)—Affirmed by Supreme Court of Canada. See (1901), 31 S.C.R. 459.

ELECTIONS ACT, PROVINCIAL, *Re*, AND *Re* HOMMA (p. 76).—Appealed to the Judicial Committee of the Privy Council, and standing for judgment.

FAWCETT *et al* v. CANADIAN PACIFIC RAILWAY COMPANY (p. 393).—Affirmed by Supreme Court of Canada, 15th May, 1902.

MANLEY v. COLLOM (p. 153).—Reversed by Supreme Court of Canada, 15th May, 1902. See 38 C.L.J. 497; 22 C.L.T. 278.

WARMINGTON v. PALMER AND CHRISTIE (p. 344).—Reversed by Supreme Court of Canada. See (1902), 32 S.C.R. 126.

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Cases reported in 7 B.C. and since appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council.

SHORT v. FEDERATION BRAND SALMON CANNING COMPANY (p. 197).—Affirmed by Supreme Court of Canada. See (1900), 31 S.C.R. 378.

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**STOCK EXCHANGE**—*Broker and principal—Payment of differences—Illegality—Criminal Code, Sec. 201.*] Defendant instructed the plaintiffs to sell shares in The C. T. Co. for him, who asked for cover, and defendant paid $600.00; no time was fixed for delivery; plaintiffs asked defendant for more as shares were rising, and finally called for $2,400.00, which defendant refused to pay. Plaintiffs then, as they alleged, purchased the shares to satisfy their own liability, and sued for amount paid. *Held*, by DRAKE, J., dismissing the action, that as no stock was ever delivered, or intended to be delivered, and as the intent was to make a profit from the fluctu-